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('27) A I R 1927 All 401=50 All 41 = 25 A L J 530=39 M L T 85 = 102 I C 665 (FB), Parsotam Saran v. Barhma Nand	Dissented from, in A. I. R. 1953 Nag. 176.
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('36) I L R (1936) All 834, Latafat Husain v. Hidayat Husain	Dissented from, in A. I. R. 1953 Mad. 161.
('36) A I R 1936 All 495 = 58 All 949 (FB), Anandi Lal v. Ram Sarup	Dissented from, in A. I. R. 1953 Orissa 51.
('36) AIR 1936 All 600=1936 All L J 1027=164 Ind Cas 515=1936 All W R 797, Mt. Kulsum Bibi v. Shiam Sunder Lal	Overruled in A. I. R. 1953 S. C. 413.
('39) A I R 1939 All 682 = 41 Cri L J 85=I L R (1939) All 924=184 I C 662 = 1939 A L J 779=1939 A W R 696, Brahma Nand Misra v. Emperor	Dissented from, in A. I. R. 1953 All. 481.
('41) A I R 1941 All 321=I L R (1941) All 617=1941 All L J 352=1941 O W N 898=1941 All W R (HC) 240 =42 Cri L J 839 = 196 Ind Cas 295 = 1941-4 F L J (HC) 268, Emperor v. Meer Singh	Held Overruled by A. I. R. 1951 S. C. 332 in A. I. R. 1953 Nag. 58.
('42) A I R 1942 Oudh 16 = 1941 Oudh W N 1115=196 Ind Cas 482, Bishunath Prasad v. Sarju Saran Tewari	Overruled in A. I. R. 1953 S. C. 521.
('42) A I R 1942 Oudh 339 = 1942 Oudh W N 248=199 Ind Cas 801, Lakshmi Narain v. Satgurunath	Overruled in A. I. R. 1953 S. C. 521.
('44) F. A. No. 345 of 1940 D/- 22-8-1944 (All)	Reversed in A. I. R. 1953 S. C. 521.
('44) A I R 1944 Oudh 90 = 1943 Oudh W N 501=1943 All W R C C 200=216 Ind Cas 2, Durga Baksh Singh v. Umanath Baksh Singh	Overruled in A. I. R. 1953 All. 747 (F.B.).
('46) A I R 1946 All 253=47 Cri L J 451 = 1945 O W N H C 347=1946 A L J 29=222 I C 420=I L R (1946) All 129=1945 A W R H C 367, Baddan v. Emperor	Dissented from in A. I. R. 1953 Raj. 105.
('46) A I R 1946 All 262=I L R (1946) All 328=222 Ind Cas 240=1946 All W R H C 243=1946 O W N H C 144, Jamna Kunwar v. Lal Bahadur	Dissented from, in A. I. R. 1953 Nag. 249.
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('47) A I R 1947 All 304=ILR (1947) All 227, Shukrullah v. Mt. Rahmat Bibi	Dissented from, in A. I. R. 1953 All. 9.
('48) Civil Revn. No. 544 of 1945 D/- 1-10-1948 (All), Bhagwali Misir v. Ram Ugrah Misir	Overruled in A. I. R. 1953 All. 472.
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('48) A I R 1948 All 288=I L R (1948) All 337=1948 All L J 105=1948 All W R (HC) 112, Prakash Chand v. Mahendra Kumar	Dissented from, in A. I. R. 1953 Bilaspur 33.
('49) A I R 1949 All 223=1949 All L J 166=1948 All W R H C 308, Governor-General in Council v. Mahomed Badr-i-alam	Dissented from, in A. I. R. 1953 All. 318.
('49) A I R 1949 All 257=I L R (1949) All 449, Ratiram v. Sri-Krishna	Overruled in A. I. R. 1953 All. 729.
('49) A I R 1949 All 589 = I L R (1949) All 803 = 1949 A L J 125 = 1949 A W R 205, Jagannath Sahu v. Srikant Dute	Overruled in A. I. R. 1953 All. 472.
('50) A I R 1950 All 270=1950-18 I T R 75=1950 All L J 36 = 1950 All W R 51, In the matter of Mishri Mal Gulab Chand	Dissented from, in A. I. R. 1953 Punj. 284.
('50) A I R 1950 All 648=1950 All L J 502=1951 All W R 33=1951-19 I T R 199, Sohan Pathak and Sons v. Commissioner of Income-tax, U. P. Ajmer-Merwara, Lucknow	Reversed in A. I. R. 1953 S. C. 456.
('51) Cri. Misc. No. 17 of 1950 D/- 16-4-1951 (All)	Reversed in A. I. R. 1953 S. C. 185.
('51) A I R 1951 All 44=52 Cri L J 1191, State v. Basdeo	Held Overruled by A. I. R. 1951 S. C. 332 in A. I. R. 1953 Nag. 58.
('51) A I R 1951 All 357=1951 All L J 518=1950 All W R 527=52 Cri L J 115, M. M. Bashir v. State	Dissented from, in A. I. R. 1953 Hyd. 288.
('51) A I R 1951 All 414 = 1950 All L J 863 = 1950 All W R 681, Kirpa Ram v. Ram Asrey	Dissented from, in A. I. R. 1953 All. 621.
('51) A I R 1951 All 498 = 1951-19 I T R 52, Haribar v. Commr. of Income-tax	Dissented from, in A. I. R. 1953 Bom. 230.
('51) A I R 1951 All 546 = I L R (1950) All 382=52 Cri L J 197=1949 All L J 441=1949 All W R (HC) 454, Promod Chandra v. Rex	Dissented from, in A. I. R. 1953 Cal. 226.
('52) A I R 1952 All 90=1951 All L J 548 = 1951 All W R (H C) 635, Ram Manohar v. Board of Revenue, U. P., Allahabad	Overruled in A. I. R. 1953 All. 264 (F.B.).
('52) A I R 1952 All 231 = 1952 Cri L J 440 = 1952 All L J 67=I L R (1952) 2 All 152 (FB), Nahar Singh v. State	Dissented from, in A. I. R. 1953 Mad. 801 (F.B.).
('52) A I R 1952 All 496=1952 All L J 202=1952 All W R (HC) 541, Ishwar Din v. Mohammad Ishaq	Overruled in A. I. R. 1953 All. 729.
('53) A I R 1953 All 25=1952 All L J 557 = 1952 All W R (H C) 517, Jyoti Sarup v. Board of Revenue, Uttar Pradesh, Lucknow	Dissented from, in A. I. R. 1953 Raj. 188.
('53) A I R 1953 All 203=1952 All L J 546 = 1953 Cri L J 565, Behari v. State	Dissented from, in A. I. R. 1953 All. 668.

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1	1950	A	500	186	1951	A	1	332	1951	A	341	558	1952	A	963	742	1951	A	845
4	"	"	534	194	"	"	119	376	"	"	181	595	1950	"	482	759	"	"	774
8	"	"	532	207	"	"	485	420	"	"	372	600	"	"	655	822	"	"	710
60	1953	"	766	227	"	"	199	445	"	"	3	607	"	"	617	825	"	"	736
85	1950	"	533	244	1952	"	642	461	"	"	64	614	"	"	669	862	"	"	816
97	1952	"	346	249	1951	"	252	477	"	"	86	631	"	"	595	867	"	"	858
109	"	"	337	265	1952	"	81	498	"	"	76	639	1951	"	21	870	"	"	851
131	1950	"	556									712	"	"	79				
149	1951	"	247	269	1951	"	821	507	"	"	245	734	1953	"	608	876	1953	"	509
159	1952	"	437	274	"	"	122	513	1952	"	257	737	"	"	133	880	"	"	739

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ILR		AIR		ILR		AIR		ILR		AIR		ILR		AIR		ILR		AIR	
1	1950	A	447	305	1952	A	698	543	1952	A	515	681	1952	A	592	806	1952	A	127
7	1951	"	167	310	1950	"	423	566	1952	"	40	694	"	"	622	838	1951	"	746
46	"	"	674	324	"	"	444	597	"	"	240	703	"	"	700	926	1952	"	74
136	"	"	867	331	1954	"	176	605	"	"	912	723	1951	"	180	941	1951	"	864
152	1952	"	231	354	1952	"	548	657	1950	"	415	726	"	"	660	949	1952	"	99
178	"	"	245	360	1951	"	41	664	"	"	427	752	1952	"	520	965	"	"	681
	"	"	224	421	1952	"	564					772	"	"	715				
200	"	"	716	467	1951	"	205	673	"	"	443	777	1951	"	234	975	"	"	229
				536	"	"	652	677	"	"	480	783	1952	"	63	984	"	"	996

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1	1952	A	224	102	1953	A	322	195	1953	A	924	304	1952	A	818	425	1952	A	925
3	"	"	584	104	1952	"	940	196	"	"	829	306	"	"	934	426	1953	"	191
8	"	"	245	106	"	"	489	199	"	"	833	310	1953	"	378	428	1952	"	958
14	1953	"	745	108	"	"	505	202	"	"	496	312	1952	"	917	430	1953	"	253
17	"	"	402	109	1953	"	398	204	"	"	804	313	"	SC	115	431	"	"	327
18	1952	"	668	111	1951	"	563	206	"	"	942	317	"	"	165	434	1952	"	933
19	1953	"	371	114	1952	"	520	207	1953	"	608	319	"	A	752	436	"	"	941
20	"	"	466	122	"	"	382	208	1952	"	703	321	"	"	861	437	"	SC	167
21	1952	"	35	131	1953	"	380	213	"	"	832	324	"	SC	145	441	1953	A	471
24	"	"	32	132	1952	"	188	214	1953	"	163	329	"	"	118	443	1952	"	891
26	"	"	229	134	"	"	831	217	1952	"	749	330	"	A	805	451	"	"	897
29	1953	"	216	135	1953	"	367	218	"	"	875	332	"	"	764	455	1950	"	305
30	1954	"	150	136	1952	"	684	221	1953	"	455	342	"	"	63	457	1952	"	942
33	1953	"	551	138	"	"	593	223	1952	"	711	351	"	"	857	476	"	"	882
35	1952	"	50	139	"	"	693	227	1953	"	379	353	"	"	992	485	"	"	890
39	1951	"	637	142	"	"	516	229	1952	"	814	358	1954	"	28	486	1953	"	62
43	"	"	710	146	1953	"	251	231	"	"	921	360	1952	"	848	489	1952	"	959
44	1953	"	417	148	1952	"	787	232	1953	"	381	362	1950	"	496	492	1953	"	58
46	1951	SC	477	149	"	"	840	234	1952	"	919	363	1953	"	187	493	1952	"	788
51	1953	A	217	152	"	"	504	236	"	"	881	364	1950	"	532	502(1)	"	"	899
52	1952	"	88	153	"	"	817	237	"	"	923	366	1952	"	852	502(2)	"	"	912
56	"	"	681	154	"	"	498	238	1953	"	139	368	1951	"	599	504	1953	"	57
60	1953	"	375	156	"	"	227	240	"	"	59	370	1953	"	48	505	1952	"	759
61	"	"	572	157	"	"	500	243	1952	"	40	373	1952	"	863	520	1953	"	51
64	1952	"	114	161	"	"	843	253	1953	"	781	376	1953	"	45	524	"	"	61
66	1953	"	574	163	"	"	836	258	"	"	734	380	1952	"	822	526	"	"	334
67	1952	"	231	167	1953	"	81	259	1952	"	825	384	1950	"	528	528	"	"	64
77	"	"	33	168	1952	"	509	264	1953	"	345	386	1952	"	854	529	"	"	36
80	"	"	544	169	1953	"	463	265	1952	"	835	388	1953	"	349	532	"	"	104
82	1953	"	578	170	"	"	146	266	"	"	918	390	1951	"	574	534	1952	"	937
85	"	"	609	172	1952	"	808	268	"	SC	105	392	1953	"	815	536	"	"	916
86	"	"	612	176	1953	"	231	270	"	A	511	393	1952	SC	9	537	"	"	913
87	"	"	219	177	"	"	236	274	"	"	699	396	1953	A	82	540	1953	"	328
88	"	"	118	180	1952	"	526	276	"	"	859	400	"	"	373	541	"	"	37
89	1952	"	678	182	"	"	519	280	"	"	806	403	1952	"	802	546	"	"	903
90	1951	"	562	183	"	"	816	283	"	"	750	405	"	"	856	555	"	"	72
92	1953	"	254	184	"	"	813	284	"	"	698	406	"	"	801	556	1952	"	715
94	1952	SC	14	186	1953	"	368	287	"	"	818	407	"	"	926	557	1953	"	25
97	"	"	27	187	1952	"	585	293	"	"	746	409	"	"	773	565	"	"	144
98	"	A	510	190	"	SC	52	298	"	"	851	412	"	"	866	566	1952	"	991
100	"	"	515	194	"	A	812	301	1953	"	876	420	"	SC	218	567	1953	"	42
101	"	"	226					303	1952	"	877	424	"	A	962	568	"	"	314

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571	1953	A	101	623	1952	A	977	667	1953	A	564	703	1953	A	117	734	1953	A	115
574	"	"	99	641	1953	"	24	668	"	"	197	705	"	"	175	736	"	"	136
576	"	"	33	643	"	"	85	670	"	"	200	710	1952	SC	401	737	1952	SC	207
580	"	"	97	646	"	"	96	672	"	"	95	715	1953	A	149	748	1953	A	452
583	1952	"	900	647	"	"	55	673	"	"	71	717	1952	SC	362	749	"	"	326
598	"	"	933	650	"	"	240	677	"	"	92	721	1953	A	173	751	"	"	316
601	1953	"	74	653	"	"	575	681	"	"	198	724	"	"	180	752	"	"	41
604	"	"	1	657	1952	"	880	682	"	"	189	727	"	"	218	753	"	"	199
609	"	"	338	658	"	"	799	685	1952	"	878	729	"	"	241	755	"	"	43
611	"	"	49	660	1953	"	242	688	1953	"	167	730	1952	"	849	757	"	"	317
614	"	"	76					692	"	"	6					758	"	"	383
616	1952	"	674	664	1952	"	874	697	"	"	158	731	1953	"	90	760	"	"	137
621	1953	"	188	665	1953	"	552	701	"	"	113	733	"	"	109	763	1952	"	858

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AWR	AIR			AWR	AIR			AWR	AIR			AWR	AIR			AWR	AIR		
1	1953	A	259	128	1953	A	463	223	1952	A	924	343	1952	A	933	516	1952	A	916
2	1952	"	28	129	1952	"	226	225	"	"	703	345	"	"	825	517	1953	"	25
4	"	"	787	131	"	"	940	230	"	"	814	350	"	"	805	525	"	"	95
5	1953	"	375	134	"	"	113	233	"	"	881	352	"	"	925	527	"	"	97
7	1952	"	782	136	"	"	498	234	"	"	519	353	"	"	878	530	"	"	42
10	1953	"	131	138	1953	"	81	235	"	"	829	357	"	"	926	532	"	"	33
14	1954	"	130	139	1952	"	697	238	"	"	832	359	1953	"	324	536	1952	"	711
17	1953	"	380	141	1953	"	578	239	"	"	750	362	1952	"	941	541	"	"	496
18	1952	"	251	144	"	"	139	241	"	"	836	363	"	"	773	544	1953	"	373
29	"	"	229	146	1952	"	681	245	1953	"	78	367	"	"	698	547	1952	"	788
32	"	"	114	151	1953	"	466	250	1952	"	510	370	"	"	938	558	"	"	753
35	"	"	38	152	1952	"	668	252	1953	"	734	373	"	"	852	576	"	"	520
37	1953	"	238	153	"	"	61	254	"	"	345	375	"	"	962	585	"	"	488
40	"	"	367	156	1953	"	219	255	1952	"	799	376	"	"	891	587	1953	"	90
41	1952	"	56	157	"	"	573	259	"	"	382	385	"	"	897	590	"	"	31
47	1953	"	554	158	1952	"	693	270	"	"	880	390	"	"	851	593	"	"	198
49	1952	"	684	162	"	"	875	271	"	"	934	393	"	"	974	595	"	"	471
52	1953	"	218	165	"	"	843	276	"	"	806	398	"	"	942	598	"	"	41
55	"	"	508	168	"	"	224	279	"	"	859	420	"	"	842	599	"	"	92
58	1952	"	506	171	1953	"	379	281	"	"	818	421	1953	"	62	604	"	"	72
62	1953	"	322	172	1952	"	804	283	"	"	923	424	1952	"	959	607	"	"	85
64	"	"	733	174	"	"	822	284	"	"	746	428	1953	"	61	611	"	"	88
66	1952	"	527	176	1953	"	368	290	"	"	863	430	"	"	341	615	"	"	189
71	1954	"	98	178	1952	"	489	295	1953	"	372	431	1952	"	882	620	"	"	137
73	1952	"	245	180	1953	"	163	297	"	"	167	442	"	"	890	623	"	"	71
80	1953	"	598	183	1952	"	516	302	1952	"	848	443	1953	"	1	626	"	"	197
84	"	"	611	188	"	"	535	304	"	"	801	450	1952	"	912	628	"	"	179
86	1952	"	70	192	"	"	918	305	"	"	858	452	1953	"	142	629	"	"	208
93	1953	"	781	194	"	"	833	307	"	"	873	456	"	"	58	631	"	"	96
98	1952	"	35	198	1953	"	59	309	"	"	845	458	"	"	147	635	"	"	240
102	1953	"	593	201	1952	"	922	314	"	"	849	460	1952	"	900	638	"	"	55
104	1952	"	26	203	1953	"	231	316	"	"	816	472	D 1953	"	334	642	"	"	113
106	"	"	526	204	1952	"	500	318	"	"	699	474	F "	"	37	645	"	"	158
109	"	"	33	209	"	"	808	323	"	"	752	480	1952	"	977	649	"	"	200
112	"	"	533	214	1953	"	118	326	"	"	874	502	"	"	991	651	"	"	199
113	"	"	186	215	1952	"	812	327	"	"	866	503	1953	"	104	653	"	"	220
117	"	"	504	216	"	"	921	337	1953	"	725	506	1952	"	913	664	"	"	245
118	1951	SC	477	217	1953	"	146	339	1952	"	937	510	1953	"	144	672	"	"	505
124	1952	A	79	219	1952	"	927	341	1953	"	353	512	"	"	314	674	"	"	564
126	"	"	207	222	"	"	515					515	"	"	323	676	"	"	316

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AWR	AIR			AWR	AIR			AWR	AIR			AWR	AIR			AWR	AIR		
1	1951	B	468	25	1952	B	72	41	1952	MB	124	52	1951	M	1042	79	1952	TC	210
11	1954	M	190	28	"	M	531	43	1954	M	131	55	1952	P	233	92	"	SC	214
16	1952	"	158	30	1951	N	237	45	1952	SC	45	57	"	C	562	99	"	"	335
17	"	C	491	35	1952	TC	113	47	1953	C	332	60	"	M	790	104	1953	C	197
22	"	M	229	39	"	C	563	49	1952	P	389	64	"	SC	159	107	1952	P	270
												73	"	Punj	214	109	"	SC	343

NOTE

For Comparative Table of 1953 Other Journals=All India Reporter, *See* next year's Index.

THE
ALL INDIA REPORTER
1953
Allahabad High Court

A. I. R. 1953 Allahabad 1

BIND BASNI PRASAD AND GURTU JJ.

The Union of India — Appellant v. *S. M. King and another—Respondents.*

Letters Patent Appeal No. 45 of 1951, D/- 30-7-1952, from decision of Brijmohanlal J. in Matrimonial Suit No. 1 of 1951, D/- 1-8-1951.

(a) Provident Funds Act (1925), S. 2—Money in deposit in provident fund—Subscriber retiring from service—Effect.

Money in deposit with the Railway Administration in the Railway Provident Fund is provident fund within the meaning of the Provident Funds Act although the subscriber has retired from railway service : A. I. R. 1952 S. C. 227, *Rel. on.* [Para 16]

Anno. P. F. Act, S. 2, N. 1.

(b) Provident Funds Act (1925), S. 3 (1)—Direction in decree to send amount to subscriber's wife amounts to assignment.

The direction in the decree of a Court to the Railway Administration to send a portion of the amount from the provident fund due to the subscriber amounts to an assignment of that portion. Such a direction is not binding upon the Railway Administration because it contravenes the provisions of S. 3 (1), Provident Funds Act : A. I. R. 1952 S. C. 227, *Rel. on;* A. I. R. 1938 Oudh 48, *held no longer good law.* [Paras 16, 18]

Anno. P. F. Act, S. 3, N. 2.

J. Swarup—for Appellant; Man Singh — for Respondent.

REFERENCES : Courtwar/Chronological/ Paras.
('52) 1952 S C J 326 : (A I R 1952 S C 227) 13, 14, 17
('51) Matrimonial Suit No. 1 of 1951, D/- 1-8-1951 (All) 23
('50) 54 Cal W N 840 : (A I R 1951 Cal 25) 14
('51) A I R 1951 Cal 285 13
('38) A I R 1938 Oudh 48 : (13 Luck 466) 17
(1887) 18 Q B D 127 : (56 L J Q B 15) 17

Bind Basni Prasad J. — This is a Letters Patent Appeal arising out of a matrimonial suit for judicial separation. The facts are as follows : On 30th January 1951, Mrs. King brought a suit against her husband, S. M. King, who was an engine driver in the East Indian Railway, praying for a decree for judicial separation, alimony and custody of the children and order for their maintenance. After the progress of the suit up to a certain stage, a compromise was reached between the parties and it was filed in the Court on 17th July 1951. The relevant terms of the compromise were as follows :

"(a) That both the petitioner and the respondent have agreed to go to U. K. together or wherever it may be so decided to live together with their children.

(b) That out of the sum of Rs. 18,450 to the account of the respondent's provident fund money in the Railway, about which an injunction was issued to the Railway by this Hon'ble Court, the respondent agrees to give Rs. 13,000 to the petitioner including cost of suit to be placed at her account at the Grindlays Bank, Bombay, and a sum of Rs. 5,000 to be placed at the account of the three minor daughters to be kept in trust for them at the Grindlays Bank, Bombay, and to be given to each of them equally on attaining majority.

(c) That the petitioner agrees not to claim any maintenance or allowance for her and for the minor children in future, or for the past and agrees to maintain and look after her three minor children properly and relieves the respondent from any responsibility for payment on this account.

(d) That the petitioner agrees to bear all costs of the suit and the respondent will not be liable to pay any such costs of the petitioner or her debts or liabilities on her behalf.

(e) That the petitioner agrees to withdraw her suit mentioned above on payment of all costs of parties settled at Rs. 1,000 and agrees that the said amount be paid in Court by the Railway out of the amount of Rs. 13,000 to be transferred to Grindlays Bank on her account."

[2] It may be mentioned that along with the plaint a petition was presented by Mrs. King for an injunction to Mr. King to restrain him from withdrawing Rs. 18,450 out of his provident fund deposited with the Railway Administration. The same day a learned Judge of this Court ordered a temporary injunction to restrain Mr. King from withdrawing the sum of Rs. 18,450 from his provident fund and the Railway Administration from paying the same to him. When the compromise was filed this Court passed the following order :

"The petition is allowed to be withdrawn. The railway administration shall be ordered to send a sum of Rs. 13,000 to Grindlays Bank Limited, Bombay, to be deposited to the credit of the petitioner and a sum of Rs. 5,000 to be deposited to the credit of the three minor children named in the petition. The balance of Rs. 450 shall be released. No order as to costs."

[3] When the order was communicated to the Railway Administration it applied to the Court for the recall of the order passed on 17th July 1951. In the affidavit filed in support of the application it was mentioned that according to the rules of the fund an employee of the Railway is entitled to 90% of the provident fund due to him on his proceeding on leave preparatory to retirement and the balance of 10% is payable when he finally retires from the service. Mr. King took leave preparatory to retirement from 1st December 1950 and was thus entitled to get 90% of his provident fund from the Railway Administration. The total sum due to him under the provident fund account was Rs. 29,184. The Railway Administration mentioned that in compliance with the Court's order Rs. 18,450 out of the provident fund money had been withheld. It was contended that under s. 3, Provident Funds Act, 1925, provident fund money is not in any way capable of being assigned or charged and is not liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the subscriber or depositor, and that under s. 4 of the said Act the provident fund money is payable to the subscriber or the depositor and in the event of his death to his nominee. It was pointed out that in view of these statutory provisions, the Railway Administration was not in a position to send the money to the Grindlays Bank or deposit in the name of Mrs. King or of her minor children, because the statute casts a duty upon the Railway Administration to pay the money only to the depositor or the subscriber.

[4] This application came up for hearing before a learned Single Judge on 1-8-1951, who in partial modification of the order dated 17-7-1951, directed that one cheque of Rs. 13,000 and another of Rs. 5,000 shall be drawn up by the Railway Administration in favour of the Registrar of this Court and after these cheques have been received learned counsel for Mrs. King should take steps to get the money deposited in Grindlays Bank in terms of the compromise arrived at in the case.

[5] Against the last mentioned order the Railway Administration has preferred this appeal. The contention is that the order of the learned single Judge directing the Railway Administration to pay the provident fund money due to Mr. King in Court is wholly without jurisdiction because the money is not liable to be attached or assigned and the order amounts to a virtual attachment of Mr. King's provident fund money.

[6] Respondent 1 Mr. King contends that Mrs. King has not carried out her part of the compromise inasmuch as she is not living with her husband and so she is not entitled to the reliefs asked for.

[7] Respondent 2 Mrs. King contends that the compromise was not conditional and that she is entitled to the money without being called upon to live with her husband. She states that the treatment of Mr. King is so bad that it is not possible for her to live with him. She disputes also the point of law urged on behalf of the Railway administration.

[8] This appeal came up for hearing before a Division Bench on 5-9-1951, and on that date the parties agreed as follows :

"The Railway Administration will draw two cheques for Rs. 13,000 and 5,000 respectively in the name of Mr. S. M. King, and these cheques will be delivered to the Registrar of this Court within three days. Mr. Man Singh (counsel for Mrs. King) will request Mr. S. M. King to endorse the first cheque in favour of Mrs. T. A. King in her personal capacity and the second in favour of that lady as guardian of the infant children. Should he fail to do so, Mrs. King will take such steps as she may be advised."

[9] Learned counsel for the Railway Administration made it clear that if the amounts for which the cheques were drawn were not realised by Mrs. King, the Railway Administration would not, when this appeal came up for hearing, raise the plea that its liability to Mr. S. M. King had been discharged. Counsel for Mrs. King undertook that in such circumstances he would not contend that the drawing of the cheques was evidence that the amounts for which they were drawn were not provident fund money.

[10] On 6-9-1951, learned counsel for Mrs. King wrote to Mr. King to come to Allahabad and to endorse the two cheques in possession of the Registrar of the High Court in favour of his client. But Mr. King declined to make endorsements and contended that the compromise was conditional.

[11] The first question for determination is whether the order dated 1-8-1951, passed by the learned single Judge is capable of being enforced against the Railway Administration. That order was passed upon the compromise dated 17-7-1951, arrived at between Mr. and Mrs. King. The Railway Administration was no party to it. The second question is as to what is the effect of the agreement reached on 5-9-1951, during the pendency of this appeal.

[12] Sub-section (1) of s. 3, Provident Funds Act, 1925, provides :

"A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to or have any claim on, any such compulsory deposit."

[13] Learned counsel for the appellant relies upon the *Dominion of India* v. *Mahabir Lall*, A. I. R. 1951 Cal. 285, and a recent decision of the Supreme Court in *Union of India* v. *Hiradevi*, 1952 S. C. J. 326. The first case is of no help in the present appeal because there the Court had ordered the Chief Accounts Officer of the East Indian Railway to make over to the receiver appointed in the execution of a decree the provident fund money due to the judgment-debtor. This order was made before the

money had become payable to the depositor. The case was decided by the Calcutta High Court on the simple ground that as the money had not become payable according to s. 4, Provident Funds Act, the execution Court was wrong in appointing a receiver.

[14] In *The Union of India* v. *Hira Devi*, 1952 S. C. J. 326, the facts were as follows: Hira Devi held a money decree against one Ram Grahit Singh, who retired on 31-1-1947, as a Head Clerk in the Dead Letter Office, Calcutta. On 1-2-1949, she got a receiver appointed for collecting the money standing at the credit of the judgment-debtor in the provident fund with the Postal Authorities. The Union of India intervened with an application for setting aside the order appointing the receiver. That application was dismissed for reasons given in *The Union of India* v. *Sm. Hira Devi*, 54 Cal. W. N. 840. The view taken by the Court was that a receiver could be appointed in execution of a decree in cases where attachment in execution of the decree had been expressly prohibited by Statute. Against this decision there was an appeal to the Supreme Court which has held that a receiver cannot be appointed in execution in respect of provident fund money due to a judgment-debtor as it cannot be assigned or charged and is not liable to any attachment. The prohibition against the assignment or attachment of such compulsory deposit contained in s. 3 of the Act is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment-creditor to get at the fund indirectly by means of the appointment of a receiver would be to circumvent the statute.

[15] The distinguishing feature in the present case is that here the amount in the provident fund of Mr. King is not sought to be taken in execution of any decree or order of any Court "in respect of any debt or liability incurred by the subscriber or depositor." It is in pursuance of a compromise reached between him and his wife that the latter asks for the payment. But s. 3, Provident Funds Act, 1925, prohibits also an assignment of the deposit in the provident fund. The word "assign", according to Webster's Dictionary, means "to transfer or pass over property to another, whether for the benefit of the assignee or of the assignor's creditors, or in furtherance of some trust."

[16] In *The Union of India* v. *Hira Devi*, (1952) S. C. J. 326, it has been held by the Supreme Court that the provident fund money not paid to the subscriber after the date of his retirement is "compulsory deposit" within the meaning of the Provident Funds Act, 1925. There can, therefore, be no doubt that the money in deposit with the Railway Administration is provident fund within the meaning of the Act although Mr. King has retired. The real effect of the compromise dated 17-7-1951, is to assign a part of the money due to Mr. King on account of the provident fund to his wife and children because according to it the property in the fund to the extent of Rs. 18,000 was transferred by Mr. King to his wife and children. The fact that subsequently by the order dated 1-8-1951, the Court directed the two cheques to be drawn in the name of the Registrar of this Court can make no difference because the essence of the transaction was to pay Rs. 18,000 to Mrs. King and her children. We must see to the pith and the substance and not to the form of the matter.

[17] Learned counsel for Mrs. King relies upon *N. A. M. Moore* v. *A. R. Moore* A. I. R. 1938 Oudh 48. That was a case where a divorce decree provided that the respondent should secure to the applicant a gross sum of Rs. 3,000 and that he should execute a proper instrument securing that payment. In execution of that decree the wife applied praying that as Mr. Moore had failed to provide her with Rs. 3,000 for her and her children's maintenance the Court may under O. 21, R. 34, Civil P. C., execute an instrument on behalf of Mr. Moore for securing the said sum to her. She suggested that the document should take the form of a special power-of-attorney in favour of the applicant authorising her on behalf of the judgment-debtor to withdraw a sum of Rs. 3,000 out of the provident fund of the judgment-debtor in the Railway Company in which he was employed. The Oudh Chief Court granted this request and held that it did not offend against S. 3 (1), Provident Funds Act. The reason assigned was as follows:

"In the first place the manner in which the money is sought to be recovered by the applicant is neither an assignment nor a charge nor an attachment. In the second place the amount decreed against the judgment-debtor cannot also be said to have been decreed in respect of any debt or liability 'incurred by the subscriber'. The words 'incurred by the subscriber' appear to us to show that the prohibition is against realization of money in respect of any debt or liability that the subscriber himself incurred voluntarily, but in the present case the liability of the judgment-debtor to pay Rs. 3,000 to the applicant was imposed on him by this Court's decree and was not incurred by him voluntarily."

In the present case the transfer of Rs. 18,000 out of the provident fund of Mr. King was voluntarily agreed to by him in the compromise and the decree of the Court only recorded that compromise. It does not appear that in the case before the Oudh Chief Court there was any compromise between the parties. Moreover having regard to the principles enunciated by the Supreme Court in *The Union of India* v. *Hira Devi* (1952 S. C. J. 326) the view taken by the Oudh Chief Court in the aforesaid case is no longer good law, for their Lordships of the Supreme Court observed:

"It is obvious that the prohibition against the assignment or the attachment of such compulsory deposit is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment creditor to get at the fund indirectly by means of the appointment of a receiver would be to circumvent the statute. That such a frustration of the very object of the legislation should not be permitted was laid down by the Court of appeal as early as 1886 in the case of *Lucas* v. *Harris*, ((1887) 18 Q. B. D.

127), where the question arose with reference to a pension payable to two officers of Her Majesty's Indian Army."

[18] It is true that in the present case there is no request for the appointment of a receiver. But when the cheques were directed by the learned single Judge to be drawn in the name of the Registrar he was virtually to act as a receiver to collect the funds for the benefit of Mrs. King and her children. The direction in the decree of this Court dated 17-8-1951, to the Railway Administration to send a sum of Rs. 13,000 to Grindlays Bank Limited to be deposited to the credit of Mrs. King and a sum of Rs. 5,000 to be deposited to the credit of the three minor children is, therefore, not binding upon the Railway Administration because it contravenes the provisions of s. 3 (1), Provident Funds Act, inasmuch as it amounts to an assignment of this sum from the provident fund of Mr. King to his wife and children. So long as Mr. King is alive he alone is entitled to realise the amount from the provident fund; vide s. 4 of the Act. Nor does the order dated 1-8-1951, passed by the learned single Judge make any difference in the position for although the cheques may be in the name of the Registrar the two sums of Rs. 13,000 and Rs. 5,000 are meant really for Mrs. King and her children.

[19] The second question is whether the position as stated above has been altered on account of the compromise reached during the pendency of this appeal on 5-9-1951. This appeal was presented to the Court on 6-8-1951. It was directed to be listed for hearing on 20-8-1951. As one of the Hon'ble Judges of the Bench was not present in Court on that date it was directed to be listed as early as possible. It came up for hearing on 31-8-1951, 3rd september and 4th september 1951, but it could not be reached. From the order sheet it appears that on 5-9-1951, learned counsel for the Railway Administration and for Mrs. King were heard. Mr. King was not present. Nor is the presence of his counsel noted in the order sheet. It appears to have been mentioned before the Court that the parties were likely to compromise and so the Division Bench passed the interim order dated 5-9-1951. In compliance with this order, the Railway Administration deposited the two cheques in the name of Mr. S. M. King with the Registrar. But when Mr. King did not agree to endorse them in favour of his wife the latter made an application to the trial Judge on 28-9-1951, requesting that Mr. King may be directed to endorse the aforesaid two cheques and sign the receipts and on his default this Hon'ble Court may be pleased to execute the receipts and endorse the cheques mentioned above. Notice was issued to Mr. King. He appeared and repeated that the compromise was a conditional one. As the agreement relied upon by Mrs. King had not been arrived at before the learned trial Judge, he directed on 26-10-1951, that Mrs. King's petition be laid before the Letters Patent Bench. When this appeal came up for hearing before a Bench on 12-5-1952, it was pointed out by the learned counsel for the appellant that Mr. King had not been formally served with the notice of the appeal. Notice was, therefore, directed to go to him and after the service of notice on him this appeal was heard. It is evident from the above narration of facts that when the order was passed by the Division Bench on 5-9-1951, Mr. King was not present and he had no notice of the appeal. He was no party to the agreement reached on 5-9-1951. He is, therefore, not bound by it and as such under no obligation to endorse the two cheques in favour of his wife. The agreement of 5-9-1951, therefore, falls to the ground as it was not subscribed by all the necessary parties.

[20] The last question is whether the compromise dated 16/17th July 1951, gives an unconditional right to Mrs. King to have a sum of Rs. 18,000 — Rs. 13,000 for herself and Rs. 5,000 for her children—from her husband, or is that right dependent upon her living with her husband. It may be noted that at present they are living apart, the wife is at Kanpur, while the husband is at Jubbulpore. The terms of the compromise have been set out in detail at the beginning of the judgment. The very first term provides that the petitioner and the respondent would "live together with their children." Mrs. King blames her husband for her inability to live with him, while Mr. King accuses his wife for this. It is not necessary to go into this question, as the compromise falls for failure of consideration, since the agreed payment of money to Mrs. King and her children is not enforceable at law.

[21] It is unfortunate that owing to the disputes that have arisen the whole of this family is suffering. But there is no help for this. Having regard to the terms of the compromise and the provisions of s. 3, Provident Funds Act, it is not possible for the Court to direct the payment of the sums to Mrs. King and her children. The solution lies in the hands of Mr. and Mrs. King. They should compose their differences, forget the past and live amicably with each other. We trust that Mr. King will not then grudge to place all what he has for his wife and children.

[22] The question now arises as to what order should be passed. In view of the findings reached above the order dated 1-8-1951, which modified the order dated 17-7-1951, passed on compromise falls to the ground. In fact the very compromise becomes inoperative because one of its terms, namely, requiring the Railway Administration to deposit a sum of Rs. 18,000 in Grindlays Bank Limited, Bombay, is contrary to law. With the failure of that important condition of the compromise the whole compromise falls to the ground, the illegal condition being inseparable from other conditions. For reasons given above, the agreement reached in this appeal on 5-9-1951, also becoms inoperative. We think that the ends of justice demand that as all these three orders have become inoperative, the

matrimonial suit may be restored and heard from the stage at which it had reached before the petition of compromise dated 16-7-1951, was filed in Court.

[23] The appeal is allowed. The order of the learned trial Judge dated 1-8-1951, is set aside. The order dated 17-7-1951, and the agreement reached during the Letters Patent Appeal between the Railway Administration and Mrs. King on 5-9-1951, are also declared inoperative. Matrimonial suit NO. 1 of 1951, *Theodora Aimee King* v. *Sidney Martin King*, is restored to its original number and the learned trial Judge shall proceed with the case from the stage it had reached before the deed of compromise dated 16-7-1951, was filed in Court and order passed on it on 17-7-1951. During the pendency of the matrimonial suit, the interim injunction restraining the Railway Administration from paying RS. 18,000 to Mr. King shall remain in force. In the circumstances of the case parties will bear their costs.

A/V.S.B. *Ordered accordingly.*

A. I. R. 1953 Allahabad 5

WALI ULLAH J.

Pearey and others — Applicants v. *State.*

Criminal Revn. No. 206 of 1951, D/- 4-2-1952.

Criminal Procedure Code (1898), S. 350 (1) Proviso (a) — "Resummoned and reheard" — Witnesses must be examined, cross-examined and re-examined — Merely allowing cross-examination is not compliance with proviso (a) — Accused cannot be said to have proper and fair trial.

Where there is non-compliance with proviso (a) to S. 350 (1), the accused cannot be said to have a fair and proper trial.

The expression "resummoned and reheard" in S. 350 (1) Proviso (a) clearly indicates that the witnesses named by the accused person must be resummoned and reheard i. e. heard afresh. Merely allowing cross-examination or further cross-examination of a witness so named by an accused person would not be sufficient compliance with the provisions contained in proviso (a) to S. 350 (1), Criminal P. C., and the accused could not be said to have had a fair and proper trial. A. I. R. 1938 Mad. 724, *Dissent.*; A. I. R. 1945 Nag. 207, *Ref.* [Para 9]

Anno. Criminal P. C., S. 350 N. 7.

Bageshwari Sahai — for Applicants; J. R. Bhatt, Asst. Govt. Advocate — for the State.

REFERENCES: Courtwar / Chronological / Paras.
('38) A I R 1938 Mad 724 : (39 Cr L J 932) 9
('45) A I R 1945 Nag 207 : (47 Cr L J 418) 7

Order.—The applicants have been tried and convicted of an offence under S. 379, Penal Code. They have been sentenced to pay a fine of RS. 25 each or in default to undergo rigorous imprisonment for one month.

[2] They went up in appeal to the learned Sessions Judge, but the appeal was unsuccessful.

[3] They have now come up in revision to this Court.

[4] One of the main points urged by learned counsel in this Court is that the proviso (a) to S. 350 (1), Criminal P. C., was not complied with fully by the learned Magistrate who decided the case and therefore the conviction of the applicants is vitiated in law.

[5] It appears that the trial of the applicants proceeded before two other Magistrates before it came to the Court of the present Magistrate—the Tahsildar Magistrate—who decided the case. It appears that all the five prosecution witnesses in the case had been examined before other Magistrates. When the case was taken up by the Tahsildar Magistrate, an application was made on behalf of the applicants that they wanted a *de novo* trial and that the prosecution witnesses might be produced afresh. This application made by the applicants was resisted by the complainant. At this stage, it appears that the counsel for the applicants made a statement that two of the witnesses viz. P. WS. 4 and 5, who were formal witnesses might not be resummoned and reheard: in other words, that their evidence, already recorded might be acted upon in the trial by the Tahsildar Magistrate. It was, however, claimed that the other three witnesses viz. P. WS. 1 to 3—witnesses of fact—must be resummoned and reheard. The learned Magistrate, however, allowed only fresh cross-examination of these witnesses. Then the case proceeded further. Defence evidence was taken and the trial actually ended later in the conviction and sentence of the applicants.

[6] Learned counsel for the applicants has contended, in the first place, that the trial of the applicants was vitiated in law inasmuch as the proviso (a) to S. 350 (1) was not complied with. Learned counsel has contended that the expression "*resummoning and rehearing*", clearly implies that the witnesses in question must be summoned again and heard afresh i. e. that the witnesses should be examined in chief, then cross-examined and, if necessary, re-examined. If this interpretation is correct, obviously the proviso (a) to S. 350 (1) has not been complied with in this case.

[7] In support of his contention, learned counsel has relied upon the case of *Nathu Balajee* v. *Emperor*, A. I. R. 1945 Nag. 207. It was held in that case by a learned single Judge of that Court that the witnesses should be heard afresh from the start and that it was not enough merely to allow them to be cross-examined again. Admittedly this has not been done in the present case. Therefore, it is contended, there has been a violation of the provisions of proviso (a) to S. 350 (1), Criminal P. C.

[8] The question is what is the consequence, if any, of this non-compliance on the validity or otherwise of the trial and conviction of the applicants. The learned Judge, who heard the appeal has observed that he was satisfied that the applicants had not been prejudiced by the fact that the material witnesses of fact were not examined afresh. In the Nagpur case cited above, it was held by the learned Judge, after an examination of a number of cases decided by various Courts in

India, including our own, that the failure of the learned Magistrate who concluded the trial to comply strictly with proviso (a) to s. 350 (1) vitiated the trial.

[9] Mr. Bhatt, the Assistant Government Advocate, has relied strongly on the case of *In re Ramamuni Reddi* in A. I. R. 1938 Mad. 724, decided by a learned single Judge of that Court. In that case, the learned Magistrate had merely allowed the witnesses to be further cross-examined and it was held that that amounted to a mere irregularity which did not vitiate the trial. With respect, I am not able to share the view of the learned Judge of the Madras High Court. On the other hand, it seems to me that the expression "resummoned and reheard" clearly indicates that the witnesses named by the accused person must be resummoned and reheard i. e. heard afresh. Merely allowing cross-examination or further cross-examination of a witness so named by an accused person would not be sufficient compliance with the provisions contained in proviso (a) to s. 350 (1), Criminal P. C. I am accordingly satisfied that in this case, the proviso (a) to s. 350 (1), Criminal P. C. was not complied with as the result of which the applicants did not have a fair and proper trial of their cases.

[10] In view of what I have said above, it is not necessary to consider certain other objections which have been raised by learned counsel in the application for revision.

[11] The result is that I allow the application in revision and set aside the conviction and sentence passed upon the applicants. The fine, if paid, shall be refunded.

A/R.G.D. *Revision allowed.*

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RAGHUBAR DAYAL AND AGARWALA JJ.

G. P. Singh — Applicant v. *The Faculty of Law, University of Allahabad and another — Respondents.*

Writ Appln. No. 7994 of 1951, D/- 15-4-1952.

(a) Allahabad University Ordinances for the Degree of Doctor of Laws (Published at page 302, Vol. I of Calendar of University of Allahabad for the year 1948-49)—Thesis for Doctorate — Condition to be fulfilled — Faculty of law or sub-committee — Constitution of India, Art. 226.

Before a person can be admitted to the degree of Doctor of Laws one of the conditions to be satisfied is that "he has written an essay approved by the Faculty of Law, or by a Sub-Committee thereof on some subject connected with Law or with Jurisprudence." The examiners appointed to examine the thesis cannot be deemed to be a Sub-Committee of the Faculty of Law, when all the examiners were not members of the Faculty of Law. The Sub-Committee, in the nature of things, must consist of the members of the larger body, i.e. the Faculty of Law. If the thesis submitted by the applicant has not been approved by the Faculty of Law or by a Sub-Committee thereof the applicant cannot claim any mandamus to the University of Allahabad ordering it to accept his thesis and award him the degree of Doctor of Laws. [Para 7]

(b) Allahabad University Act (1921), S. 33 — Draft Ordinances — Estoppel — Resolution by Faculty of Law — Constitution of India, Art. 226 — Evidence Act (1872), S. 115.

The draft Ordinances which were approved by the Faculty of Law and Academic Council but which have not been so far accepted by the Executive Council cannot become binding Ordinances unless they are made in accordance with the provisions of the Allahabad University Act of 1921. The mere fact that the University authorities acted in accordance with the provisions of the draft Ordinances would not make the draft Ordinances valid Ordinances properly made under the provisions of the Allahabad University Act. The fact that the applicant submitted a number of copies of his thesis, that examiners were appointed and he was required to pay Rs. 200 towards the fees to be paid to the examiners cannot in any way operate as estoppel against the University in the absence of any direct representation by the University to the applicant that his application for the award of the degree would be considered in accordance with the provisions of the draft Ordinances. Any resolution passed by the Faculty of Law about its awarding the degree of Doctor of Laws in conformity with the award of the degree of Doctor in other Faculties will not affect the main question that the ordinances governing the grant of a degree of Doctor of Laws would be the Ordinances framed by the Executive Council under S. 33 of the Act. Unless the provisions of such Ordinances are contravened no case for the issue of a writ of mandamus can possibly arise. [Paras 8, 9]

Anno. Evidence Act, S. 115, N. 4.

(c) (Allahabad University) Draft Ordinances 10, 11 and 12 — No viva voce examination — Application for writ of mandamus — Constitution of India, Art. 226.

If the report of the majority of the examiners is that the thesis is satisfactory, the University would be bound to arrange for the holding of the *viva voce* examination. The Ordinances do not say what the Faculty is to do if the report of the majority of examiners of the thesis and the report of the *viva voce* examiners be satisfactory. Where no *viva voce* examination of the applicant has taken place it is premature for the applicant to require the High Court to issue a writ of mandamus commanding the University to grant him the Degree of Doctor of Laws. [Para 11]

(d) (Allahabad University) Draft Ordinances 11 and 14 — Faculty of law asking applicant to revise thesis — Issue of writ of mandamus — Constitution of India, Art. 226.

The University must give its approval to a thesis after it finds it absolutely satisfactory. If a thesis is not absolutely satisfactory and fit for publication the University is to defer its approval in spite of the recommendations of the examiners. All what draft Ordinance 11 requires is that the Faculty shall accept the recommendation by the majority of the examiners of the thesis, but it does not say that the Faculty must accept it at the earliest opportunity after the receipt of the recommendations. The Faculty can take its time and can take steps to see that the thesis is in such a form to which no objection can be taken and which, if published, brings no discredit to the University. If in view of the report of the examiners the Faculty of Law is of opinion that the applicant should revise his thesis in the light of the remarks of the examiners it cannot be said that the Faculty has acted in any unfair or obstinate manner or *mala fide* and that a case is made out for the interference of the High Court by ordering issue of a writ of mandamus or other direction ordering the Faculty of Law or the University to act in a particular manner. [Para 12]

Shambhu Prashad — for Applicant; S. K. L. Misra and M. H. Beg — for Respondents.

Raghubar Dayal J. — This is an application by G. P. Singh for the issue of a writ of mandamus commanding the Faculty of Law of the Univer-

sity of Allahabad and the University of Allahabad to accept the recommendations of the majority of examiners for the award of the degree of Doctor of Laws of the University of Allahabad to the applicant on his thesis for the same.

[2-3] The facts leading to this application are as follows:

The application of the applicant for permission to supplicate for the degree of LL. D. was placed before the Faculty of Law on 19-10-1946. The Faculty granted the permission, approved the subject for the thesis and passed a resolution appointing a Committee of three persons to value his thesis. The applicant submitted his thesis to the Registrar in october 1947 for the award of the degree of Doctor of Laws.

[4] On 18-12-1946 the Academic Council of the University resolved requesting the Faculty of Law to consider the revision of the Ordinances relating to the degree of Doctor of Laws. The Faculty of Law appointed a Committee for the purpose on 13-3-1947 and accepted the Ordinances proposed by it on 7-12-1947. These draft Ordinances are in general agreement with the Ordinances for the degree of Doctors in other Faculties. The Academic Council accepted them on 21-3-1951. They were not accepted by the Executive Council of the University which resolved on 10-11-1951 that the recommendation be considered along with the draft Ordinances for the D. Sc. and D. Litt. degrees.

[5] It appears that on 13-3-1947, even before the acceptance of the draft Ordinances by the Faculty of Law, it agreed on the general principle that the award of the degree of Doctor of Laws would be in conformity with the award of Doctors' degrees in other Faculties and considered the question of appointment of examiners to assess the thesis in place of one of the members of the Committee who declined to evaluate it and appointed another person. It also resolved that two other persons would be viva-voce examiners. Ultimately the three examiners who actually examined the thesis submitted their reports which were considered by the Faculty of Law on 18-3-1948.

The Faculty resolved that the applicant be asked to re-present the thesis after necessary revision and improvements in the light of the criticisms offered by the examiners not earlier than six months and not later than two years. The applicant re-presented the thesis after revision in March 1950. The reports of the examiners on the re-submitted thesis were considered by the Faculty of Law on 20-3-1951.

It did not accept the alleged recommendation of the majority of the examiners for the award of the degree of Doctor of Laws and resolved that the applicant be permitted to submit the thesis in the light of the criticisms made by the examiners if he so desired. The applicant then submitted a re-presentation to the University authorities in April 1951. It was rejected by the Faculty of Law on 27-10-1951.

[6] It is contended that the Faculty of Law was bound to accept the recommendation of the majority of the examiners who recommended award of the degree of Doctor of Laws to the applicant.

[7] The existing Ordinances for the degree of Doctor of Laws are published at p. 302, vol. I of the Calendar of the University of Allahabad for the year 1948-49. They provide that no special examination shall be held and that a person with the prescribed qualification may be admitted to the degree of Doctor of Laws without examination if he satisfied two conditions. One of the conditions is that:

"he has written an essay approved by the Faculty of Law, or by a Sub-Committee there of on some subject connected with Law or with Jurisprudence."

It is not disputed that the thesis submitted by the applicant has not been approved by the Faculty of Law or by a sub-Committee thereof. The three examiners appointed to examine the thesis cannot be deemed to be a Sub-Committee of the Faculty of Law, as all the three examiners were not members of the Faculty of Law.

The Sub-Committee, in the nature of things, must consist of the members of the larger body, i. e. the Faculty of Law. It follows therefore that one of the conditions necessary to be satisfied before a person can be admitted to the degree of Doctor of Laws is not satisfied. Consequently the applicant cannot claim any mandamus to the University of Allahabad ordering it to accept his thesis and award him the degree of Doctor of Laws.

[8] The contention of the applicant is really based on the provisions of the draft Ordinances which were approved by the Faculty of Law and Academic Council but which have not been so far accepted by the Executive Council. These draft Ordinances cannot become binding Ordinances unless they are made in accordance with the provisions of the Allahabad University Act of 1921. Section 33 provides procedure for the making of Ordinances and says that the Ordinances shall be made by the Executive Council. It lays down certain restrictions on the power of the Executive Council with respect to its altering the draft proposed by the Academic Council. The Ordinances made by the Executive Council are to have effect from such date as it may direct. But such Ordinances can be made void if the Court resolves to cancel the Ordinances or if the Chancellor signifies his disallowance of any Ordinance to the Court or the Executive Council.

As already mentioned, the Executive Council has not so far accepted these Ordinances. These Ordinances could not have taken effect till the Executive Council fixed a date for their enforcement. They were not submitted to the Court or to the Chancellor. It is, therefore, clear that these draft Ordinances do not in any way replace the Ordinances printed in the University Calendar and cannot have any force as Ordinances of the

University. It is contended for the applicant that the Faculty of Law, the Academic Council and even the Executive Council and the Vice-Chancellor of the University have, in a way acted in accordance with the provisions of the draft Ordinances and have required the applicant also to take certain steps which were mentioned in the draft Ordinances and that therefore the University is bound to act in accordance with these Ordinances so far as the application of the applicant for the award of the degree of Doctor of Laws is concerned.

We are of opinion that the mere fact that the University authorities acted in accordance with the provisions of the draft Ordinances would not make the draft Ordinances valid Ordinances properly made under the provisions of the Allahabad University Act. It is true that the applicant submitted a number of copies of his thesis, that examiners were appointed and he was required to pay Rs. 200 towards the fees to be paid to the examiners. But these facts cannot in any way operate as estoppel against the University in the absence of any direct representation by the University to the applicant that his application for the award of the degree would be considered in accordance with the provisions of the draft Ordinances. No such representation was made.

The applicant, it may be said, seems to have been under the impression that the procedure laid down in the draft Ordinances would be followed in the matter of considering the propriety of awarding him the degree of Doctor of Laws or not, and such impression does not appear to have been really due to any representation of the University to him, as its requiring him to furnish a certain number of copies of the thesis, and to deposit Rs. 200 as fees for the examiners would not have been sufficient to make such an impression, but was due to his knowledge of what passed in the meetings of the Faculty of Law and of which he was a member probably on account of his appointment as a teacher in the University. The Faculty of Law and the University could not have gone against the provisions of the existing valid Ordinances, and, therefore, could have recommended and conferred the degree of Doctor of Laws only if the Faculty of Law or its Sub-Committee had approved of the thesis.

It is immaterial how the Faculty of Law approved the thesis. If the Faculty of Law guides itself by the provisions of the draft Ordinances in the matter of its approving an essay for the conferment of the degree of Doctor of Laws such an action would be a matter for its discretion. The Ordinances in force do not lay down procedure to be adopted by it before it be in a position to approve any such essay.

[9] Any resolution passed by the Faculty of Law about its awarding the degree of Doctor of Laws in conformity with the award of the degree of Doctor in other Faculties will, for similar reasons, not affect the main question that the Ordinances governing the grant of a degree of Doctor of Laws would be the Ordinances framed by the Executive Council under s. 33 of the Act. Unless the provisions of such Ordinances are contravened no case for the issue of a writ of Mandamus can possibly arise.

[10] Even if it be held for a moment that the University was bound by the provisions of the draft Ordinances in view of certain action which can be deemed to have been taken in accordance with its provisions, the question still remains whether the Faculty of Law has acted in such a manner as to require an order of this Court commanding it to act in any other manner.

[11] It would be necessary to reproduce certain draft Ordinances. Draft Ordinance No. 6 is:

"The thesis submitted by the candidate must be entirely his own work and must be an original contribution to knowledge characterised either by the discovery of new facts and their significance or by a new interpretation of facts or theories; and, in either case, it should evince the capacity of the candidate for critical examination and judgment. It shall also be satisfactory so far as its literary presentation is concerned and must be suitable for publication."

Ordinance 8 is:

"The examiners shall examine the thesis and other published work, if any, of the candidate and shall submit their reports on the *prescribed form* either conjointly or separately. The examiners may consult one another before submitting their reports.

They may make such suggestions as they may deem fit for the improvement of the thesis. These suggestions shall be communicated to the candidate."

Ordinance 9 is:

"After the examiners have examined the thesis they may recommend that the thesis be rejected or that the candidate be allowed to present the thesis in a revised form *not earlier than six months and not later than two years from the date* of the decision of the Faculty."

Ordinance 10 is:

"If the majority of the examiners report that the thesis is satisfactory, the University "shall arrange for the holding of the viva voce examination and the recommendations of the examiners shall be placed before the Faculty for consideration."

Ordinance 11 is:

"The Faculty shall accept recommendations made by a majority of the examiners. In the event of no definite recommendations being made by a majority of the examiners the Faculty may allow the candidate to represent the thesis or may appoint one or more fresh examiners to examine the thesis."

Ordinance 12 is:

"In case the recommendation of the Viva voce examiners differs from the recommendation of the examiners of the thesis the candidate may be asked to reappear for the viva-voce examination within six months of the decision of the Faculty. If the candidate fails to satisfy the viva-voce examiners a second time his thesis shall be rejected."

It would be clear from the above that if the report of the majority of the examiners is that the thesis is satisfactory, the University would be bound to arrange for the holding of the viva-voce examination. The Ordinances do not say what the Faculty is to do if the report of the majority of examiners of the thesis and the re-

port of the viva voce examiners be satisfactory. It would, naturally, be expected that the Faculty would ultimately act according to the recommendations of both the sets of examiners. In case of a difference between the reports of the viva voce examiners and the examiners of the thesis, the faculty can require the applicant to appear a second time for viva voce examination. If they differ again, the thesis is to be rejected. No viva-voce examination of the applicant has taken place so far. It is, therefore, premature for the applicant to require this Court to issue a writ of mandamus commanding the University to grant him the Degree of Doctor of Laws.

[11a] The Faculty of Law has not rejected the thesis. It has asked the applicant to resubmit it after revision and improvement in the light of the criticisms made by the examiners. The question is whether the Faculty can be said to have acted in such manner as to indicate that it has not acted fairly and that it is not expected to act fairly even if the applicant complies with its directions. Of the three examiners who examined the thesis of the applicant, one expressed the opinion that he could not recommend him for being admitted to the LL. D. Degree. One recommended the award of the Degree, but added :

"If Mr. Singh wants to publish the thesis in a book form, I would suggest to him that he may compress it a little as I find he has discussed over and over again some of the case law, which I think detracts a little from the value of the work."

The third examiner concluded his opinion thus:

"Originality cannot be expected in a work of this character, but I think there is merit in the way in which he has approached the subject and his discussions might be of assistance to Judges in solving some of the problems that still await solution. The author at places has been unduly prolix; some of his opinions do not seem to be well considered and there is much in his thesis which can be left out as having a most remote bearing on the subject matter. In my opinion, it is a meritorious work and by way of encouragement to, or recognition of his industry and research I can recommend that the Doctorate Degree may be awarded to him. I still think, however, that the work is still capable of further improvement, particularly in the shape of reducing its volume by discarding all unnecessary and useless matters. Opinions on matters which are controversial and which have no direct bearing on the subject matter of discussion may also be avoided."

[12] It would appear that even the two examiners who recommended the conferment of the Degree of Doctor of Laws on the applicant had to express that some portions of the contents required revision. Draft Ordinance 6 requires a thesis to be satisfactory so far as its literary presentation is concerned and must be suitable for publication. Ordinance 14 of the draft Ordinances is :

"If the thesis which has been approved by the University is subsequently published, the candidate shall state on the title page that it was a thesis approved for the Degree of Doctor of Laws of the Allahabad University."

It follows that once the University approves of the thesis it can be published by the applicant and that the applicant has to state that it was a thesis approved for the Degree of Doctor of Laws of the Allahabad University. The University must therefore give its approval to a thesis after it finds it absolutely satisfactory. If a thesis is not absolutely satisfactory and fit for publication the University is to defer its approval in spite of the recommendations of the examiners. All what draft Ordinance 11 requires is that the Faculty shall accept the recommendations by the majority of the examiners of the thesis, but it does not say that the Faculty must accept it at the earliest opportunity after the receipt of the recommendations. The Faculty can take its time and can take steps to see that the thesis is in such a form to which no objection be taken and which, if published, brings no discredit to the University.

If in view of the reports of the examiners the Faculty of Law is of opinion that the applicant should revise his thesis in the light of the remarks of the examiners it is difficult to say, that the Faculty has acted in any unfair or obstinate manner or *mala fide* and that a case is made out for the interference of this Court by ordering issue of a writ of mandamus or other direction ordering the Faculty of Law or the University to act in a particular manner.

[13] There appears no reason to suppose that the Faculty of Law and the University will not act fairly and will not consider the question of the conferment of the degree of Doctor of Laws on the applicant properly. We feel no doubt that these proceedings will not prejudice such consideration when the applicant resubmits his thesis after revising it in the light of the suggestion of the examiners.

[14] We, therefore, dismiss the application and order the applicant to pay Rs. 400 costs to the University of Allahabad.

A.D.H. *Application dismissed.*

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P. L. BHARGAVA J.

Lakshmi Narain—Plaintiff—Appellant v. *Ram Babu and another—Defendants—Respondents.*

Second Appeal No. 2089 of 1946, D/- 27-9-1951.

(a) Arbitration Act (1940), Ss. 21 and 2 (c)—"Court" includes appellate Court also — Subject-matter of appeal can be referred to arbitration.

The word "Court" appearing in S. 21 cannot be restricted to mean a civil Court of original civil jurisdiction only. The definition in S. 2 (c) is wide enough to include an appellate Court also, inasmuch as it has got jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit. An appellate Court does decide such questions when they come up in appeal before it. When the word "Court" used in S. 21 of the Act, is wide enough to include an appellate Court, there appears to be no reason to give a restricted meaning to the word "suit" so as to

exclude an appeal from its purview. Therefore, the subject-matter of an appeal pending in the appellate Court can be referred to arbitration through the intervention of the Court. A. I. R. 1948 All. 443, *Foll.*; A. I. R. 1947 All. 304, *Dissent*. [Paras 22 & 23]

Anno: Arbitration Act, S. 21, N. 17.

(b) Arbitration Act (1940), Ss. 21 and 47—Reference to arbitration of subject-matter of pending suit without intervention of Court—Legality—Joint arbitration relating to subject-matter of pending suit and matters extraneous to suit — Civil P. C. (1908), O. 23, R. 3.

There is no legal bar to the dispute which is the subject matter of a pending suit being referred to arbitration without the intervention of the Court. The award made in pursuance of such an arbitration may, with the consent of the parties interested, be taken into consideration as a compromise or adjustment of a suit under S. 47 by any Court before which the suit is pending. [Paras 23 and 28]

The arbitrations contemplated by proviso to S. 47 may include a joint arbitration relating to the subject-matter of a pending suit and the matter which is not the subject-matter of a suit without the intervention of the Court. Hence, where the dispute pending before a Court is only a minor dispute and, between the same parties there are other major disputes which can be referred to arbitration without the intervention of the Court, there is no legal bar to the parties agreeing to refer *all* the disputes between them to arbitration without the intervention of the Court and then to place the award made in pursuance of such an arbitration before the Court concerned for consideration as a compromise or adjustment of a suit. [Paras 23 & 24]

Anno: Arbitration Act, S. 20, N. 4, S. 47, N. 1, C. P. C. O. 23, R. 3, N. 9 and 19.

(c) Civil P. C. (1908), O. 32, R. 7 and O. 23 R. 3—Agreement of reference to arbitration on behalf of minor by his father—Reference of subject-matter and matters extraneous to suit without intervention of Court—Leave of Court under O. 32, R. 7—Necessity for—Arbitration Act (1940), S. 47.

An agreement of reference to arbitration of the dispute, which was the subject-matter of the pending suit along with other disputes, which were not the subject-matter of the pending suit was entered into on behalf of the minor by his father who was also acting as his guardian for the suit. The question was whether even though the reference was made without the intervention of the Court, the leave of the Court under O. 32, R. 7 was necessary:

Held, that when the father of the minor entered into the agreement of reference in question, he was acting as the father and natural guardian of the minor and not as his guardian *for the suit*. In the latter capacity he could not refer other disputes to arbitration, that he could do only in his former capacity. He was entitled to adjust the matters in suit out of Court by direct agreement between the parties or through the intervention of an arbitrator or referee and have the adjustment recorded in Court with the leave of the Court. The leave of the Court under O. 32, R. 7 was, therefore, not necessary. [Para 29]

Anno: C. P. C. O. 32, R. 7, N. 15; Arbitration Act S. 47, N. 1.

(d) Arbitration—Agreement to abide by statement of referee on question of fact and of law—Arbitration Act (1940), Ss. 2 (a) and 21.

If the parties are in law entitled to agree to abide by the statement of any person as a referee, there appears to be no reason why the rights of the parties should in any manner be restricted as regards the matters to be decided on the basis of the referee's statement. It would not be either convenient or in the interests of the parties to adjust their differences in part, that is, so far as they relate to questions of fact on the basis of the referee's statement, and to leave questions of law to be decided by the Court. The parties may choose a referee well-versed in law, in whom they have full trust and confidence and agree to abide by his statement on questions of law as well as facts. A referee has to make a statement according to his knowledge and belief; and if he is competent to make such a statement on questions of law and facts both, the parties can certainly agree to abide by his statement on all the questions and adjust their differences accordingly.

Anno: Arbitration Act, S. 21, N. 2. [Para 38]

K. C. Mital and A. P. Panday—for Appellant; J. Swarup—for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('25) A. I. R. 1925 P. C. 203: (53 Cal. 258 P. C.)	26
('39) A. I. R. 1939 P. C. 63: (54 All. 1067 P. C.)	22
('29) A. I. R. 1929 All. 132.	36
('33) A. I. R. 1933 All. 861: (56 All. 39 S. B.)	32
('37) A. I. R. 1937 All. 701: (171 Ind. Cas. 697).	32
('47) A. I. R. 1947 All. 324: I. L. R. (1947) All. 227	21, 22
('48) 1948 All. L. J. 556: (A. I. R. 1948 All. 443)	22

Judgment. — This is an appeal by Lakshmi Narain, who had instituted a suit in the Court of the Civil Judge of Agra, praying that an award made by the arbitrators, in pursuance of a reference made to them by him and others, be directed to be filed in, and be made a rule of the Court. The facts and circumstances which have given rise to this appeal are these:

[2] Ram Babu, a minor through his father Kishen Lal as next friend, instituted suit No. 297 of 1942, in the Court of the Munsif of Agra, against Lakshmi Narain the appellant, for recovery of possession over a piece of land and for demolition of certain structures built thereon by the defendant, namely, Lakshmi Narain. The suit was contested and was eventually dismissed on 31-8-1943. Against the decision of the Munsif, Ram Babu preferred an appeal No. 292 of 1943 in the Court of the District Judge of Agra. The appeal was transferred for disposal to the Civil Judge of Agra and it is still pending there.

[3] Apart from the dispute which was the subject-matter of the litigation mentioned above, there were other disputes, the disputants being Hub Lal, the grandfather of Ram Babu, and Kishen Lal, the father and guardian of Ram Babu, first party, Asa Ram, second party, Lakshmi Narain, the appellant, third party, and Gajadhar Singh, fourth party. On 10-7-1949, all the disputants, including Ram Babu through his father, executed a deed of agreement to refer the entire dispute, including the dispute which was the subject-matter of the appeal pending in the Court of the civil Judge of Agra, to arbitration. The dispute which was the subject-matter of the appeal was referred to arbitration without reference to or intervention of the Court. But, subsequently, on 7-8-1944, a joint application was made on behalf of Ram Babu, through his counsel, by Hub Lal, the grandfather of Ram Babu, and by Lakshmi Narain, the appellant, to the Civil Judge of Agra stating that the dispute in the appeal along with certain other matters had been referred to arbitration out of Court, and a deed of agreement for reference to arbitration had been executed by the parties. The prayer in the application was that some distant

date be fixed in the appeal so that the matter may be decided by the arbitrators in pursuance of the said agreement. This application was granted on the same date and the hearing of the appeal was postponed.

[4] In pursuance of the deed of reference, the arbitration proceedings commenced and in due course an award was made by the arbitrators on 16-8-1944. As regards the dispute between Ram Babu and Lakshmi Narain, the decision of the arbitrators contained in the award was that the latter should pay to the former a sum of Rs. 700/- for the land. Lakshmi Narain was satisfied with the award; while the other disputants were not satisfied with it. Accordingly, Lakshmi Narain filed the suit which has given rise to this appeal.

[5] Under the direction of the Court, the award was filed by the arbitrators in Court and, upon the receipt of notice of the filing of the award, Ram Babu and others filed written statements challenging the validity of the award on various grounds. The ground of objection, which is material for the purposes of this appeal and which had been raised on behalf of Ram Babu, was that the reference made on his behalf without the permission of the Court was bad in law and the reference being incompetent, the award based upon it was also invalid and not binding upon him.

[6] During the pendency of the objections to the award on 30-5-1945, an application was made to the Civil Judge on behalf of Ram Babu, through his counsel, saying that the appointment of a referee would be beneficial in the interest of the minor and that the necessary sanction for the appointment of a referee in the case be given. This application was allowed.

[7] On the same date, viz., 30-5-1945, counsel for the parties, including the counsel for Ram Babu, made the following statement before the Court:

"Vaklai Fariqain ne bayan kiya ki Babu Mathura Pd. Kacker vakil ko gawah hazri muqarrar karte hain. Gawah Mazkur bad tahqiqat ya bila tahqiqat ya khufia ya alania jo kuchh omur nazai ke mutaaliq bayan karde usi par muqadma faisal kar diya Jawe. Fariqain ko iteraz na ho ga aur qabul wa manzoor hoga. Fariqain mubligh 100/- rupiya nisfa nisf ada karen."

Thereupon, the Court made the following order:

"Parties stated that Mr. Mathura Pershad Kacker is appointed as Referee. Allowed. Mr. M. P. Kacker is appointed as Referee who will get Rs. 100/- as his fees. Parties will pay half and half and submit his report by 12-7-1945."

[8] The referee did not submit any report, but after several adjournments awaiting the report, on 22nd september 1945, the referee made the following statement: "There is no misconduct or material irregularity which can vitiate the award. The objections are futile."

[9] Even after the statement of the referee had been recorded, on behalf of Ram Babu the original objection to the validity of the award was pressed. That is to say, it was contended that the reference having been made on behalf of the minor without the leave of the Court, the reference as well as the award passed thereon were both invalid.

[10] The learned Civil Judge did not proceed to decide the matters in dispute in terms of the statement made by the referee. He was of the opinion that the dispute, which was the subject-matter of the appeal, could not be referred to arbitration without the permission of the Court; that all the parties other than Ram Babu were bound by the statement of the referee; that the award so far as the defendants other than Ram Babu were concerned it was binding upon them and they were not entitled to challenge the same; that so far as Ram Babu was concerned the reference itself was illegal and the award based upon the said reference was also illegal and invalid; and that the operation of the award relating to the illegal reference was separable from the rest of the award. Accordingly he made the following order:

"The award will be made decree of the Court under S. 17, Arbitration Act, so far (as) defendants other than Ram Babu are concerned. Ram Babu will not be bound by the award and so his appeal will be heard on merits . . . . . The award 71A will form part of the decree."

[11] In pursuance of the above mentioned order, a decree was prepared. Both the parties preferred separate appeals against the decree of the Civil Judge. Lakshmi Narain in his appeal contended that the decree should have been passed in terms of the whole award; while the appellants in the other appeal contended that the entire award ought to have been set aside. The learned District Judge, who heard the appeal, held that the reference to arbitration of the dispute, which was the subject-matter of the appeal, pending before the Civil Judge, was illegal as the necessary sanction of the Court to make a reference on behalf of the minor had not been obtained. As regards the referee and his statement, the learned Judge observed:

" . . . . reference to referee only sought to enforce the award. Consequently, the fact that, there was consent to refer the question whether the award should be enforced to a referee does not relieve the Court of the responsibility to see whether the award was beneficial to the minor . . . . I am of opinion, therefore, that the award cannot be enforced against the minor."

The learned District Judge further held that the want of sanction of the Court on behalf of the minor to refer the dispute to arbitration did not vitiate the whole award. Accordingly, he dismissed both the appeals.

[12] Now, Lakshmi Narain has preferred this appeal and the contention put forward on his behalf is that the award is valid and enforceable against Ram Babu inasmuch as a reference was made on his behalf by his father and natural guardian, and as such, no sanction or permission of the Court, where the appeal was pending, was necessary in law to validate the reference; that, in any case, the permission had been granted by the Court, if not expressly, by necessary implica-

tion, on 7th August 1944, when the parties informed the Court about the reference to arbitration and asked for a long date in the appeal; that, apart from it, the parties to the suit including Ram Babu having agreed to abide by the statement of a referee appointed by common consent and the statement having been made by the referee, the Courts below had no jurisdiction to go behind the referee's statement and to reopen the question of validity or invalidity of the award, much less to declare it invalid with respect to any part of it.

[13] Hub Lal and Kishen Lal have filed cross-objections wherein it is contended that in law there could be no reference to a referee and no decision could be based upon the statement of the referee; that the reference to arbitration was one and indivisible and a part of the reference being illegal, the whole reference became void and unenforceable; and that the award so far as it related to the dispute pending in appeal before the civil Judge could not be separated from the other portion of the award.

[14] On behalf of the respondents, a preliminary objection has been raised as to the maintainability of this appeal; and it has been contended that no second appeal lies, in view of the provisions of sub-s. (2) of S. 39, Arbitration Act, 1940. According to the contention of the respondents' counsel, the trial court had modified and set aside a portion of the award; consequently, the appeal filed in the court below was against the orders referred to in cls. (iii) and (vi) of sub-s. (1) of S. 39, Arbitration Act, and as such, the second appeal is barred by sub-s. (2) of the said section.

[15] In reply to the preliminary objection, the learned counsel for the appellant has pointed out that the trial court had not made any order under S. 39 (1) (iii) or (vi), Arbitration Act, but passed a decree which was not in accordance with the award. Hence, Lakshmi Narain's appeal in the court below was against the decree and not against any order modifying or setting aside the award in whole or in part.

[16] An order modifying or correcting an award mentioned in cl. (iii) of sub-s. (1) of S. 39, Arbitration Act, is the one made under S. 15 of the Act, in cases covered by cls. (a), (b) or (c) of the said section. The matter which was separated by the trial court had undoubtedly been referred to arbitration; but the reference was said to be illegal. There was no objection to the award on any of the grounds mentioned in cls. (a), (b) or (c) of S. 15 of the Act. Consequently, it is not possible to hold that there was any order modifying the award under S. 15 of the Act.

[17] An order setting aside an award referred to in cl. (vi) of S. 39 (1), Arbitration Act, is the one which is contemplated by S. 30 of the Act. Under S. 33 of the Act an award can be set aside at the instance of any party on an application made by it for the purpose. No such application was filed by any party and no portion of the award was set aside on any of the grounds mentioned in S. 30 of the Act. Even in the written statement filed by Ram Babu and others, there is no prayer for the setting aside of the award. In the written statement filed on behalf of Ram Babu certain defects were mentioned and it was alleged that in view of those defects the award was vitiated; and, in the end, it was pointed out in para. 16 that under the circumstances the application for filing the award was liable to be rejected. Lakshmi Narain had prayed for the award being made a rule of the court, and the court found that a portion of the award was illegal; and in the result passed a decree in terms of so much of the award as was not vitiated on any ground. Consequently, it is difficult to hold that there was an order setting aside the award in whole or in part.

[18] The trial court passed a decree which was not in accordance with the award. Such a decree was appealable in view of the provisions contained in S. 17, Arbitration Act, and Lakshmi Narain preferred an appeal against it. The appeal was dismissed and the lower appellate court has made a decree to that effect. Against that decree the present appeal has been filed and is clearly maintainable.

[19] I, therefore, overrule the preliminary objection.

[20] The main argument advanced on behalf of the appellant is that the parties had agreed to abide by the statement of Shri Mathura Prasad Kacker Vakil, who was cited as a witness and nominated a referee by common consent of the parties; that the referee made a statement in pursuance of the reference; and that the statement covered all the points in dispute between the parties; consequently, the courts below ought to have given effect to the statement made by the referee and the adjustment thus arrived at between the parties and they had no jurisdiction to consider on merits the objection that the reference to arbitration or the award was illegal or invalid. It has been further argued on behalf of the appellant that as far as Ram Babu minor was concerned, an application was made on his behalf seeking the permission of the court to make the reference to the referee on the ground that the course suggested was beneficial to the interests of the minor and the court had allowed the guardian through his counsel, to make the reference, and as such, Ram Babu was also bound by the reference and the statement made by the referee and the resulting adjustment.

[21] On behalf of the respondent, Ram Babu, it has been contended that the dispute between him and the appellant, Lakshmi Narain, which was the subject-matter of the appeal pending in the court of the Civil Judge of Agra, could not be referred to arbitration without the intervention of the court; that, in view of the decision of this Court in *Shukrullah* v. *Mt. Rahmat Bibi*,

A. I. R. 1947 ALL. 304, even the appellate court could not refer the said dispute to arbitration; that the reference of the said dispute to arbitration without the intervention of the court and without obtaining the court's permission to make the reference on behalf of the minor, Ram Babu, and the award made in pursuance of such a reference were both bad in law; and that, in any case, the question of the validity of such a reference and award could not be referred to or decided upon the statement of a referee.

[22] I will first take up the question whether the dispute between the appellant and Ram Babu, which was the subject-matter of the appeal pending in the Court of the Civil Judge of Agra, could or could not be referred to arbitration without the intervention of the Court. There is no clear provision in the Arbitration Act for a reference to arbitration in an appeal pending in any Court, although there is such a provision for a reference to arbitration in a suit pending in any Court. The question whether the word "suit" in S. 21, Arbitration Act, is wide enough to include an appeal, and the word "Court" appearing in the same section is comprehensive enough to include an appellate Court, has been dealt with in two Division Bench cases of this Court in *Shukrullah* v. *Mt. Rahmat Bibi*, I. L. R. 1947 ALL. 227: A. I. R. 1947 ALL. 304 and in *Munni Lal* v. *Kishun Prasad*, 1948 ALL. L. J. 556. In the first case Mootham J. interpreted the word "suit" to mean a proceeding instituted in a Court of the first instance by a plaint or in such other manner as may be prescribed and the word "Court" to mean a Civil Court having jurisdiction to decide, as a suit, the questions forming the subject-matters of the suit (p. 231). It was further held in the first case that an appellate Court has no power to make any reference to arbitration in respect of the subject-matter of an appeal pending before it. In the second case, the learned Judges recorded their opinion that it was not necessary to give such a restricted meaning to the word "suit" in S. 21, Arbitration Act, as to exclude execution proceedings, *appeals* and other proceedings before the Civil Court which are in the nature of suits in which Civil Courts decide disputes between the parties of a civil nature. In *Hansraj Gupta* v. *Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, A. I. R. 1933 P. C. 63, it was pointed out that the word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint.

Learned counsel for the appellant informed me that the question, whether an appellate Court has the power to make a reference to arbitration in respect of the subject-matter of the appeal pending before it has been, in view of the conflicting decisions aforesaid, referred to a Full Bench. The word "Court" has been defined in S. 2, Arbitration Act, as meaning

"a civil Court having jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under S. 21, include a small cause Court."

In my opinion, the word "Court" appearing in S. 21 cannot be restricted to mean a civil Court of original civil jurisdiction only and that the definition is wide enough to include an appellate Court also, inasmuch as it has got jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit. An appellate Court does decide such questions when they come up in appeal before it. When the word "Court" used in S. 21 of the Act, is wide enough to include an appellate Court, there appears to be no reason to give a restricted meaning to the word "suit" so as to exclude an appeal from its purview.

[23] Therefore, following the second case, I would hold that the subject-matter of the appeal pending in the Court of the Civil Judge of Agra could have been referred to arbitration through the intervention of the Court. The reference, as we have already seen, was, however, made direct without the intervention of the Court. Is such a direct reference absolutely prohibited under the Arbitration Act? Sec. 21 of the Act provides that, where in a suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before the judgment is pronounced apply in writing to the Court for an order of reference. This provision of law is not mandatory and the parties may or may not apply. Section 47 of the Act contemplates arbitrations other than those made in accordance with the provisions of the Act; and such arbitrations may include a joint arbitration relating to the subject-matter of a pending suit and the matters which are not the subject-matters of the suit without the intervention of the Court and the award made in pursuance of such an arbitration may, with the consent of the parties interested, be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

[24] In a case like the one before me, that is to say, where the dispute pending before a Court is only a minor dispute and, between the same parties, there are other major disputes, which can be referred to arbitration without the intervention of the Court, there appears to be no legal bar to the parties agreeing to refer all the disputes between them to arbitration without the intervention of the Court and then to deal with the award "otherwise obtained", that is, obtained in a manner different from that laid down in the Arbitration Act and to place it before the Court concerned for consideration as a compromise or adjustment of a suit.

[25] It is true that there cannot be two conflicting jurisdictions relating to one and the same

matter, that is, the jurisdiction of the Court in the suit and the jurisdiction of the arbitrator under the Arbitration Act; but the parties are entitled at any time to settle their disputes out of Court and then approach the Court to record an adjustment of the claim in respect of the subject-matter of the suit or appeal without, in any manner, interfering with the jurisdiction of the Court. The parties may adjust their dispute by themselves or through the intervention of a third person as an arbitrator or a referee.

[26] On behalf of the respondents, my attention has been invited to the Privy Council decision in *Ram Protap Chamria* v. *Durga Prasad Chmria*, A. I. R. 1925 P. C. 293. That case was decided long before the Arbitration Act, 1940, came into force; and it is also distinguishable on facts. In that case, a reference to arbitration was made through Court in respect of matters in dispute in a pending suit and other matters which were not the subject-matter of the suit and the order of reference clearly stated that the reference was being made only in respect of the matters in dispute in the pending suit, but the award covered all the matters, including those not in suit. Their Lordships of the Privy Council observed at page 297 :

"The appellate Court based their decision upon the ground that it was really impossible according to the Statute Law of India that one and the same arbitration should be held as Rankin J., expresses it;

'As to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court; between the parties to the suit and between them and other persons; under the Code provided by the Indian Arbitration Act and under the Code by the second Schedule; under the superintendence and control of the Judge who has seisin of the suit and of the Judge disposing of business under the Indian Arbitration Act; partly upon an order of reference and partly under an agreement.' "

[27] Although s. 89, Civil P. C. in force at the time when the above pronouncement was made, provided that

"(1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule."

Section 47, Arbitration Act, 1940, now lays down :

"Subject to the provisions of S. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

[28] It is, therefore, not possible to lay down that in no case can the subject-matter of a pending suit or appeal be referred to arbitration without the intervention of the Court or that an award based in pursuance of such a reference cannot be enforced by the Court. Consequently, in my opinion, there was no legal bar to the dispute, which was the subject-matter of the appeal pending in the Court of the Civil Judge of Agra, being referred to arbitration and to the award, made in pursuance of the reference, being recorded with the consent of the parties as an adjustment of the matters in dispute.

[29] It remains to be considered whether for an agreement of reference to arbitration of the dispute, which was the subject-matter of the appeal pending in the Court of the Civil Judge of Agra, along with other disputes, which were not the subject-matter of any litigation in a Court of law, entered into on behalf of the minor, Ram Babu, the leave of the Court referred to in R. 7 of O. 32, Civil P. C. was necessary even though the reference was made without the intervention of the Court. The rule aforesaid provides :

"7. (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

The rule is applicable to agreement or compromise by next friend or guardian for the suit. When Kishen Lal, father of the minor, entered into the agreement of reference in question, he was acting as the father and natural guardian of the minor and not as his guardian *for the suit*. In the latter capacity he could not refer other disputes to arbitration,—that he could do only in his former capacity. He was entitled to adjust the matters in suit out of Court by direct agreement between the parties or through the intervention of an arbitrator or referee and have the adjustment recorded in Court with the leave of the Court. In my opinion, therefore, in a case of the nature mentioned above, the leave of the Court was, for the reasons stated earlier, not necessary.

[30] The next question, which arises for consideration, is whether all the parties interested had moved the Court to take into consideration the arbitration award, obtained otherwise than in the manner provided by the Arbitration Act, 1940. The answer to this question depends upon the result of the proceedings, which followed the filing of the award in Court. The entire award was filed in Court under the directions of the Court, under s. 14 of the Act. In the suit, which was instituted for the filing of the award and for its being made a rule of the Court, the following points were in issue between the parties Lakshmi Narain, the appellant, on the one side, and Ram Babu, his father, grandfather and other disputants on the other side and in regard to them the parties agreed to abide by the statement of the referee :

(1) Whether the dispute which was the subject-matter of the appeal in the Court of the Civil Judge of Agra had been validly referred to arbitration and whether the award based upon such a reference was valid and binding upon Ram Babu.

[2] Whether the reference to arbitration on behalf of the minor, Ram Babu, was prejudicial to his interests, and

whether the guardian of the minor had in making the reference acted negligently.

(3) Whether the arbitrators were related to Lakshmi Narain and the fact had been concealed from the other side.

(4) Whether the award was vitiated on account of any misconduct on the part of the arbitrators.

[31] It is not disputed that the parties could agree to abide by the statement of the referee on all the points except the first one. I, therefore, proceed to consider whether there was any legal bar to the parties agreeing to abide by the statement of the referee in regard to the first point.

[32] An agreement that the parties will abide by the statement of a witness, who has been designated as a referee, is enforcible in law; and, as pointed out by this Court in *Suraj Narain* v. *Beni Madho*, A. I. R. 1937 ALL. 701, there is nothing in law to prevent the parties to a suit from agreeing, apart from the Oaths Act, to abide by the statement of a third person. The question whether such an agreement amounts to (1) a reference under Oaths Act, (2) a reference to arbitration, (3) a mutual admission of the parties creating an estoppel, or, (4) if carried out, an adjustment of the claim, was dealt with at some length in a Full Bench decision of this Court in *Mt. Akbari Begam* v. *Rahmat Husain*, A. I. R. 1933 ALL. 861 (S. B.). Sulaiman C. J., who delivered the leading judgment of the Full Bench observed :

"Now there is an overwhelming authority in favour of the view that a decree passed on the basis of such an agreement when carried out by the statement of the referee is binding upon the parties. The only difference of opinion that seems to have arisen is as to whether the binding character of the decree should be based on the supposition that such a reference amounts to a reference to arbitration or an adjustment of the claim, or is an admission of the parties of an offer amounting to an estoppel.

The trend of the authorities in this Court appears to be more in favour of the view that such an agreement is in substance a compromise or adjustment of the suit, and neither a mere admission capable of being rebutted nor strictly speaking a reference to arbitration."

[33] On the question whether such an agreement amounts to a reference to arbitration, the learned Chief Justice summed up his conclusions thus :

"In concurrence with the opinions of the learned Judges who have made this reference, I hold that an agreement to abide by the statement of a particular witness is in substance not a reference to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated into a decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence. But, where parties agree to abide by the statement of a third person or a referee, the referee merely makes a statement according to his knowledge or belief and the Court then decides the case and pronounces its judgment on the basis of such a statement and passes a decree thereon. The referee is not authorised to make enquiries and take evidence, and then announce his decision on the basis of such evidence. He is called upon to make a statement according to his knowledge or belief. In the case of an arbitration as the arbitrator's award is an expression of an opinion and his procedure resembles that of Court, a party is entitled to file objections and challenge the validity of the award. The making of a statement by a referee or a third person has no resemblance to a proceeding conducted by him as if he were a Court of law, and accordingly there can be no procedure for filing objections as to its validity. It is for the Court, in pronouncing judgment, to consider its effect."

[34] The true basis of the binding character of such an agreement was thus explained by the learned Chief Justice :

"When both parties make such admission simultaneously, it amounts to an offer by one and acceptance by the other. Such reciprocal admission would, therefore, be a valid agreement between them. Consideration is good because there is reciprocity. The statement of the referee would then be the admission of both the parties binding upon them. No doubt admissions are not conclusive: but, where, there has been mutuality of this kind and they have matured into an agreement, their conclusiveness follows from the principle of estoppel. The parties cannot be allowed to go back upon it and, therefore, the admission is conclusive as against both, and can be said to operate as an estoppel.

In my opinion the true basis of the binding character of such an agreement is that the original contract to abide by the statement of a third person is perfected into an adjustment of the claim in terms of the statement made, as soon as the referee makes the statement. After that stage, neither party can resile from the agreement because the claim has been duly adjusted and it has become the duty of the Court not only to record it, but also to pass a decree in terms of it. . . . . But as soon as the agreement has been fully carried out by the Court and the referee has made his statement in favour of one party or the other, it is too late for either party to go back upon the agreement; and at this stage the agreement must be deemed to have eventuated into an adjustment of the claim in accordance with the statement already made."

[35] In the case before us, as we have already seen, the parties had cited Shri Mathura Prasad Kacker Vakil as a witness and had agreed to abide by the statement made by him in Court, and they had further agreed that all the matters in dispute were to be disposed of in accordance with the statement of the referee. In pursuance of this agreement, the referee, after taking time made a statement before the Court and that statement disposed of all the matters in dispute to which reference has been made above. There was no legal bar against the Court deciding the points in dispute between the parties on the basis of that statement. The Court of first instance did in fact accept the statement of the arbitrator except in regard to the question whether the dispute which was the subject-matter of the appeal in the Court of the Civil Judge of Agra had been validly referred to arbitration and whether the award based upon such a reference was valid and binding upon Ram Babu. On this question, the learned Civil Judge proceeded to give his own decision. I do not see any reason why the said question could not be referred to a referee or decided upon the statement.

[36] Learned counsel for the respondents has contended that inasmuch as the dispute involved a question of jurisdiction, it could not be referred to the referee; and, in support of his contention, he has invited my attention to a Single Judge decision of this Court in *Jwala Debi* v. *Amir Singh*,

A. I. R. 1929 ALL. 132, wherein it was pointed out at page 132 that :

"a question of jurisdiction, although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself. . . . . A decision on the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. . . . . A question of jurisdiction is not a question which may be said to have arisen between the parties."

[37] The question which arose for determination in that case was whether a decision as to jurisdiction was or was not binding upon the parties in a subsequent litigation; and, for the reasons stated above, the question was answered in the negative. The case is no authority for the proposition that the parties cannot agree to abide by the statement of a referee on the question of validity of reference in an arbitration proceeding.

[38] The agreement to abide by the statement of a third person is a valid contract; and if the parties are in law entitled to agree to abide by the statement of any person as a referee, there appears to be no reason why the rights of the parties should in any manner be restricted as regards the matters to be decided on the basis of the referee's statement. It would not be either convenient or in the interests of the parties to adjust their differences in part, that is so far as they relate to questions of fact on the basis of the referee's statement, and to leave questions of law to be decided by the Court. The parties may choose a referee well-versed in law, in whom they have full trust and confidence and agree to abide by his statement on questions of law as well as facts. A referee has to make a statement according to his knowledge and belief; and if he is competent to make such a statement on questions of law and facts both, the parties can certainly agree to abide by his statement on all the questions and adjust their differences accordingly. In my opinion, there is no reason why in such cases a distinction should be drawn between questions of law and those relating to facts. In this connection also I may usefully quote the following observations of the learned Chief Justice at page 879 in the Full Bench case cited above :

"It may be noted in this connection that for purposes of a reference to a third party under S. 20, Evidence Act, it is not necessary that the reference should be on questions of fact within the knowledge of the referee. In Taylor on Evidence, Vol. 1, para 761, it is stated that 'these principles apply whether the question referred be one of law or of fact; whether the persons to whom reference is made have or have not any peculiar knowledge of the subject, and whatever the nature of the action in which the statements of the referee are proposed to be adduced in evidence'."

The above quotation clearly supports the view that the parties may agree to abide by the statement of a referee even on the questions of law. Consequently, there was no legal bar to the parties agreeing to abide by the statement of the referee on the question whether the dispute, which was the subject-matter of the appeal in the Court of the Civil Judge of Agra, had been validly referred to arbitration and whether the award based upon such reference was valid and binding, upon Ram Babu.

[39] It follows, therefore, that the agreement arrived at between the parties on 30th May 1945, to abide by the statement of Shri Mathura Prasad Kacker Vakil on all the points in dispute was perfectly valid and binding. Ram Babu's guardian, through his counsel, entered into the agreement on behalf of the minor, Ram Babu, with the permission of the Court; consequently, Ram Babu was also bound by the agreement. The agreement was carried out by the Court and the referee made the statement no matter right or wrong; and the agreement eventuated into an adjustment of the matters in dispute. The trial Court should, therefore, have given effect to the adjustment which was lawful and decided the matters in controversy between the parties in accordance therewith. The result of this adjustment was also to bring about a settlement of the matter which was the subject-matter of the appeal pending in the Court of the Civil Judge of Agra; and the same could be recorded. When all the matters in dispute had been adjusted, the Court had no jurisdiction to enter into the merits of any of the points in dispute and to record his own decision on the question whether the reference to arbitration and the award based thereon were valid and binding upon Ram Babu. As the referee had stated that there was no misconduct or material irregularity sufficient to vitiate the award and that all the objections filed against the validity of the award were futile, the said objections ought to have been rejected by the trial Court.

[40] As all the objections raised against the validity of the award were liable to be rejected in terms of the adjustment referred to above, the entire award should have been held to be valid and a decree passed in terms of the whole award.

[41] I see no force in the cross-objections. In view of the adjustment referred to above, the reference to arbitration and the award based upon that reference are both valid. The cross-objections are, therefore, liable to be dismissed with costs.

[42] For the reasons stated above, I allow this appeal, set aside the decision of the Courts below dismiss the objections filed against the validity of the award and direct that a decree be prepared in terms of the award, which shall form part of the decree. The respondents shall bear their own costs and pay those of the appellant in both the Courts.

[43] The cross-objections are dismissed with costs.

A/G.M.J. *Appeal allowed;*
Cross-objections dismissed.

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SAPRU AND V. BHARGAVA JJ.

Mohammad Matteen Qidwai — Plaintiff-Appellant v. *The Governor-General in Council — Defendant-Respondent.*

Second Appeal No. 2029 of 1948 connected with Second Appeal No. 751 of 1949, D/- 28-4-1952.

(a) Government of India Act (1935), Ss. 240, 241 (2), 277 (1) — Railway servant — Sub-Permanent Way Inspector of O. T. Railway — Appointment made by General Manager under orders of Government of India — Order of removal passed by Chief Engineer — Validity — Suit to declare order as invalid and for recovery of arrears of pay and allowance — Maintainability — Constitution of India, Arts. 310 & 311.

The plaintiff was originally appointed in 1930 as a sub-permanent way inspector by the Chief Engineer R. K. Railway. On 1-1-1943 R. K. Railway and B. N. W. Railway were taken over by the State and for purposes of administration they were combined into one railway called the O. T. Railway. The services of the plaintiff as also of other employees were terminated from the midnight of 31-12-1942. The plaintiff was then given to a new appointment in the O. T. Railway, on the same post by the then General Manager of B. N. W. Railway and R. K. Railway on behalf of and under the authority of the Government of India. The plaintiff was subsequently removed from service by an order dated 20-12-1944 of the Chief Engineer of O. T. Railway with effect from 3-2-1945. The plaintiff therefore brought a suit for a declaration that the order of his removal from service being in contravention of S. 240 (2), Government of India Act, was void, illegal and ineffective and he is entitled to be regarded as continuing in his post. He also claimed arrears of pay and allowance from the date of his removal till the date of this suit. The defendant contended that S. 240 (2) had no application to the case of the plaintiff and that the case fell under the proviso to S. 241 (2), Government of India Act.

Held that (i) S. 241 (2), Government of India Act, 1935, applies only to persons employed on the express conditions that their services were of a temporary nature and can be terminated by a month's notice. It has no application to a person like the plaintiff who was admitted into service as a permanent servant and for this reason, proviso to S. 241 (2) will have no application to him. [Para 6]

(ii) The guarantee embodied in S. 240 (2), Government of India Act 1935, applies not only to members of the superior civil services or the provincial civil services but also holders of civil posts or to employees in any properly established civil service of the Crown in India. Sub-section (2) of S. 240 was meant to govern all persons who fell within either of the two classes mentioned in sub-s. (1) of that section. The use of the word 'service' in sub-s. (2) did not imply dismissal of only those persons who were members of a service but included dismissal of all persons who may even have held 'a civil post under the Crown' because dismissal from that post is also dismissal from the 'service of His Majesty.' The use of the word 'such' before the word 'person' in sub-s. (2) indicates that every person mentioned in sub-s. (1) is to be governed by the provisions of sub-s. (2) and the word 'service' used in sub-s. (2) was never meant to be equivalent to the words 'civil service of the Crown in India. [Paras 12, 29]

(iii) Section 240 (2) would equally apply to orders of removal from service of His Majesty as it applies to orders of dismissal by virtue of the second clause in S. 277 (1) of the Act. The words 'service of His Majesty' in S. 240 (2) must have the same meaning as the words 'His Majesty's service' in S. 277 (1). [Paras 9, 30]

(iv) That the plaintiff's case was governed by S. 240 (2), Government of India Act, inasmuch as he was the holder of civil post under the Crown in India. The plaintiff having been appointed by the General Manager under the authority of the Government of India his services could not be terminated by an officer lower than the General Manager. The order of removal passed by the Chief Engineer O. T. Railway was therefore clearly in contravention of the Act. The plaintiff was therefore entitled to get a declaration as prayed for: A. I. R. 1937 P. C. 31; A. I. R. 1952 Punj. 58 and A. I. R. 1950 Lah. 59, *Ref.* [Paras 16, 32, 33]

(v) That the plaintiff was not entitled to any decree on account of arrears of pay or allowance as there is no such statutory right in favour of a public servant to recover arrears of pay by action against the Crown. The proper remedy of the plaintiff is to make a representation to the Government. A. I. R. 1948 P. C. 121, *Foll.* [Paras 23, 24]

Anno. Govt. of India Act, S. 240 N. 1.

(b) Government of India Act (1935), S. 240 (1) — 'Civil Post' under the Crown — Meaning of.

Per *V. Bhargava J.* — The word 'civil' used before the word 'post' in S. 240 (1) is clearly meant to distinguish posts in the Defence Forces. The words 'Civil Post' cannot be confined merely to posts which are borne on the cadre of any regularly constituted service. All posts held by any public servant, if the posts did not belong to the Military Department or the Defence Forces, must be deemed to be civil posts under the Crown. [Para 28]

Waheed Ahmad Khan and K. C. Saksena — for Appellant; Z. H. Lari — for Respondent.

REFERENCES: Courtwar/ Chronological	/ Paras
('37) 1937 All L J 213 : (A I R 1937 P. C. 31)	10, 28
('48) 1948 All L J 266 : (A I R 1948 P C 121)	21
('50) A I R 1950 Lah 59 : (Pak Cas 1950 Lah 167)	13, 28
('52) A I R 1952 Punj 58 : (I L R (1951) Punj 421)	11
(1839) 5 Bing (N C) 262	22
(1920) 3 K B 663 : (89 L J K B 1073)	21
(1897) 25 R 112	21
(1926) S C 842 (Scottish case)	21

Sapru J. — These are two cross-appeals and arise out of the same judgment. Second Appeal No. 751 of 1949 was filed by the Governor-General of India in Council (now Union of India) through the Oudh and Tirhut Railway. Second Appeal No. 2029 was filed by the plaintiff, Mohammad Matin Qidwai. It is proposed to dispose of the two appeals by a common judgment.

[2] The suit out of which these appeals arise was brought by the plaintiff for a declaration that the order of his removal from service dated 20-12-1944 was void, illegal and ineffective and he is, therefore, entitled to be regarded as continuing in his post. Also included in the reliefs claimed, was a prayer for a sum of Rs. 1,024-12-0 as arrears of pay and allowance from the date of his removal till the date of the suit. The defendant contested the suit on the grounds that the plaintiff was never appointed by the General Manager, Oudh and Tirhut Railway, that the Chief Engineer was authorised to remove the plaintiff, that the order of removal was justified, that the plaintiff had no cause of action for the suit, that the suit was time-barred and that he was not entitled to get the salary and allowances for the period during which he did not work. The learned Munsif decreed the suit for declaration and for recovery of Rs. 597 as arrears of salary but dismissed the claim for the allowance claimed. Both parties went in appeal to the lower appellate Court. That Court confirmed the decree of the learned Munsif and dismissed both the appeals. Both, the plaintiff and

the defendant, have now come up in appeal to this Court.

[3] Shortly put, the plaintiff's case was this. The plaintiff was originally appointed a sub-permanent way inspector by the Chief Engineer, Rohilkhand and Kumaun Railway, by an order dated 6-1-1930. The Rohilkhand and Kumaun Railway and the Bengal North Western Railway which were company—owned and managed railways were taken over by the State on 1-1-1943. For purposes of administration they were combined into one and were given the name of the Oudh and Tirhut Railway. On this amalgamation, the services of the plaintiff as also of the other employees were terminated from the midnight of 31-12-1942. Thereafter, the plaintiff ceased to be an employee of the Rohilkhand and Kumaun Railway and his appointment to the Oudh and Tirhut Railway was a fresh one. The two Railway Companies which were at that time company concerns had a common General Manager. He was authorised by the Government of India to offer a new appointment, along with others, to the plaintiff with effect from 1-1-1943. The terms of this new appointment were to be governed by the conditions printed on the reverse of the offer dated 13-10-1942. These terms are EX. 1 in the case. The plaintiff communicated his acceptance of this offer by his letter dated 17-10-1942.

[4] Objection was raised in the Court below that the offer by the General Manager was not made by the Governor-General and that, therefore, there was no valid contract of service under s. 29, Contract Act. Reference was made in this connection in the lower Court to s. 175 (iii), Government of India Act, 1935. The lower appellate Court held that the letter of the General Manager showed that it was under the directions of the Government of India that he had made the offer before the Company was actually taken over by Government. The learned Judge further came to the conclusion that the offer was made by him on behalf of the Government of India (Railway Board) and that, therefore, the plaintiff must be deemed to have been in service under a valid contract. On the question whether there was any ambiguity in the letter of the General Manager to the plaintiff, the view of the lower appellate Court was that the letter was clear on the point that the conditions of service in future would be governed by State rules.

In view of his finding that there was nothing indefinite or uncertain about the letter, the learned Judge held that the contract was not, as was pleaded before him, void under s. 29, Contract Act. The learned Judge further held that service agreements were executed by the employees of the two amalgamated Railways practically more than two years after Government had taken them over and for that delay the plaintiff was in no way responsible. The learned Judge further held that the service of the plaintiff was neither temporary, nor for a fixed period. In plain terms, the finding of the learned Judge was that the plaintiff was appointed to his present post by the General Manager of the Bengal North Western Railway and the Rohilkhand and Kumaun Railway on behalf of and under the authority of the Government of India. These are findings of fact which we are bound to accept in second appeal and we do accordingly.

[5] There cannot be the slightest doubt that the plaintiff was removed from service by an order of the Chief Engineer of the Oudh and Tirhut Railway with effect from 3-2-1945. As I have pointed out before, he was originally appointed no doubt by the Chief Engineer, Rohilkhand and Kumaun Railway, by an order dated 6-1-1930. That appointment however came to an end when the two Railways were taken over by Government. Thereafter, he was appointed by the General Manager of the two combined Railways acting on behalf of and under the authority of the Government of India (Railway Board). The defendant's case is that s. 240 (2) applies to a case of dismissal and has no application to that of removal. It is, therefore, contended that the case falls under the proviso to s. 241 (2), Government of India Act. It is further emphasised that R. 729, State Establishment Code enables an employee to be removed without holding any formal enquiry.

[6] I may say that on a correct reading of s. 241 (2), Government of India Act, 1935, there can be no doubt that it applies only to persons employed on the express conditions that their services were of a temporary nature and can be terminated by a month's notice. It is clear that the plaintiff was admitted into service as a permanent servant and for this reason, proviso to s. 241 (2) will have no application to him. The question, therefore, to be considered is whether the case of the plaintiff is covered by s. 240 (2), Government of India Act, 1935. That section is to the following effect:

"No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed."

[7] In order to find out who is the "such person" referred to in s. 240 (2), it is necessary to consider the terms of s. 240 (1) which I reproduce below:

"Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under, the Crown in India, holds office during His Majesty's pleasure."

[8] Obviously the "such person" referred to in s. 240 (2) is a person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India. I shall consider a little later the question what constitutes a civil service of the Crown in India. It is sufficient to point out here that this sub-section includes both "a civil servant" and "a holder of any civil post." The first question which has to be considered is whether there is any force in the argument of learned counsel that inasmuch as the plaintiff was

only removed and not dismissed, his case is not covered by s. 240 (2). Though the effects of removal and dismissal are the same in the sense that the person affected loses his employment, removal is undoubtedly a less serious form of punishment inasmuch as a removed servant is not regarded as ineligible for a new appointment under Government.

The learned Judge has, however, referred to the fact that R. 1705, State Establishment Code, makes it clear that no Railway servant can be removed or dismissed by any authority lower than that by which he was appointed. The learned Judge remarks that reading s. 240 (2) and R. 1705 together, the inference is irresistible that no Railway servant can be dismissed by any Railway Authority lower than that by which he was appointed. Our attention on this point was also invited to s. 277, Government of India Act, 1935. I quote the first part of s. 277:

"In this part of this Act—
the expressions "all-India Service,' 'Central Service Class I,' 'Central Service Class II,' Railway Service Class I,' 'Railway Service Class II' and 'Provincial Service' mean respectively the services which were immediately before the commencement of Part III of this Act, so described respectively in the classification rules then in force under S. 96-B, Government of India Act; and references to dismissal from His Majesty's service include references to removal from His Majesty's service."

[9] It was sought to be argued that references to dismissal from His Majesty's service include references only to the case of persons employed in the services mentioned in s. 277 and to no other service. This argument completely ignores the effect of the words "include" and 'His Majesty's Service.' The plaintiff was undoubtedly not a member of any of the civil services of a higher character mentioned in s. 277 (1). At the most he could be said to be holding a civil post under the Crown in India. It is, therefore, urged that in his case there is a distinction between removal and dismissal and that s. 277 (1) cannot be so read as to include cases of persons holding civil posts. I am not disposed to accept this argument as correct, not only because it pays no attention to the effect of R. 1705, Railway Establishment Code, which gives an assurance to the employees of the Railways that they will neither be dismissed nor removed by an authority lower than that which appointed them but also, and more importantly, because it ignores the provisions of s. 277 (1) and attaches no importance to the words "include" and "His Majesty's Service' in that section. Learned counsel for the Union Government has not contested the fact that the Chief Engineer is an authority lower than the General Manager. Thus the plaintiff was removed by an authority lower than that by which he was appointed.

It is, however, sought to be argued that s. 240 (2) applies only to a member of a properly constituted civil service of the Crown in India or the holder of any civil post under the Crown in India. It is contended that the plaintiff was neither a member of any civil service of the Crown in India nor the holder of any civil post under the Crown in India. It is urged that the plaintiff who is neither a member of any civil service of the Crown in India nor it is contended, the holder of a civil post under the Crown in India held office during His Majesty's pleasure and that the guarantee that he will not be dismissed from the post by any authority subordinate to that by which he was appointed cannot be said to apply to the plaintiff. As I have said before, I cannot accept the argument that the plaintiff was not the holder of any civil post under the Crown in India. He was clearly in His Majesty's Service. I may quote Professor Wade and Mr. Phillips on this point. They say in their Constitutional law that 'appointments to all posts in the civil service' are appointments to the service of the Crown, though made by and in the name of ministerial heads of departments. All servants serving Government in any capacity in this country were, previous to the new Republican Constitution, either members of a properly established civil service or holders of civil posts in this country.

[10] In this connection, I may particularly refer to the case of *Venkata Rao* v. *Secy. of State*, 1937 ALL. L. J. 213 (P. C.). In that case the appellant was a reader in the Government Press in Madras. He was held to be in the civil service of the Crown in India. Section 240 reproduces s. 96B, Government of India Act, 1915, as amended in 1919. Dealing with s. 96B their Lordships of the Privy Council observed that:

"Section 96B and the rules make careful provision for redress of grievances by administrative process and it is to be observed that sub-s. (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. . . . . They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule."

[11] The important point which emerges from a reading of this case is that their Lordships regarded a reader in the Government Press as a person in the service of the Crown in India and they were prepared to extend the guarantee given to such civil servants in regard to their dismissal from service to this reader. There is no evidence in this case that there is any properly constituted service of sub-permanent way inspectors and it cannot, therefore, be said that the plaintiff was a member of any properly constituted civil service. The position of a sub-permanent way inspector, however, appears to me in principle to be in no way different from that of a reader in a Government Press. I may in this connection also refer to the case of *Mangal Sain* v. *State of Punjab*, A. I. R. 1952 Punj. 58. In this case the question what the expression "civil *post* under a State" means came up for consideration before a Bench of the Punjab High Court. On this point the

observations of Harnam Singh J. are important and I reproduce them below :

"Now, the expression 'civil post' is not defined in the Constitution of India. Reading, however, Arts. 310 and 311 together, the conclusion is inescapable that the expression 'civil post' as used in Art. 311 means 'a post or office on the civil side of the administration' as distinguished from 'post connected with defence'."

[12] I may say that I am in complete agreement with this view. It seems to me that the only conclusion I can reasonably come to is that the guarantee embodied in s. 240 (2) applies not only to members of the superior civil services or the provincial civil services but also holders of civil posts or to employees in any properly established civil service of the Crown in India. I can see no difference between the words "His Majesty's service" and the "service of His Majesty."

[13] I may further point out that in the case of *Yusuf Ali Khan* v. *Province of the Punjab*, A. I. R. 1950 Lah. 59, it was held by a learned single Judge of the Lahore High Court that :

"Section 240 relates to every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India. Where it does not appear that the personnel of the Civil Supplies Department had been incorporated into a service, all incumbents of appointments in that department would fall into the second category, viz., of persons 'holding civil posts under the Crown in India.' It cannot be said that, because the post is declared to be temporary, or the holder thereof is a temporary employee, he is not within the expression 'person holding a civil post under the Crown in India.'"

[14] I would like to quote in this connection two well-known authorities on Constitutional Law. Professor Wade and Mr. Phillips in their well-known book on Constitutional Law, Edn. 4, p. 165, observe as follows in the Chapter dealing with "The Civil Service" :

"The departments are staffed by administrative, professional, technical, executive and clerical officers who constitute the Civil Service. Civil servants are all servants of the Crown. There is no comprehensive definition of a Crown Servant.

A person appointed by another Crown servant under the authority of a statute may be a Crown servant as much as one appointed directly by the Crown. The facts of each appointment must be considered."

[15] That the words "civil service" have a very wide connotation and do not include only what in this country are called the superior civil services is clear from the meaning as is evident from the remarks quoted above, that attaches to the words "civil service" in Britain. I beg leave to quote from the well-known book on constitutional Law, by the late Mr. Ridges, Eighth Edition, p. 196:

"The enormous expansion of governmental functions since 1835 has resulted in huge staffs, which in 1939 numbered about 400,000, a figure that had, due to wartime expansion, risen to over 700,000 in 1945; since then it has steadily declined. They are classified as industrial and non-industrial. The last class includes various grades: Administrative, formerly Class I or Upper Grade (now about 1,400); Executive; Clerical; Women Clerical Assistants and Shorthand Typists as General Classes, and Executive, Clerical, Unestablished Clerical, and Typing as Departmental Classes; etc. etc."

[16] I have quoted this in order to show how wide the conception of the civil service in Britain is. It strikes me that in enacting the Government of India Act, 1935, which is a British statute, the framers of the Constitution must have had the same conception of the civil service. For this reason, I am clearly of the opinion that the plaintiff was, at all events, the holder of a civil post under the Crown in India. I have indicated how and why s. 240 (2) must be deemed to be applicable to him. It is beyond question that he was removed from office and for the purposes of s. 240 (2) removal from office means the same thing as dismissal by an authority which was inferior to the authority which appointed him. The power of dismissal could not be delegated, having regard to the provisions of s. 240 (2) to any person other than the appointing authority and any rule to the contrary is void.

The conclusion I have arrived at is that though initially the plaintiff was appointed as a sub-permanent way inspector by the Chief Engineer of the Rohilkhand and Kumaun Railway, his appointment came to an end on 31-12-1942. Thereafter, he was appointed to the same post by the then General Manager of the two combined Railways, while that General Manager was still technically not a Crown servant, under the authority and on behalf of the Government of India Railway Board. He was thus, in my opinion, appointed by the General Manager under the authority of the Government of India and his services could not be terminated by an officer lower than the General Manager, though they could be terminated by one superior to the General Manager.

[17-21] I shall now consider the question whether the plaintiff is entitled to the relief claimed in respect of his salary. I shall refer in this connection to the case of Mr. I. M. Lall who was a member of the Indian Civil Service and who was dismissed. In that case, i.e., *The High Commissioner for India* v. *I. M. Lall*, 1948 ALL. L. J. 266 (P. C.), their Lordships referred to the observations of Lord Blackburn in the Scottish case of *Mulvenna* v. *The Admiralty*, 1926 S. C. 842, in which that learned Judge, after reviewing the various authorities, states:

"These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt,

must equally apply to every public servant—See *Leaman* v. *King*, (1920) 3 K. B. 663, *Smith* v. *Lord Advocate*, (1897) 25 R. 112, and other cases there referred to. It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil Court of justice, and that their only remedy under their contract lies in an appeal of an official or political kind."

[22] Their Lordships endorsed the statement of the law by Lord Blackburn in the case just referred to as correct. Their Lordships referred to certain sections of the Government of India Act, viz., ss. 179 (9), 247 (4), 249 and 250, and observed that they were unable to derive from them any statutory right to recover arrears of pay by action. Their Lordships, after referring to the Government of India Act, 1919, went on to observe that

"It has been settled ever since *Gibson* v. *East India Company*, (1839) 5 Bing. (N. C.) 262, that pay could not be recovered by action against the Company, but only by petition, memorial or remonstrance. It follows that the respondent fails in his claim to arrears of pay."

[23] The learned Civil Judge fell into an error in awarding a decree for arrears of pay to the plaintiff. This part of the decree cannot be allowed to stand and to this extent the appeal preferred by the Union Government must succeed.

[24] I now come to the appeal which has been preferred on behalf of the plaintiff for certain allowances. They were disallowed by the Court below. I fail to understand how arrears of allowances could be granted to him in view of the fact that he was not allowed any arrears of pay. For the recovery of his arrears of pay and allowances, the proper remedy of the appellant is to make a representation to Government. I have no doubt that any representation made by him will receive proper attention at the hands of the authorities concerned. For these reasons, the plaintiff's appeal for these allowances must be dismissed and I confirm, on this part of the case, the decree of the Court below.

[25] For the reasons given above, I would dismiss second appeal NO. 751 of 1949, except in so far as the claim for a decree for arrears of pay is concerned. I would dismiss the plaintiff's appeal for arrears of allowances: As the plaintiff has succeeded in securing from this Court the main relief asked for by him, namely, a declaration, I think that, in all the circumstances of the case, I would be justified in granting him his costs in second appeal NO. 2029 of 1948. We make no order as to costs in second appeal NO. 751 of 1940.

[26] **V. Bhargava J.**—I have had the benefit of hearing the judgment delivered by my brother, Sapru J. and I entirely agree with the conclusions arrived at by him. I would only like to put, in my own way, the reason for holding that the removal of the plaintiff from his service was illegal which was the main question discussed in these appeals.

[27] The contention of the plaintiff was that his removal was illegal as it was in contravention of the provisions of sub-s. (2) of s. 240, Government of India Act, 1935. Learned counsel for the defendant based his contention that the removal was not illegal on two grounds. The first ground was that sub-s. (2) of s. 240 of the Act did not apply to the case of the plaintiff at all and the second ground was that there had been no appointment by the Governor-General or by the Government of India so that the old appointment of the plaintiff made by the Chief Engineer of the B. N. W. and R. K. Railways had continued and, therefore, the Chief Engineer of the O. T. Railway was entitled to remove the plaintiff from service.

[28] To consider the first argument, I reproduce below the provisions of sub-ss. (1) and (2) of s. 240, Government of India Act, 1935, which are as follows:

"240 (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed."

The first point to be examined is as to whether s. 240, Government of India Act, 1935, at all applies to the plaintiff. There was some argument on the question as to whether the plaintiff was, at all a member of a civil service of the Crown in India or held any civil post under the Crown in India. The use of the words 'member of a civil service' indicates that this first clause is meant to apply to those persons who are members of a regularly constituted service and who are not merely holding posts under the Crown. There is nothing at all on the record or in the finding of the lower Courts to show that the post which was held by the plaintiff was a post borne on the cadre of a regularly constituted service. There can, however, be no doubt that the plaintiff was holding a 'civil post' under the Crown just before he was removed.

The word 'civil' used before the word 'post' in this section is clearly meant to distinguish posts in the Defence Forces. The words 'civil post' cannot be confined merely to posts which are borne on the cadre of any regularly constituted service. Learned counsel for the defendant did not press the argument further in view of the fact that, in the case of *Venkata Rao* v. *Secy. of State*, 1937 ALL. L. J. 213, their Lordships of the Privy Council recognised that a member on the clerical staff of the Government Press at Madras was holding a civil post under the Crown in India. The words 'civil post' were examined by a learned Single Judge of the Lahore High Court in Pakistan in *Yusuf Ali Khan* v. *Province of the Punjab*, A. I. R. 1950 Lah. 59 where the provisions of s. 240, Government of India Act, 1935, were still applicable. Both these cases clearly show that all posts held by any public servant, if the posts did not belong to the Military Department or the Defence Forces, must be deemed to be 'a civil post under the Crown.' It is, therefore, quite clear that the

plaintiff must be held to be a person governed by the provisions of sub-s. (1) of s. 240, Government of India Act, 1935. Sub-s. (2) of s. 240 of the Act does not use the words 'a civil service of the Crown in India or any civil post under the Crown in India.'

[29] The next point, that was urged by the learned counsel for the defendant was that sub-s. (2) of s. 240, Government of India Act, 1935, merely applied to persons who were members of 'a civil service' and did not apply to those who merely held 'a civil post under the Crown in India'. Sub-section (2) begins with referring to the person mentioned in sub-s. (1) of that section and then goes on to lay down that 'such person as aforesaid' is not to be dismissed from the 'service of His Majesty' by any authority subordinate to that by which he was appointed.

This language makes it perfectly clear that sub-s. (2) of s. 240 was meant to govern all persons who fell within either of the two classes mentioned in sub-s. (1) of that section. The use of the word 'service' in sub-s. (2) did not imply dismissal of only those persons who were members of a service but included dismissal of all persons who may even have held 'a civil post under the Crown' because dismissal from that post is also dismissal from the 'service of His Majesty.' The use of the word 'such' before the word 'person' in sub-s. (2) indicates that every person mentioned in sub-s. (1) is to be governed by the provisions of sub-s. (2) and the word 'service' used in sub-s. (2) was never meant to be equivalent to the words 'civil service of the Crown in India.' The applicant, who was undoubtedly holding 'a civil post under the Crown in India' in the State Railways would, therefore, be governed by the provisions of sub-s. (2) of s. 240 of the Act.

[30] His third contention was that sub-s. (2) of s. 240 of the Act merely governs orders of dismissal and not orders of removal. There is no doubt that there is a distinction between dismissal and removal. A person 'dismissed' from Government service is ineligible for re-employment whereas this disqualification does not attach to a person 'removed.' The contention that sub-s. (2) of s. 240 of the Act would not govern an order of removal was however, met by reference to s. 277, Government of India Act, 1935, which also occurs in part X of the Act. Sub-s. (1) of s. 277 runs as follows:

"*277 (1).* In this Part of this Act—the expressions 'All India Service', 'Central Service Class I', 'Central Service Class II', 'Railway Service Class I', 'Railway Service Class II' and 'Provincial Service' mean respectively the services which were immediately before the commencement of Part III of this Act, so described respectively in the classification rules then in force under S. 96B, Government of India Act; and references to dismissal from His Majesty's service include references to removal from His Majesty's service."

It was contended on behalf of the defendant that since ss. 240 and 277 were both in the same part of the Act, the words 'reference to dismissal' in s. 277 would govern the provisions of s. 240 and the word "dismissed" in s. 240 would, therefore, include 'removed.' It is to be noticed that in s. 240 (2), the words used are 'dismissed from the service of His Majesty' whereas in s. 277 (1) the words are 'dismissal from His Majesty's service.' Learned counsel for the defendant argued that the words 'service of His Majesty' in sub-s. (2) of s. 240 did not have the same meaning as the words 'His Majesty's service' in s. 277 (1). I am afraid this argument has no force at all. The mere change in form from 'service of His Majesty' to 'His Majesty's service' cannot make any difference. If dismissal from a civil post under the Crown in India is 'dismissal from the service of His Majesty', it would also certainly be 'dismissal from His Majesty's service.'

Learned counsel's contention was that the words 'His Majesty's service' in s. 277 (1) should be read as referring to the various services mentioned earlier in the same section and he has based this argument on the fact that the first clause of sub-s. (1) of s. 277 mentioning the various services and the second clause of the same sub-section enlarging the meaning of the words 'dismissal from His Majesty's service' have been joined together by the use of the word 'and.' The use of the words 'His Majesty's service' in the second clause of s. 277 (1), however, makes it clear that there was no intention to make this clause subject to the first clause. Had this been the intention, there was no need for using the words 'His Majesty's service.' The proper words, which could have been used, would be 'such service.'

Further, it is to be noticed that, in this second clause, the word 'service' is used in the singular and not in the plural. Had it been the intention to restrict the second clause to the services mentioned in the first clause, the words used should have been 'His Majesty's services' instead of 'His Majesty's service'. The plural word 'services' could have signified regularly constituted services having a cadre of their own. The word 'service' in singular is not meant to refer to such regularly constituted service but to the fact that there is some one serving His Majesty in some capacity or the other. Any person, who happens to be serving His Majesty in any capacity is in 'His Majesty's service' though he may not belong to any of the regularly constituted services of His Majesty. I cannot, therefore, accept the argument that this second clause of s. 277 (1) is governed by the first clause and that the scope of the reference to dismissal in s. 240 (2) was sought to be enlarged by s. 277 (1) only with reference to those few services which are mentioned in it and not with reference to all persons who are governed by sub-s. (2) of s. 240.

[31] The learned Judge of the lower Court had accepted the contention of the learned counsel for the defendant that s. 240 (2) did not apply to the plaintiff and he, therefore, sought to bring the

case of the plaintiff under the proviso to S. 241, Government of India Act, 1935. He had, therefore, to rely upon R. 1705 (c), State Railway Establishment Code to hold that the plaintiff could not be dismissed or removed by any authority lower than that by which he was appointed to the post held by him substantively. Even if this rule were to apply, it would be subject to the provisions of sub-s. (2) of S. 240 of the Act. In the lower appellate Court, it had been contended on behalf of the defendant that the protection of R. 1705 (c), State Railway Establishment Code was not available to the plaintiff because the power of dismissal of a person holding the post which was held by the plaintiff had been delegated to the Chief Engineer and the rule delegating that power could modify this R. 1705 (c) as both rules were framed in exercise of the same power of framing rules. In the light of the view taken by me in this case, this argument need not be considered at all.

It may be argued that the restriction placed under R. 1705 (c), State Railway Establishment Code, could be taken away by another rule delegating the power of dismissal but it cannot possibly be urged that any such rule can have the effect of taking away the right granted by S. 240 (2), Government of India Act, 1935. It is, therefore, not at all necessary to see whether any power of dismissal had been delegated under the State Railway Establishment Code. All that need be examined is whether the order of dismissal was by an authority subordinate to that by which the plaintiff was appointed or whether the order was passed by the authority which appointed him or by some superior authority.

[32] On this question, I have to take into consideration the argument of the learned counsel for the defendant that actually there was no valid appointment of the plaintiff at all by the General Manager of the B. N. W. and R. K. Railways taking effect from 1-1-1943, and that it must be deemed that the plaintiff's service under the R. K. Railway had continued. On the face of it, this argument must be rejected because there is a clear finding that the service of the plaintiff under the R. K. Railway was terminated by the management of that railway with effect from the midnight of 31-12-1942, by a proper notice. The fresh appointment of the plaintiff took place by virtue of the offer contained in the circular letter of the then General Manager of the B. N. W. and R. K. Railways, dated 18-9-1942, on which date the General Manager of the B. N. W. and R. K. Railways was not in Government service at all. The railways were still owned by companies and had not yet been acquired by Government. The General Manager, who issued the letter, dated 18-9-1942, was, therefore, not in the service of the Government; but this letter itself indicates that it was issued by him under instructions from and on behalf of the Government of India, Railway Department, (Railway Board).

Under S. 241, Government of India Act, 1935, appointments to the civil services of and to civil posts under the Crown in India in the case of services of the Federation and posts in connection with the affairs of the Federation were to be made by the Governor-General or by such person as he might direct. The person, who could be authorised by the Governor-General under this section to make the appointment, need not have been a Government servant. All that was needed was that there should be a direction by the Governor-General authorising him to make the appointment.

In the present case, the letter of 18-9-1942, itself contains material showing that there was authorisation by the Government of India, Railway Department (Railway Board), giving power to the General Manager of the B. N. W. and R. K. Railways to make appointments to posts in the O. T. Railway which was to come into existence on 1-1-1943. The appointment of the plaintiff by the General Manager was, therefore, made in his capacity as a special nominee of the Governor-General under S. 241 of the Act. Since the appointment was made by him, the power of dismissal under S. 240 (2) could be exercised either by himself or by some one superior to him. As he was not holding any post under the Government at the time when he made the appointment but was only a special nominee of the Governor-General, there can be no question of there being any one holding a post superior to his post and consequently the order of dismissal could only be passed either by him or by the Government of India which had conferred the authority of appointment on him and which, in exercise of its executive powers, had to act in the name of the Governor-General. Consequently, in this case, the power of dismissal or removal under S. 240 (2), Government of India Act, 1935, could have been exercised only by the individual who was holding the post of the General Manager of the B. N. W. and R. K. Railways on 18-9-1942, or by the Government of India acting in the name of the Governor-General. In this case, admittedly, the order of removal was passed by the Chief Engineer of the O. T. Railway and, therefore, this order is clearly in contravention of the provisions of sub-s. (2) of S. 240 of the Act.

[33] For the reasons given above, I entirely agree that the plaintiff is entitled to the declaration that he has not been validly removed from service and that he is still holding a post in the Railway Department from which he was purported to be removed on 3-2-1945.

A/K.S. *Order accordingly.*

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(LUCKNOW BENCH)

AGARWALA J.

Prag — Applicant v. *Ram Das and others — Complainants — Opposite Party.*

Criminal Revn. No. 39 of 1951, D/- 17-3-1952.

(a) Criminal P. C. (1898), S. 7 (2) — Notification declaring deep stream of river as boundary between districts — Interpretation of — U. P. Revenue Manual (Vol. II), Para. 1631.

The notification embodied in Para. 1631 of the U. P. Revenue Manual (Vol. II) declaring, for purposes of criminal jurisdiction, the deep stream of a river as the boundary between certain districts implies that the limits of the districts change with the shift in the deep stream and must be determined according to the deep stream as it exists at the time of the dispute and not as it existed at the date of the notification. That this is the meaning of Para. 1631 follows from the note contained in it as also from Para. 1632 : 25 Cal. 858, *Dissent.* [Para 4]

Anno. Criminal P. C., S. 7, N. 6.

(b) Practice—Practice contrary to law—Validity.

Practice contrary to law is no warrant for its validity. It is the practice which is vitiated and not the law that is submerged by a wrong practice. [Para 5]

B. S. Srivastava — for Applicant ; S. L. Suri — for Opposite Party.

REFERENCE . . . . . Para.

('08) 25 Cal. 858 : (2 Cal. W. N. 577). 3

Order.— This is an application in revision against an order rejecting an application that the Magistrate trying a case pending before him had no jurisdiction to try it.

[2] The dispute relates to certain agricultural plots, which according to the applicants are part of village Angraura in the district of Sitapur and according to the complainants opposite-parties are part of village Bhonri Kaundor situated in district Bahraich. These two districts of Sitapur and Bahraich are divided by river Ghogra, which often changes its course. The dispute was about possession over these plots and the complaint was filed in the Court of Sub-Divisional Officer of Qaisergunj, district Bahraich. The applicants' case was that the Sub-Divisional Officer of Qaisergunj had no jurisdiction to try the case because the plots in dispute were situated on the other side of the river Ghogra, the side on which the district of Sitapur was situated.

[3] In the Revenue Manual (Volume II) paragraph 1631, the limits of the two districts are thus specified :

"The deep stream of the following rivers is for purposes of criminal jurisdiction the boundary between the districts noted in Columns 2 and 3."

The river mentioned is Ghogra and the districts mentioned are Bahraich and Bara-Banki and Bahraich and Sitapur. The question is what is the meaning of this paragraph. Does it mean the stream of the river Ghogra as it existed when the notification was issued or the deep stream as it exists at a particular moment when a dispute is raised? The matter is not free from difficulty. In one case decided by the Calcutta High Court on a similar notification the view was taken that the language means the deep stream as it existed at the date of the notification. This case is reported in *Punardeo Narain Singh* v. *Ram Sarup Roy*, 25 cal. 858. The notification was

"That the deep stream of the Ghogra is the boundary between the Balia District in the North-Western Provinces and the Sarun District in Bengal, up to the point where the boundary line between mouzah Ibrahimabad Nanhara in Balia, and mouzah Shitab Diara in Bengal, meets that river."

Maclean C. J. observed :

"I think the 'deep stream' spoken of in the notification of December 1888 must be the deep stream as it then existed, that is ten years ago. It is a matter of notoriety that the channels of Indian rivers change very materially, and often in a very short time. What was the deep stream in 1888 may not be the deep stream of 1897, and it is consequently difficult for us to say what really is the deep stream which forms the boundary between the two districts."

Banerjee J. was not so definite. He stated :

"It is at any rate open to doubt whether the notification of 5-12-1888, referred to above should bear the construction sought to put upon it by the learned Vakil for the petitioner, namely, that the deep stream of the Ghogra, the position of which may shift from time to time, is the boundary between Balia and Sarun. The notification may well be understood to mean that the boundary between Balia and Sarun would be the deep stream as it existed at the date of the notification, and that this would continue to be the boundary until the Government thought fit to alter it by a further notification."

[4] In my opinion the matter has to be decided upon the correct interpretation of the language used in the U. P. Revenue Manual. Paragraph 1631 contains a note which is based upon a Government notification. The note is :

"Whatever may be the course of the deep stream of the Ghogra, the following villages will, for the purposes of criminal jurisdiction, always be a part of the Azamgarh district;"

Azamgarh is one of the districts which is touched by the river Ghogra. This note on the face of it appears to be an exception to the main paragraph and suggests that the main paragraph means that the boundaries of the districts crossed by the river Ghogra will be determined according to the deep stream as it exists from time to time. Paragraph 1632 which follows puts the matter beyond doubt. It deals with the jurisdiction for the purposes of revenue Courts and civil Courts, and it runs :

"Where the Ganges or the Ghogra forms the boundary for purposes of criminal jurisdiction between districts in Agra and districts in Oudh the deep stream of the river is also the boundary between such districts for all other purposes. In other cases, civil and revenue jurisdiction within the United Provinces does not in the absence of express notification alter with a change in the deep stream."

This shows quite clearly that although civil and revenue jurisdiction does not change with the change in the deep stream unless there is an express notification, the criminal jurisdiction may change. I think para. 1631 does imply that the limits of the districts change with the shift in the deep stream and must be determined according to the deep stream as it exists at the time of the dispute.

[5] The Magistrate in the present case assumed that the plots were on the other side of the river

Ghogra, that is on the side of Sitapur district, but he stated that the boundaries of the district would not change by the change in the course of the river, and he cited certain examples in which although upon a change of the course of the river a village fell from the side of one district to another district, yet the jurisdiction of the criminal Courts of the former district was still continued over the village. This is not a sound argument. If the jurisdiction of one criminal Court had ceased by the change in the course of the river it did not become legal because it continued to be exercised even after it had ceased to exist. Practice contrary to law is no warrant for its validity. It is the practice which is vitiated and not the law that is submerged by a wrong practice. It is, however, not agreed between the parties as to whether the plots in dispute are on the other side of the deep stream of the river Ghogra. The Magistrate assumed that it was so, but admittedly no evidence has been led by the parties and the learned counsel for the complainants urges that he does not admit the fact. The Magistrate will have therefore, to decide the question of jurisdiction afresh in view of the law stated by me above.

[6] I, therefore, allow this application, set aside the orders of the Courts below and direct that the question of jurisdiction shall be determined by the Magistrate *de novo* in the light of the observations made by me.

A/G.M.J. *Application allowed.*

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BIND BASNI PRASAD AND MUKERJI JJ.

Kr. Jyoti Sarup — Applicant v. *Board of Revenue, Uttar Pradesh, Lucknow and another — Opposite Party.*

Civil Misc. Writs Nos. 7825 and 7826 of 1951, D/- 9-9-1952.

(a) U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso 1—Interpretation — Proviso is not limited in its application to variation of method of computation of income in the course of a year.

The first proviso to S. 6 (1) means that once and only once during the course of an assessee's "assessable life," can he, unfettered, exercise the option given to him under S. 6 (1) of the Act and if once he has exercised his option, he cannot without the permission of the Board take the other alternative. [Para 14]

There is not the slightest indication in the proviso that the restriction placed by it upon the variation in the method of computation relates only to any one year and that the assessee is at full liberty to vary the method of computation every year. [Para 31]

If after the commencement of the U. P. Agricultural Income-tax Act, an assessee has once selected one method of computation of agricultural income, he cannot vary it subsequently in any year without the permission of the Board of Revenue. [Para 31]

(b) Evidence Act (1872), S. 114, Illus. (e)—Judicial and official acts—Performance of—Presumption as to —(U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso).

Where a statute, example U.P. Agricultural Income-tax Act (8 of 1949), S. 6 (1) Proviso has conferred the privilege of exercising a discretion on a responsible officer, the Court can legitimately make a presumption that he has not acted capriciously. [Para 19]

Anno. Evidence Act, S. 114 N. 29.

(c) U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso 1—Discretion under—Exercise of—Consideration as to loss of revenue—Relevancy.

A consideration of loss in the revenue, which can justly be collected by the imposition of a tax, is not an irrelevant consideration in disposing of an application to the Board of Revenue for permission to change the method of computation of income. (1891) A. C. 173, *Rel. on.* [Para 20]

As the very name of the authority indicates, the Board of Revenue in its administrative capacity has to take into consideration the effect of the permission it may grant under the proviso of S. 6 (1) upon the revenues of the State. The object of the Act is to raise revenues for the State by imposing a tax on agricultural income. If the Board acts in the above manner it acts within the spirit of the Act. [Para 34]

(d) Constitution of India, Art. 226—Administrative Authority—Discretionary power—Exercise of—Order on cyclostyled form.

Per *Bind Basni Prasad J.*—It is a well-known convention and a well recognized practice in Government Offices that where an officer agrees with an office note, he merely initials and that is enough to indicate his assent to the office suggestion ; it does not necessarily indicate that the officer acted mechanically. [Para 33]

It is not unusual to convey orders in printed or cyclostyled forms, specially when the order relates to a matter which frequently comes up before an authority. This saves time and work in the office. From the fact that the disputed order is on a cyclostyled form, it does not follow necessarily that the mind was not applied in passing that order, specially when in the counter-affidavit it is stated that the officer concerned gave full consideration to the merits of the case. [Para 33]

(e) U. P. Agricultural Income-tax Act (3 of 1949)—Recovery of tax—Burden of proof—Avoidance of tax—(Income-tax Act (1922), S. 1).

The burden is on the State to prove that it is entitled to a certain revenue before it can recover it and, if the subject can, without infringing the law, escape liability, then the subject certainly can do so and it would be no ground for Courts to order recovery of any revenue on the ground that, if the recovery was not ordered, then it would amount to the State being deprived of that revenue. [Para 22]

Anno. I. T. Act, S. 1 N. 4.

(f) U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1), Proviso 1—Validity — Provision does not infringe Art. 14 or Art. 19 (f) of the Constitution of India—(Constitution of India, Arts. 14 and 19 (f)).

The absolute and unfettered discretion given to the Board of Revenue to grant or refuse permission to an assessee under S. 6 (1) Proviso to make a change in the method of computation of his income, does not infringe Art. 14 of the Constitution : A.I.R. 1952 All. 699 and A.I.R. 1952 All. 859, *Ref.* [Paras 24, 25]

No question of the infringement of Art. 19 (f) arises in the case. [Para 24]

(g) Constitution of India, Art. 226—Mandamus, writ of—Mandamus where duty is discretionary—(U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso).

It may be that while an officer may in certain extraordinary circumstances, be compelled by mandamus to exercise his discretion one way or the other and not just simply refuse to act at all, yet after he has honestly and reasonably exercised his discretion, mandamus will not lie where the act is truly discretionary, to control that discretion, as to the particular manner of performance, even though the discretion be erroneously exercised, for there is no method of review or correction provided by

law to control such a discretion. The writ of mandamus can never be used as a substitute for appeal or what has been called in America a "writ of error." [Paras 26, 27]

Where the Senior member, Board of Revenue, had exercised his discretion to grant permission under S. 6 (1) Proviso, U. P. Agricultural Income-tax Act (3 of 1949) to make a change in the method of computation of income for purposes of the Act, honestly and on a full consideration of the materials before him and had refused permission, there is no scope for the High Court to interfere by means of the writ of mandamus. [Para 27]

(h) U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso—Grant of permission to assessee to change method of computation of his income—Board of Revenue acts in its executive capacity—(Constitution of India, Art. 226 — Judicial or administrative order).

In considering the question whether or not to grant the permission under the proviso to S. 6 (1), Board of Revenue acts in its executive capacity. The usual procedure of judicial authorities is not prescribed for the Board when dealing with such a matter. [Para 32]

Gopal Swarup Pathak, R. S. Pathak and S. C. Khare —for Applicant; S. C. G. Mahrotra—for Opposite Party.

REFERENCES : Courtwar/Chronological/	Paras
('48) 1948 All L J 543 : (AIR 1949 All 56)	34
('52) 1952 All L J 278 : (AIR 1952 All 859)	25
('52) 1952 All L J 274 : (AIR 1952 All 693)	25
(1889) 23 Q B D 579 : (61 L T 832)	22
(1891) A C 173 : (60 L J M C 73)	21
(1918) 1 K B 68 : (87 L J K B 303)	23

Mukerji J. — These two applications are connected in the sense that the points for determination in both the applications are identical. Consequently I think it proper to dispose of both the applications by means of this common judgment. Both the applications are under ART. 226 of the Constitution of India and the prayers, which have been put in the alternative, are the same in both the applications.

[2] The applicants in both the cases pray for the issue of a writ of *mandamus* as against opposite party NO. 2 i. e. the Collector of Pilibhit, directing him to issue suitable "forms" to the applicants for submitting their returns under the U. P. Agricultural Income-tax Act (ACT 3 of 1949) as provided by S. 6 (2) (a) of the Act for the assessment year, 1951-1952.

[3] The applicants further pray that a writ of *mandamus* be issued directing opposite party NO. 1 namely the Board of Revenue, Uttar Pradesh, to decide the respective applications of the applicants in accordance with law.

[4] As I stated earlier, the prayers are in the alternative. There is further prayer, in the alternative, praying for a writ of *certiorari* by calling for the record of the case and quashing the order complained of, an order which was passed by opposite party NO. 1, namely the Board of Revenue. There is a sort of a general prayer, and that too in the alternative, namely, that this Court may issue such other writ or direction as it may deem fit and necessary.

[5] The facts which have given rise to these two applications very briefly put are these. Both the applicants were liable to pay agricultural income-tax under the provisions of the U. P. Agricultural Income-tax Act (ACT 3 of 1949). The periods for which the applicants were assessed to tax earlier were 1948-49 and 1949-50.

[6] By S. 5 of the Act provision has been made for the determination of agricultural income. Section 6 of the Act makes provision for the computation of agricultural income and this section provides for the computation of agricultural income in two alternative ways. There is an "option" given to the assessee to compute his income according to either of those two methods. Both the applicants who were assessees in two different assessment cases, chose in the first year one of the two alternatives. They chose the alternative provided by S. 6 (2) (b) in the first year. In the subsequent year, the assessees found that they had made a bad choice and they therefore wanted to submit their returns according to the method prescribed by S. 6 (2) (a) of the Act. Although an assessee under S. 6 of the Act has an option, there is a proviso added to that section namely the first proviso to the section which is in the following words :

"Provided that an assessee who has once exercised an option shall not be entitled to vary the method of computation *except with the permission of the Board of Revenue.*"

The assessees consequently made their respective applications to the Board of Revenue for permission to make a change in the method of computation of their income. On receipt of the applications of the two assessees, the office of the Board of Revenue, presumably, under the rules of business framed by the Board, dealt with these applications inasmuch as an individual who subscribed himself as an Agricultural Income-tax Clerk put up a note to the Deputy Secretary along with the entire record of the respective assessment cases, which contained the respective applications of the two applicants to the Board of Revenue for granting them the necessary permission to change the method of computation. In this note it was pointed out that the assessees had originally 'opted' the method of computation of their agricultural income under S. 6 (2) (b) and their income was computed under S. 6 (2) (b) for the last three years. It was further pointed out that under R. 7 of the Agricultural Income-tax Rules, the Board had a discretionary power of allowing or rejecting the applications for a change in the method of computation. The note further stated that computation under S. 6 (2) (a) is "easier and non-controversial," but the note pointed out that in some cases the change of the method of computation from S. 6 (2) (b) to S. 6 (2) (a) was detrimental to the revenues of the State inasmuch as it gave the assessee an advantage. The writer of the note drew the attention of the Deputy Secretary to the fact that the change of option is "not generally allowed in those cases in which the interest of Government is affected." The note further said that if the change in the particular cases was allowed "Government would be at a great disadvantage."

[7] The aforementioned note also pointed out that the assessees had made a similar request last year and that their applications had been rejected on the ground mentioned earlier, namely on the ground that the change over was going to adversely affect the amount of the tax that was likely to come to the State Treasury.

[8] The synopsis which I have given of the "note" (to use a common expression) was scrutinized by the Deputy Secretary and he himself made a further note in the following words :
"S. M.

The two cases noted upon in the office note do not deserve any consideration for change of option from 6 (2) (b) to 6 (2) (a) for the reasons given in the above note from page 9 ante. The applications merit rejection.

Sd/- Jagram Singh."

[9] The matter, after these two "notings", was put before Mr. B. V. Bhadkamkar who was the then Senior Member of the Board of Revenue and who according to the rules of business, prescribed by the Board under the provisions of s. 7 (1), Land Revenue Act (Act 3 of 1901), was the competent authority to deal with the matter. Mr. Bhadkamkar, the Senior Member merely signed under the recommendation of his Deputy Secretary.

[10] There is one other fact which need be stated and that is that subsequent to the disposal of the matter by Mr. Bhadkamkar, which was done on 26-5-1951, each of the applicants made an application on 3-8-1951, for issuing appropriate forms to each of them under s. 6 (2) (a) of the Act for submitting their returns for the year 1951-52. These applications were dealt with in the same manner in which the aforementioned applications were dealt with, namely there was a note by the office and the applications were ultimately rejected with the result that neither of the two applicants was supplied the appropriate forms for making their returns in consonance with the provisions of s. 6 (2) (a), Agricultural Income-tax Act.

[11] The applicants having failed to gain their objective by means of the two applications mentioned above by me have come up to this Court to seek their remedy against the Board of Revenue as also the Collector of Pilibhit by means of these two applications under Art. 226 of the Constitution.

[12] Mr. Gopal Swarup Pathak, the learned counsel for the applicants, has argued these applications at length and with his usual vigour and ability.

[13] Mr. Pathak has raised three main points : (i) That the proviso, which I have already quoted in the earlier portion of this judgment, applies only during the course of proceedings before the Assessing officer in a particular year of assessment and that it has no application to a case like the present where the option is being exercised not during the course of any particular year of assessment, but is being exercised in relation to a completely new year of assessment. In support of his contention, Mr. Pathak relied on the provisions of the Indian Income-tax Act as also the Sales Tax Act and his argument, in substance, was that, if what he was submitting was not correct, the language of the proviso would have been different.

[14] I have given my very careful consideration to this argument and I have considered the language of the two Acts referred to above, but I do not agree with Mr. Pathak's contention. In my judgment, the language of the first proviso to s. 6 (1) is so clear that it is unnecessary, even if it were permissible, to take the assistance of other statutes to interpret this proviso. In my judgment, this proviso means that once and only once during the course of an assessee's, if I may use the word "assessable life", can he, unfettered, exercise the option given to him under s. 6 (1) of the Act and that if once, and the words of the Statute so put it, he has exercised his option, he cannot, without the permission of the Board, take the other alternative.

[15] Learned counsel for the applicants argued that in giving the meaning which I have given to the section, I would be importing some kind of a rule of *res judicata* into my decision. I, however, think that this is not the correct way of looking at the matter for there is no question of any rule of *res judicata* coming into the picture but the question is of the interpretation of the words of the proviso, set out earlier in this judgment.

[16] The next point which Mr. Pathak argued was that the discretion—and I must here state that he conceded that it was a matter of discretion—which the Board of Revenue had, was not judicially exercised as it should have been. It was argued that the decision arrived at by the Senior Member of the Board was not his decision and, in any event, he had not applied his mind to the entire circumstances of the matter and that he had been swayed by irrelevant considerations, namely the consideration of loss which was likely to accrue to the revenues of the State by permitting a change over to the applicants.

[17] Mr. Pathak further contended that the consideration of a loss to the revenues was so thoroughly irrelevant to the matter in issue that by taking this into account the decision of the Board of Revenue, if there was a decision, was vitiated and should be so treated, because according to him it was arbitrary.

[18] Lastly it was contended that the reasons set out in the application for 'permission' to change their mode of computation were not considered by the Board of Revenue. A summary of the reasons which were set out in the application referred to above have been given in para. 5 of

the respective affidavits accompanying these two writ applications.

[19] I shall first consider the last argument, because this argument, in my judgment, can be disposed of comparatively shortly. In order to be able to appreciate the strength or weakness of this submission it is necessary to bear in mind the fact that the Senior Member of the Board of Revenue, who exercised the discretion under the proviso, had before him the entire record of the case and further he had before him the two 'notes', the one by the 'clerk concerned' and the other by the Deputy Secretary. I may here mention that in his note the clerk concerned pointedly drew attention to the fact that the record, on which his note was appended, contained the two applications of the assessees and they were marked as serials 17 and 18, respectively: further, in para. 2 of the note, the clerk concerned fairly set out one of the chief grounds on which the change of option was claimed, namely that the computation under s. 6 (2) (a) was easier and non-controversial. In para. 6 of the counter-affidavit, it has been averred that the Senior Member, Board of Revenue, who was in charge of Agricultural Income-tax work gave full consideration to the merits of the case. It has been pointed out that the matter of "the option" by the applicants had been considered by the Senior Member, Board of Revenue, once before also in respect of the assessment for the year 1950-51. There is, therefore, before me material for holding that the Senior Member, Board of Revenue, gave due consideration to the reasons on which the applicants wanted a change in their method of computation. In my view, therefore, apart from the presumption which a Court can legitimately make that a responsible officer on whom a statute has conferred the privilege of exercising a discretion, has not acted capriciously, there is in this case good evidence for holding that he has not so acted.

[20] Mr. Pathak next contended that the Senior Member, Board of Revenue took into account the question of the loss of revenue, a consideration which was foreign to the scheme of the Act, and by considering such a matter his decision was vitiated. In my judgment, the question of loss of revenue was not at all foreign to the scheme of the Act. The entire object of the U. P. Agricultural Income-tax Act was to provide for the imposition of a tax, a source of revenue, on agricultural income. The preamble to the Act says "whereas it is expedient to impose a tax on agricultural income in the United Provinces." By the various sections of the Act provision has been made for recovering 'tax' on agricultural income and the Legislature has, therefore, kept to the main purpose of the Act, and made provision in the Act so that a person liable to pay tax may not escape his liability. I am, therefore, of opinion that a consideration of loss in the revenue, which can justly be collected by the imposition of a tax, is not an irrelevant consideration.

[21] Mr. Pathak further contended that whenever a Statute gives a 'discretion' to someone then that discretion has to be exercised judicially, that, if the Court finds that the discretion has not been judicially exercised but has been exercised arbitrarily or capriciously, then the High Court will interfere by means of a proper writ and for the support of his contention Mr. Pathak relied on a House of Lord's decision in *Sharp* v. *Wakefield*, reported in (1891) A. C. 173. That decision was under the Licensing Acts of 1828, 1872 and 1874 under which "the Licensing Justices" were given a discretion to refuse the renewal of licenses for the sale of intoxicating liquors. In my judgment, this case is not entirely appropriate as an authority for the case I have before me. Be that as it may, speaking for myself, I have not much difficulty in accepting the proposition of law as such, enunciated by Mr. Pathak.

[22] The next point, which was attempted to be made, was that the Senior Member, Board of Revenue, had misdirected himself completely by considering the question of the loss of revenue and, therefore, it was contended that his decision was bad. Reliance has been placed on the case of *Commissioner of Inland Revenue* v. *G. Angus & Co.*, reported in (1889) 23 Q. B. D. 579. That case was a case where a certain person attempted to avoid the payment of stamp duty on a certain conveyance at a certain rate by a legal means and in connection with that matter Lord Esher M. R. at p. 593 said this :

> "The subject may have the good fortune to escape the stamp duty, if he can get a conveyance of property sold to him without the execution of any instrument. But it is said that if the appeal be decided against the Commissioners, purchasers will rest satisfied with an agreement of which specific performance would be decreed and will not go on to execute a conveyance, and so the Crown will lose the stamp duty, and it is rather suggested that this would be cheating the Crown and committing a fraud. The Crown, however, must make out its right to the duty and if there be a means of evading the stamp duty, so much the better for those who can evade it. It is not fraud upon the Crown, it is a thing which they are perfectly entitled to do."

On the observations quoted above of Lord Esher, it was argued that the evasion of revenue was a matter which should not have been considered at all. As I read the observations of Lord Esher I do not think the Noble Lord ever meant to lay down, or actually laid down, anything like what was being contended. What was laid down in that case was that, if a subject can evade payment *legally*, then it cannot be termed as fraudulent conduct, nor can it be said that he is cheating the State of its *just* revenues. The burden is on the State to prove that it is entitled to a certain revenue before it can recover it and, if the subject can, without infringing the law, escape liability, then the subject certainly can do so and it would be no ground for Courts to order recovery of any

revenue on the ground that, if the recovery was not ordered, then it would amount to the State being deprived of that revenue. No such position arises in the present case.

[23] Mr. Pathak relied again on a decision in the case of *Rex* v. *London County Council*, reported in (1918) 1 K. B. 68. That was a case where the London County Council by virtue of a bye-law, which conferred a discretion, passed a general resolution to withhold permission in all cases to people applying for permission to sell articles in Parks and such other places. Avory J. at p. 74 of the aforementioned decision said this:

"In exercising their functions justices cannot pass a general resolution to refuse certificates; that is not a judicial exercise of their discretion. Similarly, in the present case there has not been a judicial exercise of the discretion which is vested in the County Council. The analogy seems to be complete."

Avory J. by analogy applied the rule of law laid down in the cases where certain discretion was vested in "justices" or similar authorities in the matter of granting or withholding licenses, to the case before him because, according to him, the analogy between the two types of cases was complete. If I may respectfully say, Avory J. was right in the view that he took of the analogous nature of the two matters. The case before us, in my judgment, does not attract the rule of law laid down either in the licensing cases or in the case decided by Avory J., and to borrow his language partially, I would say, that in the present case the analogy seems to me to be absolutely incomplete.

[24] Lastly, Mr. Pathak contended that the very wide and arbitrary power given to the Board of Revenue under S. 6, first proviso, was constitutionally a bad provision of law inasmuch as it vested in the Board of Revenue such absolute and unfettered discretion: it could be used as a means of discrimination; what Mr. Pathak said, was that the power to discriminate, has been given by this provision and thus his submission was that Art. 14 of the Constitution was infringed. Alternatively, he contended that it was, in any event, placing an unreasonable restriction on the subject in contravention of Art. 19 (f), Constitution of India. I have given this argument careful consideration and, in my judgment, there is no substance in either of these two contentions. In my view no question of the infringement of Art. 19(f) arises in the case.

[25] In regard to the infringement of Art. 14 of the Constitution, namely, in regard to the proviso to S. 6, Agricultural Income Tax Act giving the power to the Board of Revenue to discriminate, reliance was placed on two decisions of this Court, reported in *Karamchand* v. *Dr. Vijay Anand*, 1952 ALL. L. J. 274 and *Mannu Lal* v. *Chakradhar Hans*, 1952 ALL. L. J. 278 respectively. Both these cases were under the U. P. (Temporary) Control of Rent and Eviction Act and in the first of those cases the question was whether the "unregulated" discretion given to District Magistrates to grant or not to grant permission under S. 3 of the Act infringed the provisions of Art. 14 of the Constitution. A Bench of this Court of which one of us was a member held:

"If the discretion to grant licenses can be without any regulating principles embodied in the statute, there is no reason why the discretion to grant permission to a landlord to sue his tenant for ejectment should be *hedged* in by statutory rigid rules. We hold that it does not infringe Art. 14 of the Constitution."

[26] As I stated at the commencement of this judgment one of the prayers was for the issue of a writ of mandamus directing the opposite party No. 2 to issue suitable forms for submitting his returns in accordance with S. 6 (2) (a), Agricultural Income-tax Act and, in the alternative, a writ of mandamus was prayed for directing opposite party No. 1 to decide the applications of the two applicants before us according to law and these were the two prayers in respect of which the main arguments in the case were made by the learned counsel, appearing for the applicant. The duty of the opposite party No. 1, the Board of Revenue, U. P., which was sought to be enforced was, the duty cast on him by the first proviso to S. 1 of the Act. The duty which was sought to be enforced as against opposite party No. 2, namely, the Collector of Pilibhit, was the duty cast on him to supply the applicants the requisite "forms" so that he could make his returns according to the option which he chose to exercise under the provisions of S. 6. The duty which was sought to be enforced as against opposite party No. 2 could arise only when the opposite party No. 1, had performed his duty. As I have already stated in the earlier portion of my judgment, opposite party No. 1 had already exercised his discretion in the matter and had already decided to withhold permission to the applicants to change their option. The question, therefore, for determination at this stage is whether an application for a writ of mandamus was the appropriate remedy. In my judgment, the applicants are not, under the circumstances of this case, entitled to such a writ. In my judgment, the correct rule is that mandamus will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action.

[27] It may be that while an officer may, in certain extra-ordinary circumstances, be compelled by mandamus to exercise his discretion one way or the other and not just simply refuse to act at all, yet after he has honestly and reasonably exercised his discretion, mandamus will not lie where the act is truly discretionary, to control that discretion, as to the particular manner of performance, even though the discretion be erroneously exercised for there is no method of review or correction provided by law to control such a discretion. The writ of mandamus can

never be used as a substitute for appeal or what has been called in America a "writ of error". I have held in the earlier portion of this judgment that the Senior Member, Board of Revenue, had exercised his discretion honestly and on a full consideration of the materials before him. In my judgment, therefore, there is no scope for this Court to interfere by means of any of the writs asked for by the applicants.

[28] In the result I would dismiss these applications with costs.

[29-30] **Bind Basni Prasad J.** — I agree with the conclusion arrived at by my learned brother and desire to add the following :

The facts have been set out in the judgment of my learned brother and need not be reiterated. The first contention on behalf of the petitioners is that on a true interpretation of s. 6 (1), U. P. Agricultural Income Tax Act 1948, an assessee is at full liberty to choose any method of computation of his agricultural income in any year, but if in the course of a particular year he has chosen one method, he cannot vary it and choose another in that particular year. To interpret s. 6 (1) in this manner would be doing violence to its language. Sub-s. (1) of s. 6 provides as follows:

"The agricultural income mentioned in sub-clauses (i), (ii) and (iii) of cl. (b) of sub-s. (1) of S. 2 shall, at the option of the assessee, be computed in accordance with cl. (a) or cl. (b) of sub-s. (2):

Provided that an assessee who has once exercised his option shall not be entitled to vary the method of computation except with the permission of the Board of Revenue."

[31] The substantive part of sub-s. (1) no doubt gives an unfettered right to an assessee to choose any method of computation. But this right is cut short to a great extent by the proviso. The word "once" occurring in the proviso is unqualified. There is not the slightest indication in the proviso that the restriction placed by it upon the variation in the method of computation relates only to any one year and that the assessee is at full liberty to vary the method of computation every year. To interpret the proviso in this manner would be tantamount to the insertion of the words "in any year" after the word "computation". I can see no warrant for this. On the other hand, there is intrinsic evidence in the Act itself to indicate that there can be no question of the variation of the method of computation in the course of any one year. Section 15 provides for the return of income. Every assessee has to furnish a return by a prescribed date and once he has furnished the return, he can, under sub-s. (4) of s. 15, only correct the mistakes or fill in the omissions in the return and for that purpose submit a revised return; but he has been given no right to vary the method of computation. If the intention was to confer any such right, there would have been explicit mention of this in sub-s. (4). My interpretation of s. 6 (1) is that if after the commencement of the U. P. Agricultural Income Tax Act, an assessee has *once* selected one method of computation of agricultural income, he cannot vary it subsequently in any year without the permission of the Board of Revenue. The proviso is not limited in its application to variation of such method in the course of a year.

[32] The next contention is that in considering the question whether or not to grant the permission under the proviso to s. 6 (1), the Board of Revenue acts judicially. I am unable to agree with this. The Board acts in its executive capacity. The usual procedure of judicial authorities is not prescribed for the Board when dealing with such a matter.

[33] The third point urged is that the Board did not apply its mind in considering the application of the petitioners in the two cases. It acted mechanically and its order was conveyed in cyclostyled form. In this connection, reliance is placed upon the fact that Sri B. V. Bhadkamkar, the senior member of the Board of Revenue, merely signed below the office note, writing nothing to indicate his own mind. I see no force in this argument. It is a well-known convention and a well-recognized practice in Government offices that where an officer agrees with an office note, he merely initials and that is enough to indicate his assent to the office suggestion. The whole file including the applications of the petitioners and not only the office note was put up before Sri Bhadkamkar. It must be presumed that on a consideration of *all this material*, he assented to the office suggestion to reject the two applications. It is not unusual to convey orders in printed or cyclostyled forms, specially when the order relates to a matter which frequently comes up before an authority. This saves time and work in the office. From the fact that the disputed order is on a cyclostyled form, it does not follow necessarily that the mind was not applied in passing that order, specially when in the counter-affidavit it is stated that Sri Bhadkamkar gave full consideration to the merits of the case.

[34] Fourthly, it is argued that the Board of Revenue did not act bona fide inasmuch as it took into consideration the effect of the change upon the revenues of the State and did not consider the point of view of the applicants. As already stated, the petitioners' application for the change of method of computation was before the senior member of the Board of Revenue and it must be taken that he considered their view point. If the Board of Revenue took into consideration the effect of the change of option upon the revenues of the State it cannot be said that it was an irrelevant factor. As the very name of the authority indicates, the Board of Revenue in its administrative capacity has to take into consideration the effect of the permission it may grant under the proviso of s. 6 (1) upon the revenues of the State. The object of the Act is to raise revenues for the State by imposing a tax on agricultural income. If the Board acted in the above manner it acted

within the spirit of the Act. The above factor was not foreign to the matter before the Board. Apart from the authorities referred to by my learned brother in his judgment, Sri Gopal Swarup Pathak relied also upon *Mahadeo Prasad* v. *The Government United Provinces*, 1948 ALL. L. J. 543, in which it was held that where wide discretion is given to a statutory authority it must be exercised bona fide and reasonably and within the compass of the Act. The Board in the present case did not contravene these principles, nor can it be said that it acted arbitrarily or capriciously. It took the decision after due considerations of the facts.

[35] The contention that the proviso to s. 6 (1) infringes the equality clause contained in Art. 14 of the Constitution has no force. To accept this argument would mean that no discretion can be allowed to an authority. Nor do I see any force in the contention that Art. 19 (1) (f) which provides that all citizens shall have the right to acquire, hold and dispose of property has been violated in the present case. The tax has been imposed according to law and the proviso to s. 6 (1) is a proviso for the purpose of the collection of the tax. It is not a novel proviso. Provisions like this occur in other statutes imposing tax.

[36] For the reasons given above, I would also dismiss the two applications.

A/V.B.B. *Applications dismissed.*

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MALIK C. J. AND V. BHARGAVA J.

R. B. Seth Multanimal and Sons—Applicant v. *Commissioner of Income-tax, U. P. and Ajmer-Merwara, Lucknow—Respondent.*

Misc. Case No. 199 of 1948, D/- 27-8-1952.

Excess Profits Tax Act (1940), S. 2 (10), (19), Sch. 1, R. 7 (1), 2 (a) — Directors' remuneration — (Companies Act (1913), S. 2 (1) (9)).

In September 1940 a private limited company was formed. Raizada Seth G. M. Modi was under Art. 61 appointed Governing Director subject to the control and supervision of the Board of Directors. Article 61 provided that he was to be the Governing Director for his lifetime and he was also given the right to nominate, assign or appoint a successor or appoint his administrator or executor to be the Governing Director of the company in his place. As Governing Director of the company he was paid certain remuneration. Seth G. M. Modi owned only 10 per cent. shares in the company. In Art. 62 of the Articles of Association the various functions to be performed by the Governing Director, without prejudice to the general powers conferred on him by Art. 61, were enumerated which included the power to appoint a manager. *Held* that Seth G. M. Modi was entrusted, under Art. 62 of the Articles of Association, with certain functions by virtue of his having been appointed Governing Director and it was never the intention under that Article to appoint him as a manager under a contract of service with the company. He did not occupy two distinct and separate offices, one of the manager and the other of director. The remuneration payable to him under Art. 61 was payable in his capacity as a Governing Director irrespective of the fact whether he also discharged the functions of the manager under the Companies Act or entrusted such function to any other person appointed by him. The remuneration granted to R. B. Seth G. M. Modi was director's remuneration with in the meaning of the term as used in Sch. 1, R. 7 (1), Excess Profits Tax Act read with cl. 2 (a) of the same rule: (1947) 1 All E. R. 275, *Disting.*; (1883) 23 Ch. D. 654, *Rel. on.* [Paras 6, 7]

Anno. Companies Act, S. 2 (1) (9), N. 1.

G. S. Pathak — for Applicant ; J. Swarup —for Respondent.

REFERENCES : Courtwar/Chronological/ Paras
(1947) 1 All E. R. 275 : (63 T. L. R. 120). 5
(1883) 23 Ch. D. 654 : (52 L. J. Ch. 689). 6

Malik C. J.—This is a reference under s. 21, Excess Profits Tax Act read with s. 66 (1), Income-tax Act. The question referred to this Court is as follows :

"Whether in the circumstances of the case, the remuneration granted to R. B. Seth G. M. Modi is directors' remuneration within the meaning of the term as used in Sch. 1, R. 7 (1), Excess Profits Tax Act read with cl. (2) (a) of the same rule?"

There was a Hindu undivided family firm known as R. B. Multanimul and Sons which till March 1940 worked as Managing Agents of the Modi Sugar Works Ltd. There was a disruption in the family and the Hindu undivided family firm was succeeded by another firm of the same name which carried on business up to september 1940. In september 1940, a private limited company was formed which took over as a going concern the business of R. B. Multanimul and Sons and thus became the Managing Agents of the Modi Sugar Works Ltd. From the Articles of Association of the Company it appears that the Board of Directors could not exceed 7 including the Governing Director and could not be less than 2.

The names of the first set of 5 Directors were given in the Articles of Association and they were R. B. Seth Multanimul, Raizada Seth G. M. Modi, Seth Harmukhrai, Seth Harnam Singh and Seth Benarsidas. Raizada Seth G. M. Modi was under Art. 61 appointed Governing Director subject to the control and supervision of the Board of Directors. His functions were defined in Art. 62, Art. 61 provides that he was to be the Governing Director for his lifetime and he was also given the right to nominate, assign or appoint a successor or appoint his administrator or executor to be the Governing Director of the Company in his place. As Governing Director of the company he was paid certain remuneration and the Appellate Tribunal held that the amount paid to Raizada G. M. Modi was paid to him as Director of the company and the amount was, therefore, not a deductable expenditure from the total profits calculated for purposes of payment of the Excess Profits Tax.

[2] 'Director' is defined under s. 2 (10), Excess Profits Tax Act as including any person occupying the position of a director by whatever name called and also includes any person who is a manager of the company or is concerned in the management of the business, is remunerated out of the funds of the business and is the beneficial owner of not less than 20 per cent. of the ordinary share capital of the company. Seth G. M. Modi owns only 10 per cent. shares in the company and not 20 per cent. It was, therefore, urged that Seth G. M.

Modi was performing two separate functions, one of a director and the other of a manager, and as manager, by reason of the fact that he was not the beneficial owner of 20 per cent. of ordinary share capital of the company, he could not be called a director.

[3] On behalf of the Department it was urged that it was not their case that Seth G. M. Modi was manager of the company and as he held beneficial ownership in not less than 20 per cent. ordinary share capital of the company he was deemed to be a director, but that the whole amount paid to him was paid to him as a director and that the case came under sch. 1, R. 7 (2), Excess Profits Tax Act.

[4] 'Profits' are defined in S. 2, sub-s. (19) as meaning profits as determined in accordance with sch. 1 ; and R. 7 (1) sch. 1, provides that in computing the profits or standard profits no deduction can be made in respect of director's remuneration. Sub-rule (2) of R. 7 of the same Schedule provides that :

"The expression "director's remuneration" does not include :

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of excess profits tax."

The question, therefore, is whether the remuneration, which the company wanted to deduct and the Appellate Tribunal has held that it was not entitled to deduct, was paid to Seth G. M. Modi as director, who was required to devote substantially the whole of his time to the service of the company, it being admitted that he owned more than 5 per cent. ordinary shares, or it was paid to him as manager.

[5] Learned counsel for the assessee has urged that Seth G. M. Modi was performing dual functions of a director and a manager and the remuneration paid to him as manager cannot be said to be paid to him as director for performing any managerial work entrusted to the director. The whole basis of the argument is that under ART. 61 of the Articles of association Seth G. M. Modi had to carry on the work assigned to him subject to the control and supervision of the Board of Directors and it is urged that Seth G. M. Modi, therefore, became a manager of the company. Reliance is placed on the definition of the word 'manager', in the Indian Companies Act. The word 'manager' has been defined in S. 2 (9) of that Act "as a person who, subject to the control and direction of the directors, has the management of the whole affairs of a company". The argument is that, if he was to carry on the work assigned to him as a director and not as a manager, then he should not be subject to the control and supervision of the other directors and since he was to work subject to the control and supervision of other directors he must be deemed to be performing the functions of a manager in addition to his duties as director and ceased to be a director simpliciter.

Learned counsel has urged that the word 'manager' is not defined in the English Statute and, therefore, English cases are not likely to be of much assistance. Reference, however, was made to the case *Henry Richardson, Ltd.* v. *Inland Revenue Commissioners*, (1947) 1 ALL E. R. 275. In that case *C* was the secretary of the company and later became a director. As secretary she was drawing a salary and as director she became entitled to receive the fees payable to other directors together with certain bonuses. The question for decision was whether the whole amount paid to her as salary as secretary as well as the fees and bonuses paid to her as director became remuneration paid to her as a director. On behalf of the Inland Revenue Commissioners, it was urged that having become a director of the company whatever amount she received must be deemed to be director's remuneration. It was pointed out, on the other hand, that having continued to be the secretary it might well be urged that all that she received was secretary's remuneration.

The learned Judge (Atkinson J.), however, pointed out that the question had to be decided on a consideration of the fact whether she continued to hold two offices, her duties as secretary being separate from her duties as Director and Chairman of the Board, and that whether if she ceased to be a Director, the post of Secretary would remain and her salary as Secretary would remain payable to her. The learned Judge further pointed out that Directors are of two kinds: Directors who merely attend Directors' meetings and get Directors' fees; and working Directors who give all their time to carrying on the business of the company, such as a Managing Director, and in the latter case the amount paid to the Managing Director would be remuneration paid to a Director.

[6] In the case before us it cannot be seriously urged, that Seth G. M. Modi held two distinct and separate offices, one of director and the other of manager. The definition of a manager in the Companies Act is very wide and

"includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not".

The Indian Companies Act thus contemplates managers who might be servants of the company under contract of service as also managers who might not be servants but might be carrying on the work of a manager in some other capacity such as the capacity of a director. If is only if a person is a manager under a contract of service that the remuneration paid to him can be said to be the remuneration paid to a manager simpliciter.

In case where the person happens to be in charge of some managerial work because of some other capacity occupied by him the remuneration paid to him need not necessarily be held to be remuneration paid to him in his capacity as manager.

We may take the example of a managing agent. The managing agent is also under the control and direction of the directors "except to the extent if any, otherwise provided for in the agreement" and is entitled to the management of the whole affairs of the company by virtue of an agreement with the company. If by virtue of this right a managing agent actually has the management of the whole affairs of the company, he may be doing the same work as a manager is expected to do under the Indian Companies Act, still the remuneration paid to him must be held to be managing agent's remuneration. Similarly, if a director has the management of the affairs of a company entrusted to him in his capacity as a director, the remuneration paid to him will be director's remuneration even though the work entrusted to him might be the same as is usually done by a manager. It will cease to be director's remuneration only if he happens to be doing the work not in his capacity as a director to whom some additional work has been entrusted but as a manager in the capacity of a servant under a contract of service so that he is really holding two distinct and separate offices.

In *Hutton* v. *West Cork Railway Co.*, (1883) 23 Ch. D. 654, it was pointed out by Bowen L. J. that a director is not a servant of the company and whatever amount is paid to him is paid as gratuity. In the case before us there can be no doubt that Seth G. M. Modi was entrusted, under Art. 62 of the Articles of Association, with certain functions by virtue of his having been appointed Governing Director and it was never the intention under that Article to appoint him as a manager under a contract of service with the company. He did not occupy two distinct and separate offices, one of manager and the other of director. He, as Governing Director, was entitled to continue in that office for the rest of his life and his rights were to go to his successor, administrator or executor after his death. He was further given the right to assign his rights or nominate his successor. He was to be the Chairman of the Board and was to preside at all meetings of the Board. Under Art. 68 of the Articles of Association, though all other directors had to vacate office on being requested in writing to do so by the co-directors, the Governing Director could not be so removed. In Art. 62 of the Articles of Association the various functions to be performed by the Governing Director, without prejudice to the general powers conferred on him by Art. 61, are enumerated which include the power to appoint a manager. If he chose to appoint a manager in exercise of his power as the Governing Directors, he would cease to be the manager of the company as defined under the Indian Companies Act and yet he would be entitled to the remuneration fixed for him under Art. 61 of the Articles of Association.

It cannot be seriously contended that Seth G. M. Modi could have continued to exercise the functions entrusted to him under Art. 62 as Governing Director, if he had ceased to be director of the company. It is clear that the remuneration payable to him under Art. 61 was payable in his capacity as a Governing Director irrespective of the fact whether he also discharged the functions of the manager under the Indian Companies Act or entrusted such functions to any other person appointed by him.

[7] We are, consequently, satisfied that, on the facts and circumstances of this case, the remuneration granted to R. B. Seth G. M. Modi was director's remuneration within the meaning of the term as used in Sch. I, R. 7 (1), Excess Profits Tax Act read with clause 2 (a) of the same rule.

[8] The assessee must pay the costs of the other side which we assess at Rs. 500.

B/D.H. *Answer in the affirmative.*

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BIND BASNI PRASAD AND MUKERJI JJ.

Parasram Shukul — Plaintiff-Applicant v. *Bindeshari Pandey and others — Defendants — Opposite Parties.*

Civil Revn. No. 632 of 1948, D/- 11-8-1952.

(a) Limitation Act (1908), S. 19—"Acknowledgment of liability"— Essentials — Suit for partition in mortgagee's family—Mention of mortgage in compromise deed for description of property no acknowledgment.

An acknowledgment of liability necessarily implies a conscious acknowledgment thereof. Hence in considering whether certain words amount to an acknowledgment of liability it must be seen whether at the time of writing them the writer had in his mind the question as to his liability or whether he was thinking of and referring to some other matter.

Where mortgaged property is mentioned in the deed of compromise, filed in Court in a suit for partition in the mortgagee's family, only for the purpose of description of the property, and not with the idea of acknowledging the liability of redemption, then it would not amount to an acknowledgment within the meaning of that word as used in S. 19, Limitation Act: A. I. R. 1916 All. 201, A. I. R. 1925 All. 353 and A.I.R. 1932 All. 62, *Rel. on*: 1 All. 117 (F. B.), *Disting.* [Paras 3, 6]

Anno. Lim. Act, S. 19, N. 18, 46.

(b) Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 12—Application for recovery of mortgaged property—Necessity for deposit of mortgage money — Limitation for application — Starting point (Limitation Act (1908), Art. 148).

In an application under S. 12, U. P. Agriculturists' Relief Act, 1934, it is open to a usufructuary mortgagor to ask for recovery of possession of the mortgaged property without the payment of the mortgage money if the mortgage money has been paid up from the usufruct of the property the period of limitation for such an application is sixty years from the date when the mortgage money was so satisfied and the right to recover possession accrued. [Para 10]

Where in a case it is not shown that the debt became paid up according to the provisions of the U. P. Agriculturists' Relief Act before the commencement of U. P. Debt

Redemption Act and the mortgage money was satisfied only when accounts were taken in accordance with S. 9 of the latter Act, 1st January 1941 being the earliest date at which the latter Act was applicable, that date must be taken to be the date on which the right to recover possession without payment of the mortgage money accrued to the mortgagor. That being so the period of limitation under S. 148, Limitation Act must be taken to have begun to run from that date. [Para 7]

Anno. Lim. Act, Art. 148, N. 18.

(c) Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 12—Scope—(T. P. Act (1882), S. 83.)

Section 12 embraces within its scope the nature of suits both under Ss. 60 and 62, Transfer of Property Act. A perusal of that section and the succeeding ones in Chap. III shows that S. 12 is an elaboration of S. 83, Transfer of Property Act which section is wide enough to cover both the types of mortgages — simple and usufructuary. [Para 8]

Anno. T. P. Act, S. 83, N. 1.

(d) T. P. Act (1882), Ss. 60 and 62—Scope.

Section 60 is a general provision giving the right of redemption to mortgagors in general. Section 62 deals specifically with usufructuary mortgages. [Para 8]

Anno. T. P. Act, S. 60, N 1; S. 62, N 2.

K. L. Misra and C. B. Misra — for Applicant; R. R. Prasad—for Respondents.

REFERENCES : Courtwar/Chronological/	Paras.
('75-77) 1 All 117 (F B)	5
('16) A I R 1916 All 201 : (38 All 540)	4
('25) AIR 1925 All 353 : (85 Ind Cas 584)	4
('32) AIR 1932 All 62 : (136 Ind Cas 624)	4
('38) 1938 All L J 1115 : (AIR 1939 All 88)	9
('46) 1946 All L J 175 : (AIR 1946 All 400)	7

Bind Basni Prasad J.—This is a mortgagor's petition in revision from the judgment, dated 15th May 1948, passed by the learned District Judge of Gorakhpur upholding the judgment dated 15th April 1946, given by the learned Sub-divisional Officer of Deoria. It arises out of proceedings under S. 12, U. P. Agriculturists' Relief Act. The relevant facts are as follows :

On Jeth Sudi 15, 1881 A. D. a usufructuary mortgage in respect of an agricultural plot was made by the applicant's ancestors to the opposite parties' predecessors. On 1st March 1944, that is to say, more than sixty years after the date of the mortgage, the application for redemption was filed. The applicant contended that in the year 1911, there was an acknowledgment of the mortgage and so the case was saved from the operation of the bar of limitation. It was further contended that according to the provisions of S. 9, U. P. Debt Redemption Act, 1940, there was a fresh start of limitation when that Act came into force, viz., on 1st January 1941. The trial Court held that the case was barred by limitation and learned District Judge upheld that order. The mortgagor, therefore, comes in revision.

[2] The first question is whether there was an acknowledgment within the meaning of S. 19, Limitation Act. It appears that in 1911 there was a partition suit among the members of the mortgagee family, being suit NO. 403 of 1911 in the Court of the Munsif of Deoria. In the course of that partition suit a compromise was arrived at and *inter alia* there was the following condition in it:

"Whatever land is in possession of the plaintiffs under the mortgage deed dated Jeth Sudi 15, 1288 Fasli executed by Gur Dutt, father of Jhinguri and Dubri, mortgagors, shall continue to remain in possession of the plaintiffs."

The contention on behalf of the petitioner is that this amounts to an acknowledgment under S. 19, Limitation Act.

That section provides:

"Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

[3] Explanation 1 provides, *inter alia*, that it is not necessary that the acknowledgment should be addressed to the person who seeks to take benefit of it under S. 19. Nevertheless, an acknowledgment of liability necessarily implies a conscious acknowledgment of liability. Hence in considering whether certain words amount to an acknowledgment of liability it must be seen whether at the time of writing them the writer had in his mind the question as to his liability or whether he was thinking of and referring to some other matter. If the mention of the mortgaged property in the deed of compromise was only for the purpose of description of the property, as we think it was, and not with the idea of acknowledging the liability of redemption, then in our view it would not amount to an acknowledgment within the meaning of that word as used in S. 19, Limitation Act.

[4] There are some decided cases bearing on this point: In *Khiali Ram* v. *Taik Ram*, A. I. R. 1916 ALL. 201, a Dakhalnama contained a description of the property purchased by the defendants' predecessor and his signature thereon and in that description there was a reference to the mortgage. It was held that the Dakhalnama did not amount to an acknowledgment of liability within the meaning of S. 19, Limitation Act and the mention of the mortgage was merely for the purpose of description of the property. In *Mt. Sham Devi* v. *Bhagwant Dayal*, A. I. R. 1925 ALL. 353, there was a sale deed in which the property purchased was described as subject to a mortgage and only the mortgagee rights were sold. It was held that all that the vendor admitted was that he came into possession of the property on the foot of a mortgage. No question arose in his mind as to whether the mortgage subsisted or had become time barred. The statement in the sale deed by itself did not signify to the mind of the person making it or to anybody else that the maker of the statement thought or believed that he was liable to be redeemed at the date of making the statement. Such statement, therefore, was held not to be an acknowledgment within S. 19. In *Nait Ram* v. *Roshan Lal*, A. I. R. 1932 ALL. 62,

there was an application for sale of a mortgaged property under O. 21, R. 66, Civil P. C. and in support of it there was an affidavit to the effect that upon an examination of the registration office the applicant found that there was a mortgage deed of the property of which the sale proclamation was to issue. It was held that this statement did not amount to an acknowledgment of liability affixed to the property or personally to the applicant within the meaning of S. 19.

[5] Learned counsel for the applicant has invited our attention to the Full Bench case reported in *Daia Chand* v. *Sarfraz*, 1 ALL. 117 (F.B.). That was a case in which the defendants had attested as correct the record of rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor. It was held by the majority of the Judges that there was an acknowledgment of the mortgagor's right to redeem within the meaning of Art. 148, sch. II of Act 9 of 1871. The facts of that case are distinguishable from those of the present one. At the settlement the nature of rights is expressly brought into issue. Moreover the language of S. 20 of Act 9 of 1871 was quite different. We are of opinion that the principle laid down in this Full Bench case is not applicable to the present case.

[6] For the reasons given above and on the authorities cited above, we hold that the recital in the deed of compromise of 1911 does not amount to an acknowledgment within the meaning of S. 19, Limitation Act of 1908.

[7] The second point argued is that with the commencement of the U. P. Debt Redemption Act, 1940, a fresh start of limitation was given from 1-1-1941, when the Act came into force. Reliance is placed upon *Ram Prasad* v. *Bishambhar Singh*, 1946 ALL. L. J. 175. The view taken in that case was that Art. 148, Limitation Act, 1908, provides two types of suits: (1) for redemption of a mortgage and (2) for the recovery of possession from a mortgagee of immovable property. For the redemption the time from which the period of limitation begins to run is when the right to redeem accrues and for the recovery of possession the time begins to run from the date when the right to recover possession accrues.

In the application under S. 12, Agriculturists' Relief Act the relief claimed was for the recovery of possession only. In express terms there was no claim for the redemption of the mortgage. In Para. 4 of the plaint it was alleged that the entire mortgage money had been paid up from the usufruct of the property. The right to recover possession of the property in the present case, therefore, accrued when the entire mortgage money became paid up from the usufruct of the property. Prior to the U. P. Debt Redemption Act according to the law, as it then stood, the mortgage money was not satisfied. The term in the mortgage deed was that the usufruct of the property will go towards the payment of the interest. According to this term the usufruct could not be applied towards the repayment of principal. When the U. P. Agriculturists' Relief Act, 1934 was passed statutory rates of interest were provided and they were to prevail against the contractual rates, but those statutory rates according to S. 30 of that Act were to be applied only from 1-1-1930. Prior to that date the provisions of the Usurious Loans Act, 1918, were applicable; but prior to 1918 the contractual rates were to prevail. It is not shown to us that according to the provisions of the U. P. Agriculturists' Relief Act the mortgage money in the present case became paid up before the commencement of the U. P. Debt Redemption Act.

It was in S. 9, U. P. Debt Redemption Act that provision was made that interest on a secured debt shall not exceed 4½ per cent. per annum simple and in the determination of the amount due under a loan not only the sums actually paid by or on behalf of the debtor but also the net profits realised by the mortgagee or which, with the exercise of ordinary diligence, might have been realised by him shall be taken into consideration. The position in the present case is that the mortgage money was satisfied only when the accounts were taken in accordance with S. 9, U. P. Debt Redemption Act, 1940. The earliest date on which this section could be applicable was 1-1-1941. Hence it must be taken that on that date the right accrued to the mortgagors in the present case to recover possession of the mortgaged property without the payment of the mortgage money. That being so, limitation for a suit for the recovery of possession under Art. 148 began to run from 1-1-1941. In this view of the case the present suit is within time.

[8] It has been argued that the present case is not for recovery of possession as contemplated by S. 62, T. P. Act, 1882, but is a case pure and simple for the redemption of a mortgage under S. 60 of that Act. This is a suit neither under S. 60 nor S. 62, T. P. Act. It is an application under S. 12, U. P. Agriculturists' Relief Act, 1934. A close examination of this section leads us to the conclusion that it embraces within its scope the nature of suits both under ss. 60 and 62, T. P. Act. It starts with the opening words "notwithstanding anything contained in S. 83, T. P. Act, 1882 or any contract to the contrary." A perusal of that section and the succeeding ones in chap. III shows that S. 12 is an elaboration of S. 83, T. P. Act. Section 83 is wide enough to cover both the types of mortgages—simple and usufructuary, for the last paragraph of that section provides for the delivery of possession to the mortgagee.

Section 60 is a general section declaring the right of redemption of the mortgagors. It contemplates also usufructuary mortgages for cl. (b) of that section provides that a mortgagor may

require the mortgagee in possession to deliver possession of the mortgaged property to him at any time after the principal money has become due and after the mortgage money has been paid or tendered. To a certain extent ss. 60 and 62 overlap with each other. Compare cl. (b) of s. 62 with s. 60 of the Act. But to a certain extent s. 62 makes provision for a contingency for which no provision exists in s. 60. Section 60 contemplates redemption after "payment or tender" of the mortgage money. It does not contemplate a case where the mortgage money has been paid off from the usufruct of the mortgage property. Clause (1) of s. 62 makes provision for this, for it provides that a mortgagor may bring a suit for recovery of possession of the mortgaged property where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property and the mortgage money has been so paid up. Section 60 is a general provision giving the right of redemption to mortgagors in general. Section 62 deals specifically with usufructuary mortgages.

[9] It may be argued that from s. 13, U. P. Agriculturists' Relief Act it is apparent that the deposit of the mortgage money is essential for an application under s. 12. In *Iqan Husain* v. *Babu Ram*, 1938 ALL. L. J. 1115, it was held that the deposit of money is not essential for an application under s. 12 where it is alleged that the mortgage money had been paid up from the rents and profits of the property.

[10] The conclusion at which we reach is that in an application under s. 12, U. P. Agriculturists' Relief Act, 1934, it is open to a usufructuary mortgagor to ask for the recovery of possession of the mortgaged property without the payment of the mortgage money if the mortgage money has been paid up from the usufruct of the property and the period of limitation for such an application is sixty years from the date when the mortgage money was so satisfied and the right to recover possession accrued. This is our interpretation of Art. 148, Limitation Act.

[11] The result is that the revision succeeds and it is hereby allowed. Parties will bear their own costs throughout. Possession will be delivered by the mortgagee in Jeth, 1953.

B/M.K.S. *Revision allowed.*

A. I. R. 1953 Allahabad 36

(LUCKNOW BENCH)

BEG J.

Mahadeo and others, Applicants v. *Satya Narain, Complainant — Opposite Party.*

Criminal Revn. No. 257 of 1951, D/- 30-7-1952.

Criminal P. C. (1898), Ss. 209, 253—Sessions case — Powers of Magistrate — Magistrate can sift evidence and discharge accused under S. 209.

Even if a Magistrate proceeds under Chap. 18, Criminal P. C., he has the power to discharge the accused under S. 209, Criminal P. C., though the power under S. 209 is not so wide as that under S. 253, Criminal P. C. It cannot be said that while acting under S. 209, Criminal P. C., the Court of inquiry is to become a mere automaton and cannot sift the evidence and believe or disbelieve the witnesses: A. I. R. 1949 Oudh 68, *Rel. on;* 26 All. 564, *Disting.* (Para 4)

Thus where in a complaint which included an offence under S. 395, Penal Code, the Magistrate found that the evidence was untrustworthy and discharged the accused under S. 253, Criminal P. C. and the order was set aside in appeal on the ground that the Magistrate should have proceeded under Chap. 18, Criminal P. C. :

Held that though the order setting aside the order of discharge under S. 253 was technically correct, the Magistrate had power to discharge the accused under S. 209. (The High Court treated the order as one passed under S. 209, Criminal P. C. and held that it was justified by the facts of the case.) (Paras 4, 5)

Anno. Criminal P. C., S. 209 N. 2.

J. S. Trivedi holding brief of N. Banerji — for Applicants; S. S. Chaudhri — for Opposite Party.

REFERENCES : Courtwar/Chronological/ Paras

('04) 26 All 564 : (1 Cri L J 510) 6

('48) 1948 Oudh App 61:(AIR 1949 Oudh 68 : 50 Cri L J 486) 4

Order. — This is a revision application against the order of the learned temporary (Additional) Sessions Judge of Gonda setting aside the order of discharge passed by Sri Gopal Lal Shah, Special Magistrate, Gonda. The case arose out of a complaint made by one Satya Narain against five accused persons, namely Mahadeo, Lalta, Chhedi, Mata Prasad and Pearey for having committed offences under ss. 147, 323, 452 and 395, Penal Code. It would appear that Satya Narain complainant had a shop in village Paraspur. The landlord of the building was Mahadeo accused and the rent of the said shop was Rs. 2-8-0 per mensem. The complainant was carrying on the profession of a goldsmith in that shop and kept some gold and silver also in the shop in connection with his work. According to the allegations of the complainant, on 17-10-1950, a person alleging himself to be a peon of the civil Court came to the shop and told him that he had come to eject him and to deliver possession of the shop to the accused. He was accompanied by five persons. These five persons were arrayed as accused in the complaint. It was alleged that these persons beat him with fists and kicks. They dislodged the safe from the masonry and placed it on the road. Twenty-two bhars of gold, 1100 bhars of silver, a chair, a dhoti, an account-book, some planks, some utensils and a chadar were left inside and locked therein by the complainant's party. A sub-inspector of police also happened to arrive on the scene shortly after. The accused were present on the spot at the time. The complainant had no knowledge of any civil Court decree of ejectment against him and according to his allegations even if any such decree was passed, it must have been obtained ex parte and by practice of fraud by the accused. On the above allegations he filed the aforesaid complaint under ss. 323, 147, 452 and 395, Penal Code.

[2] On behalf of the complainant, six witnesses were examined. The learned Magistrate who recorded the evidence was not convinced that the aforesaid witnesses were trustworthy. He accordingly passed an order on 3-4-1951, discharging the accused under S. 253, Criminal P. C.

[3] The complainant Satya Narain moved an application before the learned temporary (Additional) Sessions Judge of Gonda, who set aside the above-mentioned order of discharge and ordered further enquiry into the complaint. The ground on which the order was set aside by the lower Court was that the complainant had also mentioned S. 395, Penal Code as one of the offences which was committed by the accused, and an offence under S. 395, Penal Code was exclusively triable by the Sessions Court. The Magistrate should therefore have proceeded under chap. XVIII, Criminal P. C. and not passed an order of discharge under S. 253, Criminal P. C.

[4] I have heard the learned counsel for the parties at length and am of opinion that this revision must be allowed. The criticism of the learned temporary (Additional) Sessions Judge of Gonda that the Magistrate should not have treated the case as one under S. 253, Criminal P. C. is technically correct, but even if the Magistrate had proceeded under chap. XVIII, Criminal P. C., he would still have the power to discharge the accused under S. 209, Criminal P. C. It is true that the power to discharge the accused under S. 209, Criminal P. C. is not so wide as the power to discharge the accused under S. 253, Criminal P. C. Still it cannot be said that while acting under S. 209, Criminal P. C., the Court of enquiry is to become a mere automaton and cannot sift the evidence and believe or disbelieve witnesses. The learned counsel who prepared the case with commendable thoroughness has invited my attention to *Husaini* v. *Rex*, 1948 oudh APP. 61 in which it was held by a Judge of the late Chief Court of Avadh that a Magistrate conducting an enquiry under chap. XVIII does not act merely as a post office. I have, therefore, examined the order of the Magistrate, as if the order in question had been passed under S. 209, Criminal P. C., and am of opinion that the grounds given by him for discarding the evidence of the witnesses produced in the case are sufficient to justify an order of discharge even under that section.

[5] (His Lordship discussed the facts and the evidence in the case and proceeded as follows:) The facts of the case are so patent and evident that they would even have warranted quashing of the proceedings at an initial stage of the case. To my mind, it would be an abuse of the process of the Court to allow these proceedings to go on further . . . . . apart from the harassment that it would cause to the accused. The entire proceedings, as I have already observed above, seem to be *mala fide*.

[6] The learned counsel appearing for the opposite party places strong reliance on *Fattu* v. *Fattu*, 26 ALL. 564. The facts of that case were quite different. In that case the Magistrate after a minute scrutiny of evidence held that :

"Both sides of the case are in a suspicious condition, and there are doubts grave and unusual. Under these circumstances, the accused are, in my opinion, entitled to the benefit of the doubt."

In this particular case, as the above discussion would indicate there is no doubt regarding the innocence of the accused. Moreover, even in the said case Aikman J. while dealing with the function of a Magistrate acting under chap. XVIII observed as follows :

"As to the functions of a Magistrate who is holding an inquiry under Chap. XVIII, Criminal P. C. into cases triable by the Court of Session, or by the High Court, I am of opinion that he is empowered not only to consider whether the evidence for the prosecution, if true, furnishes sufficient grounds for committing the accused for trial, but that he can go further and weigh that evidence that is, that he can consider whether it is true. . . . . "

The Magistrate has weighed the evidence in this case and has rightly branded it as untrustworthy. I see no reason to take a different view. The order of discharge must, therefore, be upheld.

[7] Accordingly I allow the revision, set aside the order of the learned temporary (Additional) Sessions Judge of Gonda and confirm the order of discharge passed by the trial Court.

B/D.R.R. *Revision allowed.*

A. I. R. 1953 Allahabad 37

AGARWALA J.

Dharam Sarup—*Appellant* v. *The State.*

Criminal Appeal No. 972 of 1950, D/- 8-8-1952.

(a) Prevention of Corruption Act (1947), S. 6—Sanction under—Form of — Facts to be placed before sanctioning authority—Test of sufficiency.

No special form is prescribed for according sanction under S. 6, Prevention of Corruption Act. The prosecution, however, must show that the sanctioning authority had before it the relevant facts on the basis of which prosecution was desired. [Para 7]

The satisfaction of the sanctioning authority is entirely subjective. He is the judge of the materials that should be placed before him for enabling him to accord the sanction. If the facts placed before him are not sufficient to enable him to exercise his discretion properly, he will ask for more particulars but it is for him and him alone to determine this matter. The Courts are concerned only with one matter — to find whether sanction for the particular prosecution was in fact accorded by the proper authority. If the record shows that the sanction was in fact accorded and the sanction was in respect of the particular transaction which is the subject-matter of the charge against the accused, the requirements of the law are fully satisfied. No hard and fast rule can be laid down as to what facts are necessary to be brought to the notice of the sanctioning authority : *Case law referred.* [Para 13]

Held, that the sanction accorded in the case could not be challenged on the ground that necessary facts were not brought to the notice of the sanctioning authority. [Para 13]

(b) Prevention of Corruption Act (1947), S. 6—Discretion to sanction prosecution—Nature of.

The discretion to sanction prosecution under S. 6 is vested solely in the sanctioning authority and is absolute. Its exercise cannot be questioned in a Court of law. [Para 13]

(c) Prevention of Corruption Act (1947), S. 6—Sanction to prosecute for offence under S. 161, Penal Code —Prosecution for offence under S. 5 (1) — Validity — Analogy of S. 238, Criminal P. C., not applicable — (Criminal P. C. (1898), S. 238).

Where sanction is accorded for prosecution of an offence under S. 161, Penal Code, it does not amount to a sanction to prosecute for a graver offence defined in S. 5 (1) and made punishable under S. 5 (2). Even where the facts alleged fall both under S. 161, Penal Code, and S. 5 (1) (d), Prevention of Corruption Act, the sanction granted for prosecution under S. 161 cannot be availed of by the prosecution for the prosecution of the accused under S. 5 (2) of the Act. [Para 15]

Further there being no sanction for the prosecution of the accused under S. 5 (2), Prevention of Corruption Act, he cannot be convicted under S. 161, Penal Code, on the analogy of S. 238, Criminal P. C. as that section assumes that the trial of the accused for the major offence was valid in law. But when the trial itself is vitiated on account of certain extraneous facts, like the absence of a previous sanction, the authority of the Court to alter the conviction does not come into play, because the whole trial is vitiated and there is nothing before the Court upon which it can exercise the discretion vested in it under S. 238. [Para 17]

Anno. Cr. P. C., S. 238, N. 1.

Vishwa Mitra and Harish Chandra Sharma—for Appellant; J. R. Bhatt, A. G. A.—for the State.

REFERENCES: Courtwar/Chronological/ Paras

('48) 1948 All L J 170 : (A I R 1948 P C 82 : 49 Cri L J 261). 8, 12

('50) 1950 All L J 383 : (A I R 1950 All 494: 51 Cri L J 1323). 9

('50) A I R 1950 All 507 : (51 Cri L J 1363). 10

('50) 1950 All L J 533. 11

('50) Cri Revn No. 192 of 1950, D/- 29-11-1950 (All). 12

Judgment. — This is an appeal by Brahm Sarup Patwari against his conviction under s. 5 (2), Prevention of Corruption Act, 1947, and sentence of two years' R. I.

[2] The appellant was a Patwari of village Najabatpura Pargana Daranagar, district Baijnor. In the aforesaid village there is a hamlet, Ganj, where a grove formerly owned by Swami Krishna Nand is situated. In January 1949 Swami Krishna Nand transferred a half-share in the grove to Yati Vishokha Nand complainant by means of a deed of gift, and in respect of the other half, he made a bequest in favour of the donee. Subsequently, in August 1949 Swami Krishna Nand executed a deed of gift in respect of the entire grove in favour of Nagamagum Vidyalaya, Ganj. The person in charge of the Vidyalaya, Swami Kawela Nand, made two applications for mutation in respect of the grove. Yati Vishokha Nand did not object to the mutation in respect of that half about which there was only a bequest in his favour, but he objected to the mutation in respect of the other half which he had obtained under the deed of gift. This objection was made on 13-8-1949 and 20-8-1949 was fixed for hearing.

[3] The prosecution case was that two days earlier than the date fixed in the case, the appellant Brahma Sarup Patwari met the complainant and informed him that Swami Kawela Nand was offering him Rs. 1,500 to obtain from him a cancellation of Yati Vishokha Nand's name from the revenue papers and that if the complainant paid him more he would not cancel his name. The complainant said that he would think over the matter. The appellant told the complainant that he would meet him at Ganj in the evening the next day. The parties, however, could not meet in the evening of 19th August. The appellant then went to the complainant's place on the 20th of August in the morning and it was settled that they would again meet in the Tahsil compound the same day. In the Tahsil compound, the appellant told the complainant, that there were a number of witnesses against him and that unless the complainant paid Rs. 100 at least that very day he would file his extract from the khewat against him. The complainant went to his counsel for consultation.

On the way the complainant met one Kr. Aditya Vir Singh, his friend, and told him about the Patwari's demand. Kr. Aditya Vir Singh took the complainant to the S. P. Bijnor who took them to the S. D. M. Bijnor, Sri Raghunandan Sarup Bhatnagar. The latter signed ten currency notes of Rs. 10 each in the presence of the S. P. and told the complainant to offer the same to the appellant. The complainant took the ten currency notes to the Tahsil compound and called the appellant outside the building and offered the ten currency notes to him. The appellant did not accept the currency notes there, and suggested that they should be offered to him at his house. The complainant and Kr. Aditya Vir Singh went to the Kotwali and informed the S. P. and the S. D. M. Bijnor of what had happened.

Then the complainant and Kr. Aditya Vir Singh went to the house of the appellant and after having ascertained that the appellant was already inside the house, Kr. Aditya Vir Singh returned to take the S. P. and the S. D. M. to that place. The S. P. and the S. D. M. came to the residence of the Patwari, but remained outside at a short distance. The complainant went inside the house and offered the currency notes to the appellant in a room whose outer door was open. The appellant took the currency notes and placed them inside one of his settlement volumes kept in an open almirah. Kr. Aditya Vir Singh was also standing outside the door with his cycle and noticed the complainant offering the currency notes to the appellant. As soon as the currency notes had been delivered, the S. P. and the S. D. M. came inside the house and the S. D. M. searched the person of the appellant but the currency notes could not be found. The complainant pointed towards the almirah. On search of the papers in the almirah, the ten currency notes which had already been signed by the S. D. M. were recovered from a settlement volume. The

currency notes were taken into possession and the Patwari was arrested.

[4] The S. D. M. lodged the first information report at the Kotwali, Bijnor, the same day. After investigation a charge sheet was prepared by the police and was sent to the District Magistrate for according sanction to prosecute the appellant. In this charge sheet the name of the complainant was mentioned as Swami Yatiji obviously referring to Yati Vishokha Nand. The appellant's name was mentioned as the accused. In col. 7 in which the offence, the name of the accused, section under which the prosecution is intended, and a short statement of the relevant facts are required to be mentioned, it was stated as follows :

"'Shrimanji Yatiji complained to the S. P. about Brahma Sarup Patwari having taken bribe from him on 20th August 1949. The complaint was investigated and an offence under S. 161, Penal Code was established. The case is being sent to Court.' On the reverse of the charge sheet the names of the prosecution witnesses were mentioned. There was a note by the special prosecuting officer, 'submitted to District Magistrate for favour of necessary sanction for prosecution'."

The District Magistrate ordered "Prosecute. Judicial Officer, Bijnor will please try this case." Although in the charge sheet the offence mentioned was under s. 161, Penal Code, the Judicial Magistrate framed a charge under s. 5 (2), Prevention of Corruption Act, 1947. The charge was in these words :

"That you on 20th August 1949 at the house of Sri Madho Prasad in Mohalla Sotian Bijnor obtained by corrupt means illegal gratification of ten currency notes Ex. 1 valued at Rs. 100 from Sri Yati Vishokha Nand by abusing your position as a public servant as a patwari of village Nijabatpura, Pargana Daranagar, District Bijnor, and thereby committed an offence punishable under S. 5 cl. (2), Prevention of Corruption Act, 1947, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge."

[5] Neither before the Sessions Judge nor before the Judicial Magistrate was any objection on the ground of defect in the sanction taken. The Sessions Judge found the accused guilty of the offence with which he was charged and sentenced him to rigorous imprisonment for two years.

[6] In this appeal the first point urged before me is that there was no valid sanction for the prosecution of the appellant under S. 5 (2), Prevention of Corruption Act, 1947, and that therefore the proceedings should be quashed. It is urged that the sanction was not a valid sanction for two reasons, first, that it did not disclose the facts which could have enabled the District Magistrate to grant the sanction in a proper manner and, secondly, that the sanction, if any, was in respect of the prosecution of the appellant for an offence under S. 161, Penal Code and not for an offence under s. 5 (2), Prevention of Corruption Act.

[7] In so far as the first objection is concerned, I do not think it can be sustained. No special form is prescribed for according sanction under s. 6, Prevention of Corruption Act. It has, however, been held that the prosecution must show that the sanctioning authority had before it the relevant facts on the basis of which prosecution was desired.

[8] In *Gokulchand Dwarkadas* v. *The King*, 1948 ALL. L. J. 170, the Privy Council had occasion to consider this matter. Their Lordships held that the sanction to prosecute was an important matter; that it constituted a condition precedent to the institution of the prosecution and that where there was nothing on the face of the sanction or other extraneous evidence to indicate that the sanctioning authority knew the facts alleged to constitute the offence, the sanction was invalid. In the case before their Lordships the sanctioning authority had before it the name of the accused and the clause under which he was sought to be prosecuted. It had no other facts before it when it granted the sanction to prosecute. Their Lordships held that the sanction was invalid. This case does not, in my opinion, help the appellant because in the present case something more than merely the name of the accused and the section of the Penal Code under which he was to be prosecuted, was brought to the notice of the District Magistrate.

[9] In *State* v. *Karim Bux*, 1950 ALL. L. J. 383, I had a case before me in which there was no specific order sanctioning the prosecution of the applicant. The charge sheet was sent to the S. P. (who happened to be also the officer who could have accorded the necessary sanction for the prosecution of the accused). The S. P. merely as an officer responsible for the prosecution in the ordinary way, wrote down on the charge sheet which was submitted to him that "it may be sent to the proper Court through the Chief Inspector." I held that this order could not be construed as sanction to prosecute because it did not appear that the S. P. had applied his mind to the question whether he should sanction the prosecution of the accused or not, and that he had merely forwarded the charge sheet to the Court in the normal manner as any head of the police would do in ordinary cases that were investigated and desired to be sent to the Court for trial. I further observed that:

"A sanction to prosecute a particular person for an offence implies, first, a full knowledge of the facts upon which it is sought to prosecute him and, secondly, a deliberate decision of the sanctioning authority that he may be prosecuted."

In my judgment, this decision also does not help the appellant. In the present case a definite request was made to the District Magistrate to accord the sanction to prosecute. The District Magistrate considered the matter and in definite terms accorded the sanction. There was, therefore, an actual exercise of the discretion vested in the sanctioning authority. The relevant facts were in substance given in the charge sheet. The charge sheet contained sufficient indication of the

incident in respect of which the appellant was to be prosecuted. It mentioned the name of the complainant, the name of the appellant, and the date on which the offence was said to have been committed. The nature of the offence 'bribery' was mentioned. The section under which prosecution was to be launched was also indicated.

[10] It is not necessary that full details of the prosecution case be mentioned in the charge sheet or brought to the notice of the sanctioning authority. It is enough if the essential facts on which the prosecution is based are stated. The present case is practically on all fours with the case of *Pearey Lal* v. *Rex*, A. I. R. 1950 ALL. 507 where the facts mentioned in the police charge sheet were held to be sufficient for according sanction.

[11] The case reported in *Maqsud Khan* v. *State*, 1950 ALL. L. J. 533 is not very helpful to the appellant. In that case it did not appear on the record for what offence the sanctioning authority had granted the sanction.

[12] The last case cited before me was an unreported decision of my learned brother Mootham, in *Yadu Nath Bhatnagar* v. *State*, Criminal Rev. No. 192 of 1950, decided on 29-11-1950. In that case a letter from the S. P. asking for sanction for the prosecution of the accused was very much similar in terms to the statement in the charge sheet in the present case. The District Magistrate ordered "prosecution of Yadunath Bhatnagar by law is sanctioned." One of the contentions was that the order purporting to be the sanction of the District Magistrate had not been duly proved. My learned brother held that although the signatures of a gazetted officer like the District Magistrate could be taken judicial notice of, the statements in the document could not be so taken notice of and that it was not clear how the document above referred to had come on the record. It was not marked as an exhibit, nor was it produced by any witness. On those facts it is obvious that the sanction had not been proved in the case. My learned brother, however, went on to observe:

"The requirements of a valid sanction were laid down by their Lordships in the well-known case of *Gokulchand Dwarkadas* v. *The King*, 1948 All. L. J. 170, in which it was held that it must be proved that the sanction was given in respect of the facts constituting the offence charged. Those facts must, in my opinion, include (if it is known) the name of the person who was given or attempted to give the alleged bribe, the amount of bribe, and what is particularly important, the purpose for which the bribe was given, for unless the illegal gratification is given for the purpose specified under S. 161 no offence is committed."

[13] The law does not lay down that minimum facts must be brought to the notice of the sanctioning authority. The object of requiring sanction to be obtained before a public officer is prosecuted is to prevent his unnecessary harrassment and to safeguard the larger interests of the State. The discretion to sanction prosecution is vested solely in the sanctioning authority and is absolute. Its exercise cannot be questioned in a Court of law. The satisfaction of the sanctioning authority is entirely subjective. He is the judge of the materials that should be placed before him for enabling him to accord the sanction. If the facts placed before him are not sufficient to enable him to exercise his discretion properly, he will ask for more particulars but it is for him and him alone to determine this matter. The Courts are concerned only with one matter—to find whether sanction for the particular prosecution was in fact accorded by the proper authority If the record shows that the sanction was in fact accorded and the sanction was in respect of the particular transaction which is the subject-matter of the charge against the accused, the requirements of the law are fully satisfied. No hard and fast rule can be laid down as to what facts are necessary to be brought to the notice of the sanctioning authority. In my opinion the sanction accorded in the present case cannot be challenged on the ground that necessary facts were not brought to the notice of the sanctioning authority.

[14] The second objection, however, raised by learned counsel, to the validity of the sanction must be accepted. As already stated, the charge-sheet mentioned S. 161, Penal Code as the offence for which the appellant was sought to be prosecuted. The sanction of the District Magistrate was for prosecution for that offence. The prosecution, however, was not under S. 161, Penal Code but under S. 5 (2), Prevention of Corruption Act, 1947. A new offence has been created under that section—an offence of criminal misconduct in the discharge of duty by a public servant. Clause 5 (1) of the Act which defines the offence consists of four clauses:

"(a) If he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in S. 161, Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

Clause (2) of S. 5 lays down the punishment for the offence, the punishment may extend to seven years, or with fine, or with both. Clause (a) of S. 5 (1) of the Act deals with habitual acceptance of illegal gratification. This clause deals with the habitual commission of an offence under S. 161,

Penal Code. Clause (b) relates to the habitual acceptance of a valuable thing without consideration or for inadequate consideration from persons with whom a public servant has to deal in his official capacity. This offence may or may not fall under s. 161, Penal Code. Clause (c) deals with misappropriation. This has nothing to do with s. 161, Penal Code. Clause (d) deals with accepting any valuable thing by a public servant for himself or for any other person by corrupt or illegal means by abusing his official position. This may or may not fall under s. 161, Penal Code.

[15] It would thus appear that the offences under s. 5 (1) are not necessarily covered by s. 161. In some cases they may be so covered but in others they may not. The offence under s. 5 (1) is undoubtedly a graver offence than the one under s. 161, the former being punishable for seven years, while the maximum sentence under the latter section is only three years. Where sanction is accorded under s. 161, Penal Code, it does not amount to a sanction for a graver offence defined in s. 5 (1) and made punishable under s. 5 (2). As already stated, there was no sanction for the prosecution of the appellant under s. 5 (2). The facts alleged in the present case do, no doubt, fall both under s. 161, Penal Code and s. 5 (1) (d), Prevention of Corruption Act. The question is whether sanction having been granted for prosecution under s. 161 could be availed of by the prosecution for the prosecution of the appellant under s. 5 (2) of the Act.

[16] Under s. 238, Criminal P. C. :

"When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it."

Or again

"when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."

[17] It was urged that on the analogy of s. 238, Criminal P. C., it may be held that where sanction is granted for a minor offence and no sanction is granted for a major offence, and the minor offence is established from the evidence on the record the conviction of the accused may be altered from the major offence to that of a minor offence. In my judgment, this cannot be done. Section 238 assumes that the trial of the accused for the major offence was valid in law. When the trial is valid and it is found that the person charged with a major offence is not guilty of that offence, but is guilty of a minor offence, he may be convicted of the minor offence. But when the trial itself is vitiated on account of certain extraneous facts, like the absence of a previous sanction, the authority of the Court to alter the conviction does not come into play, because the whole trial is vitiated and there is nothing before the Court upon which it can exercise the discretion vested in it under s. 238, Criminal P. C. There being no sanction for the prosecution of the appellant under s. 5 (2), Prevention of Corruption Act, he cannot be convicted under s. 161, Penal Code.

[18] I, therefore, allow this appeal and quash the conviction of the appellant as well as the proceedings of the Courts below. It will be open to the State to prosecute the appellant after obtaining a regular and proper sanction.

[19] The appellant is on bail. He need not surrender.

B/D.R.R. *Appeal allowed.*

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MALIK C. J. AND V. BHARGAVA J.

M/s Kanodia Brothers, Cawnpore—Applicant v. *Commr. of Income-tax, U. P. Ajmer-Merwara, Lucknow — Respondent.*

Misc. Case No. 70 of 1948, D/- 25-8-1952.

Income-tax Act (1922), S. 26A — Renewal of registration of firm — Constitution remaining same — Change in constitution of branch business —Renewal cannot be refused.

So far as the registration proceedings are concerned the question as to what businesses are being carried on by the firm seeking registration is not relevant. The rules framed do not require that the business of the firm should be shown in the application for registration or the application for renewal of registration. Where the information that has to be supplied by a firm applying for registration or its renewal has remained exactly what it was before the deed of partnership on the basis of which the renewal is sought, the question of the constitution of the branch business cannot be taken into consideration and the mere fact that a wrong allegation was made in the partnership deed regarding the constitution of the branch business cannot justify a refusal to renew the registration after there has been a finding that the firm has remained unaltered.

[Para 3]

Anno. Income-tax Act, S. 26A, N. 1.

G. S. Pathak and R. S. Pathak — for Applicant; K. Bose and J. Swarup — for Respondent.

V. Bhargava J. —The following question has been referred to this Court by the Income-tax Appellate Tribunal:

"Whether in the circumstances of the present case, renewal of registration of the firm Kanodia Bros. could be allowed on the basis of the partnership deed dated 5-1-1943, which gave a wrong constitution of its branch concern?"

[2] The facts given in the statement of the case show that Kanodia Bros. was a partnership firm consisting of four partners, Murlidhar Kanodia, Manoharlal Kanodia, Jagmohan Lal Kanodia and Bhika Ram, each having an equal share of four annas in the firm. This partnership had come into existence in the year 1940. The assessment year in respect of which this case has been referred to us is the year 1943-44 and the accounting year relating to that assessment year is from october 1941 to october 1942, corresponding to Asoj, Samvat 1898-99. The accounting year, therefore, ended on 4-10-1942.

A fresh deed of partnership was executed on 5-1-1943, under which the partners of the firm Kanodia Bros. continued to be the same four partners

with the same shares as they had in 1940 in the originally constituted firm. In cl. (8) of this deed, however, it was stated that with effect from Kuar Sudi 10, Samvat 1999, corresponding to 4-10-1942, Lala Banwari Lal had been added as a working partner in Murli Manohar Brothers which until that date was a branch of the business of Kanodia Bros. but thereafter ceased to be a branch due to the addition of a new partner. The firm applied that the old registration may be renewed because the firm of Kanodia Bros. was still continuing its business with the same partners and with the same shares so that the constitution of the firm had remained unaltered. The Income-tax Officer refused renewal of the registration on the ground that cl. (8) of the deed of partnership dated 5-1-1943, gave a wrong constitution of the branch business of Murli Manohar Bros. which in fact, had continued to be the business of Kanodia Bros. and that the recital that Lala Banwari Lal had been added as a working partner in that firm was fictitious.

The Appellate Assistant Commissioner, though agreeing with the finding of the Income-tax Officer that Lala Banwari Lal had not been in fact added as a partner in the branch business of Murli Manohar Bros. disagreed with the Income-tax Officer that this disentitled the firm to the renewal of the registration and directed that the registration should be renewed. The Income-tax Appellate Tribunal on appeal restored the order of the Income-tax Officer and set aside that of the Appellate Assistant Commissioner.

[3] In the statement of the case and the appellate order of the Tribunal, we have not found any finding at all to indicate that the firm of Kanodia Bros. had ceased to exist or that its constitution was altered in any manner by the deed of partnership dated 5-1-1943. The partners of the firm as well as their shares continued as before. On the finding of fact given by the Tribunal that the branch firm working under the name of Murli Manohar Brothers was still a branch of Kanodia Bros. it would appear that even the business of Kanodia Bros., has remained unaltered. Under these circumstances Kanodia Bros. are clearly entitled to the renewal of their previous registration. So far as the registration proceedings are concerned the question as to what businesses are being carried on by the firm seeking registration is not relevant. The rules framed do not require that the business of the firm should be shown in the application for registration or the application for renewal of registration. The information that has to be supplied by a firm applying for registration or its renewal has, in the case of the firm Kanodia Bros., remained exactly what it was before the deed of 5-1-1943. The question of the constitution of the branch business, Murli Manohar Bros., may be relevant if and when the firm claiming that business separately applies for its registration. It may also have to be considered when assessing the profits of Kanodia Bros., in order to find out whether the profits of that branch business Murli Manohar Bros., are profits of Kanodia Bros., or not. So far as proceeding for registration of the firm Kanodia Bros. is concerned, this question cannot be taken into consideration and the mere fact that a wrong allegation was made in the partnership deed dated 5-1-1943, cannot justify a refusal to renew the registration after there has been a finding that the firm of Kanodia Bros., has remained unaltered.

[4] Our answer to the question referred is, therefore, in the affirmative. The assessee will be entitled to its costs which we fix at Rs. 300.

B/R.G.D. *Answer in affirmative.*

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AGARWALA J.

Kashi Ram and others, Applicants v. *State.*

Criminal Revn. No. 1187 of 1952, D/- 26-8-1952.

Criminal P. C. (1898), Ss. 367 (2), 537 — Object of—Passing of composite sentence—Validity.

Section 367 (2), Criminal P. C., clearly requires that the Court shall apply its mind to the offence or offences which have been committed by every accused and record its finding thereon, and further, that it will specify the punishment which it proposes to impose upon the accused. Although the section is not clearly worded, it implies that the punishment for each offence of which an accused is found guilty should be specified separately. But where the punishment imposed is a composite punishment for the various offences which have been specified and found to be committed by a particular accused, it cannot always be said that the sentence vitiates the trial, provided that the sentence imposed does not exceed the maximum sentence provided under any one of the sections under which the accused has been found guilty, and provided of course that the Magistrate was empowered to impose the sentence passed by him. The imposition of a composite sentence is merely an irregularity in such a case, covered by S. 537, Criminal P. C.: A. I. R. 1948 All. 136, *Disting.* [Para 2]

Anno. Criminal P. C., S. 367 N. 9.

D. Sanyal—for Applicants; A. G. A.—for the State.

REFERENCE	Paras.
('48) A I R 1948 All 136: (49 Cri L J 103).	1, 2

Order. — There is no force in this revision on the merits. The Magistrate passed a composite order of sentence of 18 months rigorous imprisonment under ss. 452 and 323, Penal Code read with s. 149, Penal Code and of six months' rigorous imprisonment under s. 147, Penal Code. In appeal the learned Judge considered that a composite sentence of punishment should not have been made but took no further steps in the matter. It has been urged that the composite sentence could not be passed, and in support of this argument reliance has been placed upon the ruling of a learned Single Judge of this Court reported in *Brij Nandan* v. *Emperor*, A. I. R. 1948 ALL. 136. In that case five accused were tried under ss. 147 and 452 and s. 323 read with s. 149, Penal Code. The learned Magistrate who tried the case passed an order convicting the applicants without specifying the sections of the Indian Penal Code under

which he was convicting them and passed combined sentences upon them of six months' rigorous imprisonment and a fine of Rs. 50 each. On those facts the learned Judge held that the imposing of a composite sentence was not legal. It was observed :

"By not specifying the different sections of the Indian Penal Code under which each applicant was convicted and by not passing a separate sentence for each offence the trial Court was unable to apply its mind to the case of each applicant separately and judging the extent of each applicant's guilt and determining what sentences should be passed upon them for each offence."

The facts of the present case are different. In the present case the learned Magistrate clearly specified the sections under which each individual was held guilty. He held them guilty under ss. 147 and 452 and s. 323 read with s. 149, Penal Code. He sentenced each of them to undergo rigorous imprisonment for a period of six months under s. 147, Penal Code and sentenced each of them to 18 months' rigorous imprisonment under ss. 452 and 323 read with s. 149, Penal Code.

[2] Under s. 367 (2), Criminal P. C., every judgment shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced. The section clearly requires that the Court shall apply its mind to the offence or offences which have been committed by every accused and record its finding thereon, and further, that it will specify the punishment which it proposes to impose upon the accused. Although the section is not clearly worded, it implies that the punishment for each offence of which an accused is found guilty should be specified separately. But where the punishment imposed is a composite punishment for the various offences which have been specified and found to be committed by a particular accused, it cannot always be said that the sentence vitiates the trial, provided that the sentence imposed does not exceed the maximum sentence provided under any one of the sections under which the accused has been found guilty, and provided of course that the Magistrate was empowered to impose the sentence passed by him. The imposition of a composite sentence is merely an irregularity in such a case covered by s. 537, Criminal P. C. The case referred to above *Brij Nandan* v. *Emperor*, A. I. R. 1948 ALL. 136 is clearly distinguishable, because in that case even the sections were not specified by the learned Magistrate, and, therefore, it was held that the learned Magistrate had not applied his mind to the case. This cannot be said of the present case. I am, therefore, unable to hold that the imposition of a composite sentence of 18 months' rigorous imprisonment imposed by the learned Magistrate vitiates the trial. The sentence, however, appears to me to be too severe.

[3] While rejecting this application on merits, I reduce the sentence to one year's rigorous imprisonment. With this modification the revision application is rejected.

B'D.R.R. *Order accordingly.*

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MALIK C. J. AND V. BHARGAVA J.

City Board, Mussoorie — Applicant v. *Commissioner of Income-tax, U. P., Ajmer, Merwara and Lucknow—Respondent.*

Misc. Case No. 69 of 1948, D/- 19-8-1952

(a) Excess Profits Tax Act (1940), S. 4, Proviso — Totally — Meaning — Profits derived from supply of water and electricity beyond area of local authority — Liability to pay excess profits tax — (Income-tax Act (1922), S. 4 (3) (iii).)

The word 'totally' in the proviso to S. 4 is not intended to make a change. It does not mean that while under sub-s. (3) of S. 4, Income-tax Act, there is a partial exemption granted in case of income-tax to local authorities, there is a total exemption granted from payment of excess profits tax. All that it means is that if Income-tax is not payable under sub-s. (3) of S. 4, Income-tax Act, no Excess Profits tax would be payable on that income. [Para 4]

An income of a local authority arising from the supplies of electric energy and water outside its own jurisdictional area is, therefore, chargeable to excess profits tax under the first proviso to S. 4, E. P. T. Act 1940, read with S. 4 (3) (iii), Income-tax Act, 1922. [Paras 8, 10]

Anno. E. P. Tax Act, S. 4 N. 1.

(b) Income-tax Act (1922), S. 2 (9) — Amendment of 1939—Object of.

The Amending Act of 1939 did not really make a change in the definition of the word 'person' in S. 2 (9), Income-tax Act, 1922. The amendment was made merely to clarify the position and to remove all doubts. [Para 6]

(c) Excess Profits Tax Act (1940), S. 2 (17)—Person includes local authorities under General Clauses Act, (1897)—(General Clauses Act (1897), S. 3 (39)). [Para 7]

Anno. General Cls. Act, S. 3 N. 20.

Raj Bahadur Jain and Gayanendra Kunwar — for Applicant; S. C. Das—for Respondent.

Malik C. J. — The City Board, Mussoorie, which is a Municipal Board, constituted under the U. P. Municipalities Act (No. 2 of 1916) supplies electric energy and water outside its municipal limits at a profit. The Excess Profits Tax Officer held that on such profits derived from business carried outside its territorial limits the City Board, Mussoorie, is liable to pay excess profits tax. The City Board contested this position and mainly relied on the definition of the word 'person' in s. 2 (17), Excess Profits Tax Act. The Income Tax Appellate Tribunal held against the City Board and on an application made by the Board the following questions have been referred to us under s. 66 (1), Income-tax Act read with s. 25, Excess Profits Tax Act :

"(i) Whether the applicant's income arising from the supplies of electric energy and water outside its own jurisdictional area, is chargeable to excess profits tax under the first proviso to S. 4, E. P. T. Act, 1940, read with cl. (III) of sub-s. (3) of S. 4, Income-tax Act, 1922 ?

(ii) Whether the provisions of S. 2 (17), E. P. T. Act, 1940, can be construed to mean that 'person' includes a local authority ?

(iii) Whether the scheme of the machinery sections of these E. P. T. Act provides no method of the recovery of excess profits tax from a local authority ?"

Though the Tribunal has framed three questions the point for decision is whether the City Board, Mussoorie, is liable to excess profits tax on the profits made from supply of electric energy and water outside its jurisdictional areas.

[2] Learned counsel for the assessee has urged that as a local authority is not included in the definition of the word 'person' in the Excess Profits Tax Act excess profits tax cannot be levied against the Municipal Board, Mussoorie. He has further relied on the provisions of s. 4, Excess Profits Tax Act and has urged that that section gives a total exemption and, therefore, the City Board cannot be made liable for payment of excess profits tax even as regards income derived from its business carried on outside its territorial jurisdiction.

[3] Under s. 4 (3) (iii), Income-tax Act, before its amendment in 1939, the income of local authorities was totally exempt. After amendment the exemption was limited to income from trade or business carried on within its own jurisdictional area. At the same time when this amendment was made, the definition of the 'person' in s. 2 (9) was also amended so as to include a local authority. The old section read as follows:

"'Person' includes a Hindu undivided family;"

After the amendment it reads:

" 'Person' includes a Hindu undivided family and a local authority;"

The Excess Profits Tax Act (Act 15 of 1940) was enacted in the year 1940 and in s. 2 (17) of this Act the old definition was maintained. It is as follows:

" 'Person' includes a Hindu undivided family;"

As regards exemptions the proviso to s. 4 is as follows:

"Provided that any profits which are, under the provisions of sub-s. (3) of S. 4, Income-tax Act, 1922, exempt from Income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act."

It will be noticed that under this proviso exemptions are only granted from payment of excess profits tax in cases where exemption has been granted under sub-s. (3) of s. 4, Income-tax Act, 1922, except in the case of business of life insurance of which special mention is made.

[4] Learned counsel had to admit that profits derived from supply of water and electricity beyond the jurisdictional area of the City Board of Musoorie was liable to income-tax. The exemption from payment of excess profits tax could, under the proviso to s. 4, Excess Profits Tax Act, therefore, be claimed only if there was exemption from payment of income-tax under sub-s. (3) of s. 4, Income-tax Act. Learned counsel has, however, relied on the word 'totally' and has urged that the word 'totally' in the proviso was intended to make a change and while under sub-s. (3) of s. 4 there was a partial exemption granted in case of income-tax to local authorities, there was a total exemption granted from payment of excess profits tax. We do not think the word 'totally' in the proviso to s. 4, Excess Profits Tax Act can be interpreted in that way. All that it means is that if income-tax is not payable under sub-s. (3) of s. 4, Income-tax Act, no excess profits tax would be payable on that income.

[5] Learned counsel has urged that excess profits tax was imposed to tax abnormal profits made due to the war conditions as it was felt that profits made in excess due to such a calamity as war should be handed back in the shape of excess profits tax to meet the abnormal expenses caused by the war. The same reasoning, it is suggested, would not apply to a local authority which was not likely to take advantage of the war conditions and make large additional profits. It is not for us to go into the policy, nor is it correct to suggest that it was not possible for a local authority to make abnormally high profits due to conditions prevailing during the war. There would be no reason to grant an exemption on the ground suggested by learned counsel and the case will have to be decided on the interpretation of the relevant sections of the Act.

[6] As regards the definition of the word 'person' no doubt in the Amending Act of 1939 the word 'person' was defined to include a local authority, but in the very next year, when the Excess Profits Tax Act was passed, the amendment already made in the Indian Income-tax Act was not reproduced and the old definition of the word 'person' was retained. It must, however, be borne in mind that the Amending Act of 1939 did not really make a change in the definition of the word 'person'. The amendment was made merely to clarify the position and to remove all doubts. When a definition is said to include something it might be with the object of giving it an extended meaning or it might be with the object of clarification or removal of doubts. A study of the relevant provisions of s. 4 (3) (iii), Income-tax Act itself, before the amendment, would show that the amendment of 1939 was merely for purposes of clarification. If the word 'person' could not before the amendment made in 1939 include a local authority, it was not necessary to provide in s. 4 (3) (iii) that the income of a local authority was not liable for payment of income-tax.

[7] The word 'person' also is defined in the General Clauses Act (No. X of 1897) as including any company or association or body of individuals whether incorporated or not. A Municipal Board or a City Board consists of a body of individuals and is a body corporate (see ss. 6 and 9, U. P. Municipalities Act (No. II of 1916)). In the General Clauses Act, the Indian Income-tax Act or the Excess Profits Tax Act a complete definition of the word 'person' has not been attempted and there is nothing repugnant in the subject or context of the Income-tax Act or the Excess Profits Tax Act

which would make the definition in the General Clauses Act inapplicable.

[8] We are, therefore, of the opinion that the City Board, Mussoorie, is liable to pay excess profits tax on the profits made from supply of electric energy and water outside its jurisdictional areas.

[9] Learned counsel for the assessee has not attempted to point out why the machinery sections of the Excess Profits Tax Act could not be applied for recovery of excess profits tax from a local authority. As a matter of fact, no arguments have been addressed to us at all on the point.

[10] Our answer to the first two questions is in the affirmative while our answer to the third question is in the negative.

[11] The Department is entitled to its costs which we assess at a sum of Rs. 300.

B/D.R.R. *Reference answered.*

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(LUCKNOW BENCH)

MISRA J.

D. P. Halwasiya—Applicant v. *The State.*

Criminal Misc. Appln. No. 332 of 1951, D/- 26-4-1952.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 7, 9—Person let in by previous tenant without landlord's consent—Such person not turned out by landlord — It does not amount to consent.

Where the previous tenant lets a person into occupation of premises without the landlord's consent the fact that such person was not bodily turned out by landlord cannot be treated as landlord's consent or creation of tenancy or violation of the Act and Rules and orders thereunder. No duty is imposed on the landlord to take measures against a squatter for his ejectment either forcibly or through Court. [Para 7]

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7 — Landlord giving intimation that his premises have fallen vacant — Landlord not called upon at any time to let or not to let premises to any person—There can be no violation of later part of S. 7. [Para 9]

(c) Criminal P. C. (1898), S. 561-A—Powers of High Court to interfere at interlocutory stage.

Under S. 561A, the High Court has full power to prevent abuse of the process of the Court and unnecessary harassment of the accused by quashing or stopping proceedings or by passing other orders which might arrest such abuse or harassment. It is true that ordinarily such a course is not adopted when the proceedings in the subordinate Court are in an interlocutory stage but the obligation to act under the section is rendered imperative whenever circumstances calling for the immediate use of those powers come to the notice of the Court. [Para 10]

Anno. Cr. P. C., S. 561A, N. 6.

Bijai Shankar — for Applicant; R. P. Bisaria, for Government Advocate—for the State.

Order.—This is an application under S. 561-A, Criminal P. C., for quashing certain proceedings pending in the Court of the City Magistrate, Lucknow so far as they relate to the applicant, D. P. Halwasiya.

[2] The case arose on the complaint made by the senior inspector of the Rent Control and Eviction Department under s. 8, U. P. (Temporary) Control of Rent and Eviction (Amendment) Act, 1947, for contravention of ss. 7 and 9 of that enactment. Section 8 says that :

"Any person who contravenes any of the provisions of this Act or any order made in pursuance thereof shall be punishable on conviction with simple imprisonment for a term which may extend to six months or with fine up to Rs. 1000 or with both."

Section 7 lays down that :

"The District Magistrate may, by general or special order, require the landlord to give intimation that any accommodation of which he is the landlord is or has fallen vacant and to let or not to let such accommodation to any person."

It goes on to say that in cases, where in pursuance of an order of the District Magistrate passed as aforesaid, the vacancy of any accommodation is required to be reported, the tenant occupying such accommodation, shall within seven days of his vacating the same, give intimation thereof in writing to the District Magistrate or such officer as the District Magistrate may appoint in this behalf. It would seem that the District Magistrate of Lucknow acting under S. 7 passed an order on 8-3-1949, making it incumbent upon every landlord within the municipal limits of Lucknow and the limits of the notified areas of Alambagh and Charbagh to give immediate intimation of the fact of the falling vacant of any accommodation of which he is the landlord to the Rent Control and Eviction Officer, Lucknow. Such intimation according to the notification had to be given in writing in the prescribed form not later than seven days after the date on which the accommodation fell vacant. The order further provided that no landlord shall let out such accommodation as is mentioned above to any person for a period of fifteen days from the date of receipt of the intimation by the Rent Control and Eviction Officer, Lucknow, and he shall on receipt of the allotment order from the District Magistrate or the Rent Control and Eviction Officer, Lucknow, within that period let out the accommodation only to the persons specified in that order.

[3] Section 9, the contravention of which was also complained of provides :

"Every order made under cl. (bb) of sub-r. (2) of R. 81, Defence of India Rules, in respect of any of the matters specified in or under this Act shall, so far as it could validly have been made by the Provincial Government or the District Magistrate, continue in force and be deemed to have been made under this Act until it is superseded or modified by a competent authority under this Act and all orders made and directions given under any such order shall also continue in force until superseded or modified by a competent authority."

The applicant is one of the three partners of the firm Ganesh Das Ram Gopal which owns a large shopping centre constructed in April 1948 in Hazratganj, Lucknow and is known as Halwasiya Market. Shops Nos. 7 and 9 in the aforesaid market were held in tenancy by one Sri Manohar Lal Mullick till 8th January 1951. On the last

mentioned date this gentleman wrote to Messrs. Ganesh Das Ram Gopal intimating that he was giving up his tenancy and Messrs. Bhatia Brothers would use the premises which were in his occupation. The letter is of importance and its relevant parts may well be reproduced. It states :

"You are aware, my late lamented father breathed his last on 16th November 1950. I have, therefore, decided to close my shop at Halwasiya Market and intend to sell all my furniture to Messrs. Bhatia Brothers who will also use the above mentioned shops which were under my occupation. I trust, you will kindly recognise him as your tenant in place of me and also cause having the allotment made by the Rent Control and Eviction Officer, if necessary."

[4] On 10th January 1951 the applicant forwarded a copy of the aforementioned letter to the Rent Control and Eviction Officer, Lucknow, with a covering letter of his own saying :

"We are enclosing herewith a copy of a letter received from M/s Mullicks which is self explanatory for your information. We have no objection if the shops are allotted to Messrs Bhatia Brothers."

[5] The Rent Control and Eviction Officer, it would seem, did not communicate to the applicant any orders of allotment of the shops referred to above within the time specified in the order of the District Magistrate dated 8th March 1949. Reference in this connection may also be made to Rr. 3 and 4 framed under S. 17 of the Act :

"3. *Allotment order.*—The District Magistrate shall make an allotment order within thirty days of the receipt of the intimation sent by the landlord under S. 7 (1) (a) of the Act and shall give notice thereof to the landlord."

"4. *Landlord's right to let.*—If the landlord receives no notice from the District Magistrate within 30 days of the receipt by District Magistrate of intimation given by the landlord under S. 7 (1) (a) the landlord may nominate a tenant and the District Magistrate shall allot the accommodation to his nominee unless, for reasons to be recorded in writing he forthwith allots the accommodation to any other person."

The papers, produced by the complainant in the Court of the City Magistrate, disclose that a senior inspector of the department was deputed to carry out an inquiry on the information contained in the letter of Messrs. Ganesh Das Ram Gopal. According to his report which is dated 22nd January 1951, the furniture of the shops was sold by Messrs. Mullick and Company to Messrs. Bhatia Brothers (who were at that time in occupation) without having given any intimation of the fact to the department. When this report reached the Rent Control and Eviction Officer to whom the District Magistrate of Lucknow has delegated his powers, he inquired :

"What is the real position ? Have the premises, as reported, been occupied by Messrs. Bhatia Brothers ? If so, please issue notice and ask them to explain why possession has been taken without proper allotment order."

Notice was accordingly issued to Messrs. Bhatia Brothers and a copy thereof was endorsed to the firm Ganesh Das Ram Gopal on 3rd February 1951. The occupiers of the premises in acknowledging the communication submitted that they had purchased the furniture from Messrs. Mullick & Co. and had also the consent of the landlord who had already written to the department for necessary allotment. They, however, apologized 'profoundly' for the irregularity committed by them and said that they would be grateful if their action was now regularised. Matters appear to have remained in this condition till 12th May 1951, when a further report was submitted by the senior inspector apparently communicating to the Rent Control and Eviction Officer the above representation of Messrs. Bhatia Brothers and saying that, in order to avoid further complications, it was desirable to regularise their occupation as requested. It would seem that this report along with the reply of Messrs. Bhatia Brothers was laid before the allotment committee and on 21st May 1951, the Rent Control and Eviction Officer passed an order for prosecution of the landlord as well as of the tenant whose occupation, he thought, was unauthorized. Pursuant to the above order, the senior inspector submitted a charge-sheet to the Court of the City Magistrate, Lucknow, on 19th June 1951, against Messrs. Ganesh Das Ram Gopal and Messrs. Bhatia Brothers and in the details of the offence committed by the accused, he mentioned that the first named accused did not wait for the orders of the Rent Control and Eviction Officer, Lucknow, and accepted the tenancy of Messrs. Bhatia Brothers, accused 2, thus contravening ss. 7 and 9, U. P. Temporary Control of Rent and Eviction Act, 1947 by letting out the shop in question to accused 2 in the month of January 1951 without the permission of the Rent Control and Eviction Officer, Lucknow, an act for which he is punishable under s. 8 of the Act.

It was further stated that accused 2 occupied the premises without proper allotment order from the Rent Control and Eviction Officer, Lucknow, and in doing so he violated the provisions of s. 11 of the Act. There is an order of the Additional District Magistrate on the record, which was passed presumably in July 1951, saying that from a perusal of the file, he found that a prima facie case under ss. 7, 9 and 8, U. P. (Temporary) Control of Rent and Eviction (Amendment) Act, 1948, was made out against accused 1 Messrs. Ganesh Das Ram Gopal and against Messers. Bhatia Brothers. He purported to sanction the prosecution under the said sections of the Act and to send the case to the City Magistrate, Lucknow, for trial. It is not clear under what provision of law this sanction was accorded. Apparently there is some rule whereunder such prior sanction for the prosecution of a person under the penal provisions of the Act is made necessary in order to safeguard people against unnecessary victimisation. I take it that this sanction must have been communicated to the City Magistrate in due course. After the receipt of it the City Magistrate, unmindful of the provisions of s. 12, ordered the Station Officer, Hazratganj Kotwali to produce before him on 2-8-1951, "the firm Messrs. Ganesh Das Ram Gopal and firm Bhatia Brothers." I

notice also that the offence under s. 8 is triable as a summons case but the learned Magistrate somehow persuaded himself to believe that it was necessary to secure the bodily presence of the accused through the police agency instead of the normal procedure which the law prescribes in such cases.

[6] Information of the impending prosecution was, it would seem, meanwhile received by the applicant for he appeared in Court on 18-8-1951, and applied for and secured an order from the learned Magistrate excusing his personal attendance on future dates. Thereafter he applied to this Court on 23-8-1951 under s. 561A, Criminal P. C. praying that in the circumstances disclosed in his petition and the accompanying affidavit, there was no case against him and his prosecution by the department constituted an abuse of the process of the Court.

[7] The facts narrated above have been taken almost entirely from the documents which are on the file of the learned Magistrate. The letter of Sri Manohar Lal dated 8-1-1951 leaves no room for doubt that Messrs. Bhatia Brothers were let into occupation of the premises by him without any authority of the landlord. He only 'trusted' that the firm would recognize them as tenants. It is not alleged that this recognition was accorded by the owners. The communication sent by the applicant to the Rent Control and Eviction Officer puts it beyond dispute that he conveyed information to the department in due course of all the facts that were known to him till 10-1-1951 and it is fair presumption that this was done in order to facilitate the allotment of the shops to a new tenant. The fact that he intimated that he would have no objection if the allotment was made to Messrs. Bhatia Brothers indicates that he had not till then accepted Messrs. Bhatia as tenants. The language of the letter clearly implies that before accepting the recommendation of Mr. Mullick, Mr. Halwasiya would await the order of allotment by the officer. This, apparently, is all that the landlord was bound to do under the rules. I need hardly stress that the Act does not impose on him the duty to take measures against the squatter for his ejectment either forcibly or through Court. I am clear therefore that the mere fact that the applicant did not bodily turn out the firm of Messrs. Bhatia Brothers from the premises cannot be treated as the landlord's consent or as amounting to creation of tenancy or violation of the Act and the Rules or orders made thereunder. There is also the fact that the Rent Control and Eviction Officer himself failed to comply with the order of the District Magistrate promulgated on 8-3-1949, and R. 3 of the Rules framed under s. 17. It will bear repetition that these rules made it essential that the District Magistrate or the officer who was deputizing for him must let out the shops within thirty days of the intimation sent to him by the tenant or by the landlord and if he did not do so, the landlord could engage with a tenant of his own choice.

[8] The documents on the record do not indicate any action after 8-1-1951, on the part of the landlord which could amount to creation of tenancy in the new occupants of shops Nos. 7/9. I am informed that apart from these documents, there is no other evidence in the possession of the complainant which might go to show that the premises were let out by the applicant at any time after the aforementioned date. It is said in the charge-sheet submitted by the complainant that the Senior Inspector of the Rent Control and Eviction Department would depose that the second accused is in possession of the shops since January 1951. I was informed that the Senior Inspector would be prepared to state further that during the course of his enquiries he was given information to the effect that Messrs. Ganesh Das Ram Gopal let out the shops to Messrs. Bhatia Brothers later. This kind of evidence would obviously not carry the matter any further and I am convinced that if the Senior Inspector hereafter deposes that he learnt from some informant that the landlord actually let out the premises to Messrs. Bhatia Brothers between 10-1-1951, and the date of his report, such statement would be worse than useless.

[9] It would be recalled that in the order of the Additional District Magistrate sanctioning the applicant's prosecution, it was stated that a case against the applicant for infringement of ss. 7 and 9 had been made out by complainant. It has already been observed above that the landlord performed the duty enjoined upon him by s. 7 (1) (a), namely, the duty to give intimation that the shops Nos. 7 and 9 in Halwasiya Market of which he is the landlord had fallen vacant. It is true that the information was not sent on the prescribed form, but this was not the gravamen of the charge. There is nothing to show that the firm or any of its partners was called upon at any time to let or not to let that accommodation to any person and there can, therefore, under the circumstances be no violation of the later part of the provisions of s. 7. So far as s. 9 is concerned, the learned counsel for the opposite party admits that it has no bearing, whatsoever on the facts in possession of the complainant. In these circumstances I have no hesitation in holding that the prosecution of the applicant has been launched somewhat lightly. Indeed I am constrained to say that in taking action against the applicant, the department has failed to show that it acted with due sense of responsibility.

[10] Under s. 561A, Criminal P. C., this Court has full power to prevent abuse of the process of the Court and unnecessary harassment of the accused by quashing or stopping proceedings or by passing other orders which might arrest such abuse or harassment. It is true that ordinarily such a course is not adopted when the proceedings in the

subordinate Court are in an interlocutory stage but the obligation to act under the section is rendered imperative whenever circumstances calling for the immediate use of those powers come to the notice of the Court. In the present case it is expedient in the ends of justice that the proceedings against the applicant should be quashed. I order accordingly.

[11] In order to remove any possible doubt later I would like to add that I have not taken into consideration the question whether or not the prosecution of Messrs. Bhatia Brothers is justified. The present order, therefore, is not intended to affect the proceedings so far as the second accused is concerned.

B/R.G.D. *Proceedings quashed.*

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(LUCKNOW BENCH)

MALIK C. J. AND P. L. BHARGAVA J.

Bhagwan Din — Plaintiff — Appellant v. *Ram Das, Plaintiff and others, Defendants — Respondents.*

Second Appeal No. 395 of 1946, D/- 21-4-1952.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 36, 37 — Scope — 'Widow', meaning of — Widow of a pre-deceased son succeeding to a statutory tenant —Subsequent surrender by her in favour of her daughter's son — Succession is governed by S. 36 and not by S. 37.

Section 36, U. P. Tenancy Act does not say that the widow in that section must be the widow of the last tenant. The word 'widow' in S. 36 was meant to include any person who succeeded as a widow, that is, by reason of her having been married in the family, she had become an heir to the tenancy by reason of the death of her husband. [Para 5]

There is no reason why, when S. 36 is applicable to five female heirs out of six mentioned in S. 35, the widow of a male lineal descendant should be treated differently and the succession in her case should be different from that in the case of other female heirs, who had inherited the tenancy by succession to a male tenant. These rules of succession are not confined to Hindus and the Sections apply to all tenants, Hindus, Muslims and others. The idea, therefore, was that where a female tenant had succeeded to a male tenant in accordance with the provisions of S. 35, after her death, the property should be treated as having belonged to the last male tenant and it should go to his other heirs, while, if the property belonged to her in her own right as a tenant, then the succession would be as given in S. 37. [Para 5]

Hence, where a widow of a predeceased son of a statutory tenant who has succeeded to the land as his heir subsequently executes a deed of surrender in favour of her daughter's son, the succession would be governed by S. 36 and not by S. 37 and the cousins of the statutory tenant would be entitled to claim possession of the land from the daughter's son. The mere fact that a widow had to remain in possession for a total period of 8 years under S. 48 read with the explanation to S. 3 (18), Oudh Rent Act to acquire the status of statutory tenant could not affect the position that she had inherited an interest in the holding as a widow within the meaning of S. 36: A. I. R. 1952 All 854, *Rel. on.* [Para 6]

Naimullah—for Appellant; R. B. Lal and R. B. Chaudhari — for Respondents.

REFERENCE : Para.

('52) Appeal No. 1 of 1950 : (A. I. R. 1952 All. 854). 6

Malik C. J.—This is a plaintiff's appeal. The plaintiff's suit for possession of seventeen tenancy plots, measuring 18 bighas and 5 biswas in Ashrafpur, district Faizabad, was dismissed by the lower appellate Court. These plots belonged to one Binda, who was the statutory tenant of these plots. He died in 1939. He had a son Abhilakh, who had predeceased him, leaving a widow, Srimati Rajwanta. This widow became the heir to the property under the Hindu Women's Rights to Property Act, XVIII of 1937, read with U. P. Hindu Women's Rights to Property (Extension to Agricultural Land) Act, XI of 1942. The fact that Rajwanta became the heir to Binda under the Acts mentioned above is not denied. On 8th November 1943, Rajwanta executed a deed of surrender in favour of Ram Bachan, her daughter's son. The suit was filed by Bhagwan Din and Ram Din, cousins of Binda, on the ground that they were the heirs of Binda and were entitled to possession of the property. The suit was filed on 15th November 1944. Rajwanta died on 14th December 1944, and after Rajwanta's death Ram Bachan was impleaded.

[2] The only question for decision in the case is whether the plaintiffs are entitled to claim the property and the decision of that question will depend on the interpretation of ss. 36 and 37, U. P. Tenancy Act, XVII of 1939. If s. 37 is applicable, the plaintiffs have clearly no case. If, on the other hand, s. 36 is applicable, then as the next reversioners of Binda they became entitled to claim the property.

[3] Section 35, U. P. Tenancy Act gives the list of persons who are entitled to inherit to a male tenant. Section 37 gives a list of persons who are entitled to succeed to a female tenant. Section 36, on the other hand, provides that when a widow or other female tenant mentioned in that section, who has inherited the tenancy as such heir dies, the tenancy will devolve on the heir of the last male tenant in accordance with the provisions of s. 35. Section 37 can only apply if s. 36 is not applicable. The question, therefore, is whether s. 36 is not applicable to this tenancy.

[4] The relevant portion of s. 36 is as follows:

"When a female tenant ..... who either before or after the commencement of this Act has inherited an interest in a holding as a widow, as a mother, as a father's mother, or as daughter dies or abandons such holding, or surrenders such holding or a part of such holding or in the case of a tenant inheriting as a widow or as a daughter, marries, such holding or such part of such holding shall, notwithstanding anything in S. 45, devolve in accordance with the order of succession laid down in S. 35 on the heir of the last male tenant, other than a tenant who inherited as a father's father under the provisions of that section."

In s. 35 there are six kinds of female heirs who inherit to a male tenant—widow, mother being a widow, step-mother being a widow, father's mother being a widow, widow of a male lineal descendant in the male line of descent and unmarried daughter. Section 36 specifically mentions widow, mother being a widow, step-mother being a widow, father's mother being a widow and unmarried

daughter. A widow of a male lineal descendant in the male line of descent who is also an heir under cl. (h) of S. 35 is, however, not specifically mentioned in S. 36, and it is on that omission that learned counsel has based his argument that when a widow of a predeceased son succeeds to the property, the inheritance must be governed by S. 37 and not by S. 36.

[5] We have carefully considered this argument and we are not satisfied that there is any substance in it. A mother, a step-mother, a grandmother and an unmarried daughter succeed due to blood relationship with the deceased male tenant and their names are, therefore, specifically mentioned in S. 36. Section 36 does not say that the widow in that section must be the widow of the last tenant. Rajwanta succeeded to the tenancy as the widow of Binda's son. It cannot, therefore, be urged that she did not succeed as a widow. Five out of six female heirs having been included in S. 36, there was no reason why, when a widow was included, the widow of a male lineal descendant should have been excluded, and she should have been given larger rights, so that after her death the property should go to her own heirs in preference to the heirs of the last male tenant. We think the word widow in S. 36 was meant to include any person who succeeded as a widow, that is, by reason of her having been married in the family, she had become an heir to the tenancy by reason of the death of her husband. No reason is suggested to us why, when S. 36 is applicable to five female heirs out of six mentioned in S. 35, the widow of a male lineal descendant should be treated differently and the succession in her case should be different from that in the case of other female heirs, who had inherited the tenancy by succession to a male tenant. These rules of succession are not confined to Hindus and the sections apply to all tenants, Hindus, Muslims and others. The idea, therefore, was that where a female tenant had succeeded to a male tenant in accordance with the provisions of S. 35, after her death the property should be treated as having belonged to the last male tenant and it should go to his other heirs, while, if the property belonged to her in her own right as a tenant, then the succession would be, as given in S. 37.

[6] Learned counsel has further urged that Rajwanta did not inherit any interest in the holding. His contention is that under S. 48, Oudh Rent Act, Rajwanta had merely a right to remain in possession for five years and in case she remained in possession for a further period of three years, as required by Explanation to S. 3(18), she would acquire statutory tenancy rights and it could not be said that she had inherited from Binda the statutory tenancy, which she had herself acquired. We have pointed out in S. 12 (2), O. C. Act, *Ram Ratan Tewari* v. *Jagdat Tewari*, (Appeal No. 1 of 1950 (All.) that Rajwanta could not have acquired statutory tenancy rights under S. 48 read with the Explanation to S. 3 (18) if she had not been heir of Binda. There is no doubt that because she was heir of Binda, she was entitled to acquire statutory tenancy rights by remaining in occupation for a period of five years under S. 48 and thereafter for a further period of three years in accordance with the Explanation to S. 3 (18), Oudh Rent Act. She had, therefore, inherited an interest in the holding though she had to remain in possession for a further period of eight years to become a statutory tenant. She became a statutory tenant because she was a widow and the origin of her tenancy was inheritance from Binda. Section 36 was, therefore, clearly applicable and Rajwanta having surrendered the tenancy, the plaintiffs were entitled to maintain the suit and claim the property.

[7] The result, therefore, is that this appeal is allowed, the decrees of the Courts below are set aside and the plaintiff's suit is decreed with costs in all the Courts.

B/K.S. *Appeal allowed.*

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(LUCKNOW BENCH)

KIDWAI J.

Ali Shabber and others—Applicants v. *Haider Husain—Opposite Party.*

Criminal Revn. No. 226 of 1951, D/- 2-4-1952.

(a) Criminal P. C. (1898), S. 145 (1) — Sufficiency of material for passing preliminary order.

Where the Magistrate had before him the application for action under S. 145 and also the police report which clearly showed that a dispute did exist with regard to the property and from this the Magistrate inferred that the dispute was of such a nature as was likely to cause a breach of the peace, it cannot be said that he acted wrongly and that his order became one without jurisdiction. It cannot be said that the material was not sufficient to justify the inference : A. I. R. 1920 Pat. 499, *Disting.* [Paras 5, 6]

Anno. Cr. P. C., S. 145 N. 7, 8.

(b) Criminal P. C. (1898), S. 145 (1) — Parties to whom notice should issue.

At the stage of the preliminary order notice can only go to persons mentioned in the application for action under S. 145 and not to anybody else when there is no allegation that anybody else was interested or was creating a dispute : A. I. R. 1934 All. 853, *Disting.* [Para 8]

Hence, where an application for action under S. 145 gives no indication whatsoever that the person mentioned in it was acting as a manager or was acting for anybody else, notice cannot issue to anybody but him. [Para 8]

Anno. Cr. P. C., S. 145 N. 19.

Farooq Hasan—for Applicants; Kalbe Mustafa — for Opposite Party.

REFERENCES : Courtwar/Chronological/ Paras

('34) A. I. R. 1934 All. 853 : (36 Cr. L. J. 114) 8
('20) A. I. R. 1920 Pat. 499 : (21 Cr. L. J. 748). 5

Order.—On 2nd August 1950, Haider Husain applied under S. 145, Criminal P. C. claiming that plot No. 639 of village Manni Khera was included in a wakf Alalaulad executed by his father Mujtaba Husain, was looking after the wakf properties and that the opposite parties in the case,

namely Ali, Nazoo, Bhabhooti and Hoshey had raised a dispute with regard to the possession of the plot by cutting some trees and uprooting the *mash* crop. He, therefore, prayed for action under S. 145, Criminal P. C. A Police report was called for and in it it is stated that there was dispute with regard to the property in question and some reports have been made with regard to the matter. A breach of the peace might possibly occur and an eye was kept upon the situation. It was prayed that attachment of the property might be ordered. On 7th August 1950, the Magistrate passed a preliminary order under S. 145, cl. (1), Criminal P. C., and directed the property to be attached.

[2] Written statements were filed by the parties on 21st and 23rd August 1950. In the written statement filed by Ali Shabbar and others it was alleged that plot NO. 639 was the guava grove of Mt. Habibunnissa, mother of Ali Shabbar and Mt. Hakimunnissa, his aunt, who were in possession through Ali Shabbar as their Karpardaz. It was further stated that they had been in possession for a long time peacefully and without any apprehension of a breach of the peace. With regard to the other opposite parties, it was alleged that they had purchased the fruits of the grove or had acted as labourers on behalf of Mt. Habibunnissa and Mt. Hakimunnissa.

[3] After this the parties produced their evidence and the learned Magistrate Judge on a consideration of all the evidence came to the conclusion that the possession of Haider Husain was established and he directed the opposite parties namely Ali Shabbar and others not to interfere with their possession except by due process of law.

[4] Ali Shabbar and others applied in revision but the learned Sessions Judge of Unnao dismissed the application. Two points were argued before him, namely :

(1) that the preliminary order holding that there was an apprehension of a breach of the peace was not well-founded and

(2) that the principal party, namely Mt. Hakimunnissa and Mt. Habibunnissa not having been impleaded the whole proceedings were vitiated.

[5] Ali Shabbar and others have now come up in revision to this Court and the same two points have been urged on their behalf. With regard to the first point the Magistrate had before him the application of Haider Husain and the police report. The police report clearly showed that a dispute did exist with regard to the property. Of course it could not be said with certainty that that dispute was bound to result in a breach of the peace but the report made it clear that the police had to be on the alert and keep an eye on the situation because of the existence of the dispute. If from this the Magistrate inferred that the dispute was of such a nature as was likely to cause a breach of the peace it cannot be said that he acted wrongly and that his order became one without jurisdiction. In *Ram Saroop* v. *Mt. Darsano Koer*, A. I. R. 1920 Pat. 499, the police report did not show any apprehension of a breach of the peace. That cannot be said to be the police report in the present case.

[6] The decisions of the Allahabad High Court are to the effect that if there is material on the record and it is shown that the Magistrate has applied his mind to that material then even the absence of a preliminary order is not fatal to the case. In the present case there is material on the record and a preliminary order has been passed indicating that the Magistrate has applied his mind to the case. It cannot be said that the material was not sufficient to justify an inference to which he has arrived. In these circumstances it must be held that the preliminary order is not vitiated.

[7] In the written statement it was alleged no doubt by Ali Shabbar and others that their possession had been peaceful and without force. They also produced evidence to that effect. The learned Magistrate has considered the evidence in his order and he had not felt inclined on the basis of that evidence which he has disbelieved to come to the conclusion that there was no apprehension of a breach of the peace or that his preliminary order should be cancelled under S. 145, cl. (5), Criminal P. C. The judgment shows that it is not a case in which a Magistrate has failed to consider this aspect of the matter. He has in fact referred to the evidence produced by Ali Shabbar to show that there was no quarrel (as indicating no breach of the peace) with regard to the disputed land but he does not believe the statements of these two witnesses and the reason for this is obvious, namely that each of the parties claim to have sown the *mash* and to be entitled to reap it. In these circumstances it cannot be said that the conclusion at which the Magistrate arrived in the matter of whether there was an apprehension of a breach of the peace is incorrect.

[8] The second question is as to the parties, Haider Husain is not a servant of Mujtaba Husain. He is a karpardaz acting for his father who, owing to the necessity of carrying on his profession at Basti, could not look after the property. The father was not in Unnao and could not make the application at the time when the apprehension of a breach of the peace occurred. Haider Husain who was present, and who is one of the beneficiaries under the wakf took immediate action. His father appeared as a witness and accepted his action. He claimed for a declaration of the possession of his father as Mutwalli. His complaint was against Ali Shabbar who, according to him, was creating a dispute. At the stage of the preliminary order, therefore, notice could only go to Ali Shabbar and the other persons mentioned in the application and not to anybody else since there

was no allegation that anybody else was interested or was creating a dispute. When the written statement was filed by Ali Shabbar, he asserted that his possession was as karpardaz of his mother and aunt and he further prayed that his possession as such karpardaz should be maintained. He even stated that the sale of the fruits and so on had been actually effected by him on behalf of his mother and aunt. The written statement was filed after the preliminary order had been issued and there was no occasion to implead anybody after this date though under the provision of S. 145, cl. (4) a Magistrate could come to the conclusion that neither of the parties to the dispute was in possession of the property and if he came to that conclusion naturally he would not release the property in favour of either of the parties. This is perfectly clear from the words of sub-s. (4) and sub-s. (6) of S. 145. The rights, therefore, of the mother of Ali Shabbar and his aunt are not affected by these proceedings nor is their possession, if they had any, affected. The applicant made a request for action only against those persons who were actually disturbing his possession and creating trouble. He was not concerned in the present case nor is the Magistrate concerned with title to the property : the only concern of the Magistrate and of the complainant is as to possession and persons who disturbed that possession.

The complainant does not accept the position that anybody else but Ali Shabbar has disturbed his possession and the written statement of Ali Shabbar indicates that in fact it is he who claims to be in possession though he ascribes that possession to his mother and aunt whose karpardaz he claims to be. The order that has eventually been passed is that Ali Shabbar and the other opposite-parties could not interfere with the possession of the applicants. This order does not even purport to affect the rights of persons who are not parties to these proceedings. If Ali Shabbar is not in fact in possession he could have no grievance against this order and it is inexplicable why he has come in this revision. If Mt. Habibunnissa and Mt. Hakimunnissa have any right either of title or of possession, it is up to them to assert it. They have taken no action in this matter at all and when eventually an application was made for impleading them at a later stage that was also made by Ali Shabbar and not by them. In *Peare Lal* v. *Emperor*, A. I. R. 1934 ALL. 853, it was laid down that the proceedings held in the absence of the real masters were unsatisfactory and the proceedings were set aside with the direction that notice should issue to the masters and thereafter the provisions of S. 145, Criminal P. C. should be complied with. I have read this judgment carefully but I cannot find anything in it to indicate under which provision of S. 145 it was open to the Court to issue a notice to a person against whom the preliminary order was not directed, nor can I understand how the preliminary order could be directed against a person who was not mentioned in the case to which reference was made. In that case the name of the master was really mentioned and what was said in the report was that one Sheo Prasad, Manager of the Estate of Sahu Har Prasad, had laid foundation to a breach of the peace. Thus, it was made clear in that case in the application for action under S. 145, Criminal P. C. itself that the gentleman who had disturbed the possession claimed to be acting as the Manager of another person and the Magistrate was, therefore, aware that the real parties to the dispute were other people and not the Manager. In that case, therefore, the preliminary order itself should have been issued to Sahu Har Prasad and not to his Manager but in the present case the application for action under S. 145, Criminal P. C. gives no indication whatsoever of Ali Shabbar being the Manager or acting for anybody else and therefore at the time of the preliminary order the Court could not issue notice to anybody but him. Having regard to the above facts there is no defect in the order passed by the learned Magistrate and this application is dismissed.

B.G.M.J. *Application dismissed.*

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RAGHUBAR DAYAL AND AGARWALA JJ.

Prem Shankar Pandaya, Applicant v. *U. P. Provincial Co-operative Bank Ltd., and others, Opposite Party.*

Civil Misc. Writ No. 354 of 1950, D/- 19-8-1952.

(a) Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) — Preamble and S. 7 (1) (a)—House falling vacant — Landlord requiring house for his own occupation—Case is covered by Act — Allotting house to tenant does not amount to requisitioning.

The expression, *control of letting of accommodation*, in the preamble is wide enough to cover the case of a house owner's occupying the house himself when it falls vacant. The moment any such accommodation falls vacant the Rent Control and Eviction Officer gets control over it for the purposes of its occupation by persons other than the house owner. Such powers of the Rent Control and Eviction Officer to consider the claim of the house owner with respect to an accommodation which was in a tenant's possession and had been vacated did come within his powers with respect to the control of the letting of the accommodation. The fact that the Act contemplates the control of letting of accommodation does not necessarily mean that it contemplates control of the letting of accommodation only when a house owner evinces a desire to let his building but the control of letting does contemplate the control of the letting of such accommodation which was in the possession of tenants when the Act came into force and of such accommodation which was vacated by owners of the houses after the enforcement of the Act.

Though controlling the letting of buildings does mean a restriction on the right of the owner about not letting the building, such a compulsion to let a building cannot amount to requisitioning the building. The Government does not get possession of the building and then deal with it in any manner it likes. It simply arranges for the letting of the house and prevents the owner's withdrawing that accommodation from being available to persons

in need of it. The accommodation is not in possession of the house owner. It is in the possession of tenants. When a tenant vacates, the Rent Control and Eviction Officer gets control over it and the owner is not free to occupy the house. If he occupies it and fails to get an allotment made in his favour he would be liable to eviction.. [Paras 6, 7]

(b) Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7 (1) (a) and S. 17, rules under — District Magistrate can allow landlord to occupy accommodation.

Section 7, sub-s. (1) (a) empowers the District Magistrate to permit the landlord to occupy the accommodation himself and not to let it when the District Magistrate considers that desirable. The Rules framed by the Government in exercise of its powers under S. 17 of the Act also provide for the case of District Magistrate's ordering that the accommodation be not let to any person but be occupied by the landlord himself. Rule 6 deals with the occupation by the landlord and authorises the District Magistrate to permit the landlord to occupy the accommodation himself which has fallen vacant if he be satisfied that the landlord *bona fide* needed it for his own personal occupation. [Para 9]

(c) Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7 (1) (a) — Does not contravene Art. 19 (1) (f) — (Constitution of India, Art. 19 (1) (f).)

The owner's right to hold and dispose of the property is restricted by the provisions of S. 7 (1) (a) authorising the District Magistrate to ask the landlord to let or not to let the accommodation to any person. But the restriction imposed is a reasonable restriction on the exercise of the right to hold and dispose of property. The restriction can be considered to be a hard one so far as the owner of the house is concerned. But it cannot be considered to be unreasonable. The provisions of S. 7 (1) (a) do not therefore contravene Art. 19 (1) sub-cl. (f) of the Constitution. A. I. R. 1952 All. 703 (F. B.), *Rel. on.* [Para 10]

Gopinath Kunzru and Amarnath Kaul — for Applicant; Standing Counsel—for Opposite Party.

REFERENCE: /Para.

('52) 1952 All L J 208: (A I R 1952 All 703 F B). 9, 10

Raghubar Dayal J.—Prem Shankar Pandaya applies for the issue of directions, orders or writs in the nature of mandamus, prohibition or certiorari declaring that the order of allotment passed on 16-3-1950 in respect of house NO. CK/36/7 situate in Chowk Banaras was invalid and illegal, and directing the opposite parties, viz., the U. P. Provincial Co-operative Bank Ltd. and Shri Chunni Lal allottees and the Assistant Rent Control and Eviction Officer, Banaras, and the Rent Control and Eviction Officer, Banaras, not to take any steps or action on the basis of the allotment order.

[2] The facts leading to this application are that the applicant is the owner of the house in suit and had let it to the Bharat Bank Ltd., of Delhi. He himself occupied another rented house. The house was let in 1943 under a lease for five years. The lease was renewed in 1948 and was to expire in JANUARY 1953. The applicant, however, persuaded the rentee, the Bharat Bank Ltd. of Delhi, to vacate the house in october 1950 as he wanted it for the purpose of his business. The Bharat Bank vacated the house on 31-10-1950.

[3] On 15-11-1950 the applicant sent a notice to the Rent Control and Eviction Officer, Banaras, stating therein that he was staying in a rented house and felt great inconvenience there and that he would be staying in and occupying the whole building for his personal use. He requested the Rent Control and Eviction Officer to allot the house in suit to him. The Rent Control and Eviction Officer, however, allotted the house to opposite-parties NOS. 1 and 2 on 16-11-1950 in ignorance of the applicant's application of 15-11-1950. The applicant then filed the present application on 28-11-1950.

[4] The affidavit filed on behalf of Chunni Lall, opposite-party NO. 2 mentions that he had applied for the allotment of the house on 4-11-1950 and that the applicant did not really need the house and that his claim that he needed the house for business purposes was not *bona fide*. It further mentioned that the application dated 15th NOVEMber was to be heard by the Rent Control and Eviction Officer on 1st DECEMBER but further proceedings were stayed on account of the interim injunction order from this Court. The order issued by this Court restrained either party from occupying the house and did not directly order the stay of the hearing of the applicant's application.

[5] Learned counsel for the applicant attacked the legality of the allotment order on two grounds. The first contention is that the Rent Control and Eviction Act does not provide for the house owner's not occupying his own house but provided for the control of the letting of that house by the house owner to any other person as to tenant besides its providing for matters relating to rent and eviction. The second contention is that if the Act be held to provide for the house owner's not occupying his own house himself the Act to that extent is *ultra vires* as it contravenes the provisions of ART. 19 (1) (f) of the Constitution of India. We do not agree with either of the contentions and therefore do not see any force in this application.

[6] The Preamble of the U. P. (Temporary) Control of Rent and Eviction Act, 3 of 1947 says :

"An Act to provide for the continuance during a limited period, of powers to control the letting and the rent of residential and non-residential accommodation and to prevent the eviction of tenants therefrom.

* * * * * * * * *

And whereas due to the shortage of accommodation in the United Provinces it is expedient to provide for the continuance during a limited period of powers to control the letting and the rent of such accommodation and to prevent the eviction of tenants therefrom ;

It is hereby enacted as follows:"

The expression, *control of letting of accommodation*, is wide enough to cover the case of a house owner's occupying the house himself when it falls vacant. It may be mentioned that the scheme of the Act is that the Rent Control and Eviction Officer does not exercise any jurisdiction over such accommodation which was in the personal occupation of the house owner on the date the Act came into force, and that the Rent Control and

Eviction Officer got powers over such accommodation only when the house owner, for any reason, vacated any accommodation in his own possession. The moment any such accommodation falls vacant the Rent Control and Eviction Officer gets control over it for the purposes of its occupation by persons other than the house owner. Thus he gets control of the letting of such accommodation. The Rent Control and Eviction Officer gets control over the accommodation which was in the possession of tenants at the time of the enforcement of the Act. If the house owner requires any such accommodation on its falling vacant for his own use he is, like other persons, to apply to the Rent Control and Eviction Officer and the said officer, on considering his claim along with the claim of others, is free to decide whether the accommodation should be allotted to a tenant or should not be allotted or should be allowed to be occupied by the owner himself. Such powers of the Rent Control and Eviction Officer to consider the claim of the house owner with respect to an accommodation which was in a tenant's possession and had been vacated did come within his powers with respect to the control of the letting of the accommodation.

If the expression 'control the letting' was not to cover such a power, the power of the Rent Control and Eviction Officer of letting would be not of much effective use if the exercise of such power be considered in relation to the interest of the general public in need of accommodation. In his own interest the house owner would like to rent the accommodation he does not want to use himself to tenants. So long as the amount of rent and the owner's right of ejecting the tenant be in control the interest of the general public do not much suffer on account of the accommodation being let to A or B. The interests of the general public suffer when the accommodation which was available to tenants is reduced by the owner's withdrawing a certain accommodation from further tenancy and by occupying it himself. One can imagine cases in which merely for reasons other than genuine requirements the owner may like to seize the tenancy of his building and to keep it in his own possession. The loss he may suffer in rent may be considered justified on account of his own fancies. We are, therefore, of opinion that the fact that the Act contemplates the control of letting of accommodation does not necessarily mean that it contemplates control of the letting of accommodation only when a house owner evinces a desire to let his building and are of opinion that the control of letting does contemplate the control of the letting of such accommodation which was in the possession of tenants when the Act came into force and of such accommodation which was vacated by owners of the houses after the enforcement of the Act.

[7] It is argued for the applicant that the District Magistrate's not letting the owner to occupy his own building amounts to forcing him to let it on rent and this amounts to the requisitioning of the building and then letting it to tenants. Controlling the letting of buildings does mean a restriction on the right of the owner about not letting the building. We do not think that such a compulsion to let a building can amount to requisitioning the building. The Government does not get possession of the building and then deal with it in any manner it likes. It simply arranges for the letting of the house and prevents the owner's withdrawing that accommodation from being available to persons in need of it. It is not necessary that the Act should have provided for the eviction of house owners when it contemplated the prevention of house owners from occupying the houses which were already on rent, as no question of eviction arises. The accommodation is not in possession of the house owner. It is in the possession of tenants. When a tenant vacates the Rent Control and Eviction Officer gets control over it and the owner is not free to occupy the house. If he occupies it and fails to get an allotment made in his favour he would be liable to eviction.

[8] Sections 3 and 7B of the Act deal with the eviction of tenants. Sections 3A, 4, 5 and 6 deal with the rent or other amounts which the house owner could or could not get, and matters relating to the fixation of rent.

[9] Section 7 deals with the control of letting and S. 7A deals with steps to be taken when somebody occupies the accommodation in contravention of the order of the District Magistrate under S. 7 (1). Section 7, sub-s. (1) cl. (a) authorises the District Magistrate (which includes any officer authorised by the District Magistrate to perform any of his functions under the Act) to require a landlord, by general or special order, to give intimation that any accommodation of which he is the landlord is, or has fallen, vacant and to let or not to let such accommodation to any person. The District Magistrate therefore can order the landlord not to let a certain accommodation to any person. This power not to let the accommodation to any person implies the power to allow the landlord to occupy the accommodation himself. Such an interpretation has been put on this provision in *Raman Das* v. *State of Uttar Pradesh*, 1952 ALL. L. J. 208 (F.B.). There too the applicant was the owner of the house who wanted to occupy the house vacated by a tenant but was not allowed to do so and the house was allotted to another person by the Rent Control and Eviction Officer. It was observed at p. 211:

"The District Magistrate had under S. 7 (1) (a) of the Act to decide whether the premises were to be let or they should not be let and if they were to be let, to whom they should be let."

It was further observed at the same page in discussing the argument that R. 6 allowing the District Magistrate to permit a landlord to occupy

the accommodation himself, if he *bona fide* needed it, was *ultra vires*:

"This argument, we are afraid, does not take account of the last few words of S. 7 (1) (a) which provide that the District Magistrate shall decide whether the accommodation is to be let or not to be let. If the District Magistrate had decided in favour of the applicant he would have then allowed him to occupy it himself and it was not necessary for him to let out the premises to any one."

Such an interpretation is consistent with the proviso in sub-s. (1) of s. 7, U. P. (Temporary) Control of Rent and Eviction Act of 1947, the proviso being:

"Provided that in making the first allotment in the case of any accommodation constructed after 1-7-1946 the District Magistrate shall allot it to the owner, if the owner, not being in occupation of any other house owned by him in that municipality or other contiguous area to which the Act applies, genuinely requires such accommodation for his own residence."

It is to be gathered from the proviso that the District Magistrate can permit a landlord to occupy a certain accommodation in certain circumstances. Such power is given to him when the general powers given to him under s. 7 (1) (a) included the power of refusing the landlord to occupy the accommodation himself which again implied the power to allow him to occupy it. Such a power would be covered by the provisions of cl. (a) of sub-s. (1) of s. 7 only if the expression "not to let such accommodation to any person" be interpreted to include the case of not letting the accommodation to any person in order that the landlord may occupy the accommodation himself and be not restricted to mean simply a power to refuse the letting of accommodation to any particular person. We are, therefore, of opinion that s. 7, sub-s. (1) (a) empowers the District Magistrate to permit the landlord to occupy the accommodation himself and not to let it when the District Magistrate considers that desirable. The Rules framed by the Government in exercise of its powers under s. 17 of the Act also provide for the case of District Magistrate's ordering that the accommodation be not let to any person but be occupied by the landlord himself. Rule 3 authorises the District Magistrate to make the allotment order within thirty days of the receipt of the intimation about the vacancy of the accommodation sent by the landlord under s. 7 (1) (a). Rule 4 permits the landlord to nominate a tenant in case he receives no notice of allotment within thirty days of the receipt by the District Magistrate of the intimation given by him, and enjoins the District Magistrate to allot the accommodation to such nominee unless for reasons, to be recorded in writing, he forthwith allots the accommodation to any other person. It does not contemplate the landlord's just intimating the District Magistrate that he himself would occupy the house. Rule 6 deals with the occupation by the landlord and authorises the District Magistrate to permit the landlord to occupy the accommodation himself which has fallen vacant if he be satisfied that the landlord *bona fide* needed it for his own personal occupation.

[10] Article 19 (i) (f) of the Constitution provides that all citizens shall have the right to acquire, hold and dispose of property. It is argued that the right to hold and dispose of property includes the right to occupy the house himself or to let it out to others and that therefore s. 7 (1) (a), U. P. (Temporary) Control of Rent and Eviction Act (III [3] of 1947) is *ultra vires* in so far as it restricts the right of the owner of the house to let or occupy it himself. We concede that the owner's right to hold and dispose of the property is restricted by the provisions of s. 7 (1) (a) authorising the District Magistrate to ask the landlord to let or not to let the accommodation to any person. We are, however, of opinion that the restriction imposed is a reasonable restriction on the exercise of the right to hold and dispose of property. The right given under Art. 19 (1) (f) of the Constitution is subject to the provision of cl. (5) which permits the State to make any law imposing reasonable restrictions on the exercise of that right—in the interest of the general public. It is not disputed that in view of paucity of accommodation available to persons in need of it the control of the letting of accommodation was justified and the restriction imposed was reasonable. What is contended for the applicant is that restricting the owner of the house from occupying the house himself when he stands in need of it is an unreasonable restriction. The restriction in the circumstances can be considered to be a hard one so far as the owner of the house is concerned. But we do not think that it can be considered to be unreasonable. As already observed, the scheme of the Act is that the Rent Control and Eviction Officer gets control over an accommodation which was in the occupation of tenants when the Act came into force and did not get control over such accommodation which was then in the occupation of the owner himself till such time that the owner decided to vacate the accommodation and thus made it available to prospective tenants. It follows that the owner of the accommodation which thus came within the control of the Rent Control and Eviction Officer did not need that accommodation till the time it fell vacant and may be was in occupation of some other accommodation. He probably needs to withdraw this accommodation from the accommodations available to tenants because of some extra needs of his. He is free to apply to the Rent Control and Eviction Officer for permission to occupy the accommodation. He is not completely barred from occupying it. The Rent Control and Eviction Officer will consider his needs along with the needs of other persons requiring accommodation and will pass orders in conformity with his views about the greater necessity of the citizens. The power he is exercising is, therefore, a power in the interest of the general public. The necessity for the exercise of such powers arises on

account of the paucity of accommodation. We are, therefore, of opinion, as already mentioned, that this restriction on the right of the owner of accommodation to occupy it after it is vacated by a tenant is a reasonable restriction in the interest of the general public and that therefore the provisions of S. 7 (1) (a), U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) do not contravene Art. 19 (1), sub-cl. (f) of the Constitution. We may in this connection refer to what was said by the Full Bench in *Raman Das* v. *State of Uttar Pradesh*, 1952 ALL. L. J. 208 (F.B.) at p. 212 in dealing with a similar contention. They said :

"Learned counsel was not able to explain how his rights to acquire, hold and dispose of property were being interfered with by the order of the allotment officer. In any case, as we have already said, we cannot say that it imposes any restriction on the rights of the landlords which is not reasonable."

[11] We, therefore, reject this application with costs and vacate the interim injunction.

B/R.G.D. *Application rejected.*

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SANKAR SARAN AND KAUL JJ.

Sm. Premwati and others—Judgment-debtors —Appellants v. *Sm. Satayawati Jain and others —Decree-holders—Respondents.*

Exn. First Appeal No. 109 of 1952 and Civil Revn. No. 713 of 1952, D/- 17-9-1952.

(a) Civil P. C. (1908), Ss. 47, 96, 115 and O. 21, R. 66 — Order dismissing application for setting aside ex parte order fixing terms of sale proclamation under O. 21, R. 66—Neither appeal nor revision lies.

In execution of a mortgage decree for sale notice was issued to the judgment-debtor fixing a date for the settlement of terms of the sale proclamation. The judgment-debtor filed objections to the execution of decree on various grounds under S. 47, Civil P. C., but the application was dismissed for default in appearance of the judgment-debtor on date of hearing and the Court ordered the sale proclamation to be prepared according to its direction. Subsequently the judgment-debtor filed an application for setting aside the ex parte order and the amendment of the terms of the sale proclamation but it was dismissed. The judgment-debtor appealed against the order and also filed a revision :

Held (1) that the order dismissing the application was not appealable as a decree. An order under O. 21, R. 66, Civil P. C., is not a judicial adjudication of any question arising between the parties to the execution but merely the issuing of directions as to the mode of proclamation of sale and as such does not fall under S. 47: *View of Sulaiman J. in* A.I.R. 1939 F. C. 74, *held not obiter and Foll.; Case law referred.* [Paras 4, 7]

(ii) that the order was also not open to revision under S. 115, Civil P. C. [Para 8]

Anno. C. P. C., S. 47, N. 71A ; S. 115, N. 2 ; O. 21, R. 66, N. 20, 21.

(b) Constitution of India, Art. 227 — Other remedy open—Exercise of jurisdiction under Art. 227.

If any relief in respect of an injury can be claimed by another provision of the law, the High Court would not exercise its jurisdiction under Art. 227 of the Constitution to grant such relief. [Para 9]

S. K. Varma — for Appellants ; N. P. Asthana — for Respondents.

REFERENCES : Courtwar/Chronological/ Paras

('98) 25 Ind. App. 146 : (20 All. 412 P. C.). 5
('39) A.I.R. 1939 F. C. 74: (I.L.R. (1939) Kar. (FC) 165). 4
('17) 39 All. 415 : (A. I. R. 1917 All. 349). 5
('26) A. I. R. 1926 All. 268 : (48 All. 260). 5
('26) A. I. R. 1926 All. 401 : (94 Ind. Cas. 1). 5
('32) A. I. R. 1932 All. 85 : (53 All. 391). 5
('32) Nathu Lal v. Yashodha Devi, (A.I.R. 1932 All. 136). 5
('32) Ram Charan v. Jumna Prasad, (A.I.R. 1932 All. 696 (1)). 5
('17) A. I. R. 1917 Pat. 381 : (37 Ind. Cas. 872 F. B.). 5
('23) A. I. R. 1923 Pat. 134 : (72 Ind. Cas. 860). 5
('40) A. I. R. 1940 Pat. 422 : (189 Ind. Cas. 355). 5, 6

Kaul J. — Both the above cases relate to the same order passed by the learned Civil Judge, Kanpur, and may conveniently be disposed of by one common judgment.

[2] The material facts lie within a short compass. Shrimati Satayawati Jain along with some other persons obtained a decree against Shrimati Premwati, who is the appellant in Execution First Appeal No. 109 of 1952 and the applicant in civil Revision No. 713 of 1952, on 29-10-1949. It was a final decree for sale in a mortgage suit. An application for execution was made by the decree-holders on 16-2-1950. Notices fixing the date for settlement of the particulars of the sale proclamation was issued on 7-2-1952. Owing to the death of His Majesty King George VI the Courts were closed on that date and the cases fixed for that date were taken up the next day. On 8-2-1952, the judgment-debtor filed objections mentioning a number of grounds against the execution of the decree. It was complained by her that inasmuch the decree-holder had not filed a written statement as was required by law for settlement of the particulars of the sale proclamation, she was unable to file a proper objection. It was ordered that the application be registered as a miscellaneous case under S. 47, Civil P. C., and be put up the next day. When the case was taken up, the objector was absent and the objections were dismissed for default. The main execution case was also taken up the same day and an order directing that a sale proclamation be prepared in accordance with the directions given was made. The sale proclamation was prepared accordingly and on 11-2-1952, it was ordered that a warrant be issued for holding an auction sale of the property on 26-3-1952.

[3] It may be mentioned that according to the decree-holders, the property sought to be sold was worth Rs. 70,000. On 8-3-1952, the judgment-debtor made another application praying that the *ex parte* order passed against her on 9-2-1952, be set aside, the particulars of the sale proclamation be amended and the sale be stayed meanwhile. It was held by the learned Civil Judge that an application for setting aside an order like the one passed by him on 9-2-1952, did not lie and the application was dismissed. Dissatisfied with this order, the present appeal and the revision application have been filed. Mr. Varma, who appeared for the judgment-debtor, stated that he had filed

his revision application by way of abundant caution.

[4] A preliminary objection was raised by Dr. Asthana to the hearing of this appeal. Relying on the observations of Sulaiman J. in *Shyamakant Lal* v. *Rambhajan Singh*, A. I. R. 1939 F. C. 74 at p. 80, Dr. Asthana contended that no appeal lay in the present case. This was contested by Mr. Varma. Having considered the matter carefully, we have come to the conclusion that the preliminary objection should prevail. It was laid down in the Federal Court case, to which reference has just been made that an order under O. 21, R. 66, Civil P. C. is not a judicial adjudication of any question arising between the parties to the execution but merely the issuing of directions as to the mode of proclamation of sale. Sulaiman J. further observed:

"It is really difficult to see how the approximate estimation of the value of the property can ever be regarded as a determination of any question arising between the decree-holder and the judgment-debtor within the meaning of S. 47, Civil P. C."

He further added:

"There seems to be a perfect unanimity among all the Indian High Courts that the fixing of the value of the property under this rule (O. 21, R. 66) is by no means an adjudication within the meaning of S. 47, Civil P. C. and such an order is not appealable as a decree."

He cited a large number of authorities including several cases of our own Court in support of the view taken by him. Mr. Varma sought to distinguish this case by saying that the observations were obiter and that they were not concurred in by the other two Judges constituting the Bench. Specific reference was made by him to the observations of Gwyer C. J. and Varadachariar J. at p. 77. He particularly invited our attention to the following passages:

"Our brother Sulaiman, though otherwise in agreement with us, holds that no appeal lies to this Court in the present case. We are unable to concur in that opinion. We think that the order of the High Court in this case must be treated as a final order for the purposes of S. 205, Constitution Act. If the appellant's application related only to the settlement of the proclamation, it is true that an order dealing with that application could not be regarded as determining the rights of the parties in any measure so as to make it a final order. A question of this kind must be determined with reference to the substance of the dispute between the parties and not merely in the light of the fact that the application is one made to the Court before whom an application to execute a decree is pending."

We are unable to hold that the observation made by Sulaiman J., was obiter. It is true that the two other learned Judges composing the Bench did not agree with him that the question before the Court in that case was one entirely governed by the provisions of O. 21, R. 66, Civil P. C. They pointed out that ss. 16 and 17, Bihar Money-lenders' Act, gave certain valuable rights to judgment-debtor whose case was covered by those sections. That would not, however, be sufficient ground to hold that the observations made by Sulaiman J., with regard to the correct nature of a proceeding under O. 21, R. 66, Civil P. C., were obiter. This is clear from the observations made by Gwyer C. J., and Varadachariar J., at pages 77 and 78. They were of opinion that though O. 21, R. 66, Civil P. C., was relevant to the case before them and did require consideration but according to their view certain other provisions of the law were also not to be lost sight of. In this view of the matter Mr. Varma's contention that the observations made by Sulaiman J., were obiter cannot be accepted.

[5] It will be further noted that the observations made by Sulaiman J., on the true character of the proceedings under O. 21, R. 66, Civil P. C., were concurred in by the other two learned Judges composing the Bench. They dissented from him not on that point but were of opinion that the matter before them was not covered solely by the provisions of O. 21, R. 66, Civil P. C. There were a large number of authorities to which reference was made by Sulaiman J., in support of his view including the following cases of our own Court viz., *Ajodhia Prasad* v. *Gopi Nath*, 39 ALL. 415; *Hira Lal* v. *Tikam Singh*, A. I. R. 1926 ALL. 401; *Mahomed Zakaria* v. *Kishun Narain*, A. I. R. 1926 ALL. 268; *Qaiser Beg* v. *Sheo Shankar Das*, A. I. R. 1932 ALL. 85 and *Nathu Lal* v. *Yashodha Devi*, (A. I. R. 1932 ALL. 136) and *Ram Charan* v. *Jumna Prasad*, A. I. R. 1932 ALL. 696 (1) reported in the same volume at pp. 136 and 696. Referring to the last case, he pointed out that it was held in that case that an order fixing the valuation for the purposes of the sale proclamation was not a decree within the meaning of S. 47, Civil P. C. Then he referred to decisions of other High Courts but we do not consider it necessary for the purposes of the present case to mention them here. In this view of the matter the question seems to be concluded by authority.

Mr. Varma, however, invited our attention to three cases of the Patna High Court, viz. *Sri Kant Lall* v. *Ram Bhajan Singh*, A. I. R. 1940 Pat. 422, *Raghunath Singh* v. *Hazari Sahu*, A. I. R. 1917 Pat. 381 (F. B.) and *William Maling Grant* v. *Suraj Mal Marwari*, A. I. R. 1923 Pat. 134, and to a decision of their Lordships of the Privy Council in *Saadatmand Khan* v. *Phul Kuar*, 25 Ind. App. 146 (P. C.). We are clear that in none of these cases the question which arises before us came up for consideration directly. In *Saadatmand Khan* v. *Phul Kuar*, 25 Ind. App. 146 (P. C.), it was held that

"a material misrepresentation (though made gratuitously by the decree-holder and the Court) of the value of property contained in a proclamation of sale under S. 287, Civil P. C., is a material irregularity in publishing or conducting a sale in execution within the special remedy provided by S. 311 for setting such sale aside."

It will be noted that the old S. 311 of the Code of 1882, corresponded to our O. 21, R. 90 of the present Civil P. C., 1908, and the finding of the Court arrived at in that case that the misstatement of the value of the property in that case could hardly have been made in good faith. Clearly such a matter could

be agitated even now under O. 21, R. 90, Civil P. C. This case can be no authority for the proposition that an order directing that a certain amount be mentioned in the sale proclamation as the approximate value of the property sought to be sold is a judicial adjudication of any question arising betwen the parties to the execution. In *Raghunath Singh* v. *Hazari Sahu*, A. I. R. 1917 Pat. 381, a Full Bench of the Patna High Court held that:

"It is the duty of a Court in preparing a proclamation of sale to state as fairly and accurately as possible in the proclamation the value of the property."

But Chamier C. J. with whom Sharfuddin and Atkinson JJ. agreed expressly made it clear that it was not necessary for him for the purposes of that case to consider the question whether a revision under s. 115, Civil P. C. could be entertained in such circumstances. The revision application was, therefore, entertained under the provisions of s. 107, Government of India Act. As we know, that section was also altered subsequently, and under the corresponding provision in the Government of India Act, 1935, no such power as was exercised under s. 107 of the earlier Government of India Act could be exercised. Nor do the third Patna case referred to can be of any help to Mr. Varma's client. The question which now arises before us did not arise in that case. It was observed by Das J. who pronounced the judgment in *William Maling Grant* v. *Suraj Mal*, A. I. R. 1923 Pat. 134, that in the case before them the application of the judgment-debtors did not raise any question as to the terms on which the sale proclamation should be settled. It raised a different question altogether.

[6] The facts in *Sri Kant Lall* v. *Ram Bhajan Singh*, A. I. R. 1940 Pat. 422, were different from the facts of the case before us.

[7] For the reasons given above, we are clear that no appeal lies in the present case.

[8] We will next consider whether the revision application under s. 115, Civil P. C. is entertainable. We have followed the view expressed by Sulaiman J. in the Federal Court case to which reference has been made earlier in this order. According to him, the determination of the value to be inserted in the sale proclamation in a proceeding relating to the execution of decree is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation for sale. Clearly, therefore, no question of exercise of any jurisdiction which did not vest in the Court or refusal to exercise jurisdiction properly vested in it, or exercise of its jurisdiction with material irregularity can arise in such a case. Accordingly no revision under s. 115, Civil P. C., can be entertained.

[9] Mr. Varma as a last resort fell back upon the provisions of Art. 227, Constitution of India, which gives the High Court a power of superintendence over all Courts and tribunals in this State. It was frankly conceded by the learned counsel for the applicant that if any injury is caused to the interests of his client by "the defective" sale proclamation which has been issued, he will be entitled to seek relief after the sale has been held under O. 21, R. 90, Civil P. C. If any relief in respect of an injury can be claimed by another provision of the law, this Court would not exercise its jurisdiction under Art. 227 of the Constitution, to grant such relief. This disposes of all the points raised by Mr. Varma.

[10] We, therefore, dismiss the appeal as well as the revision application. The respondents shall get their costs of the appeal. No order is made as to costs in the revision application.

A/K.S. *Appeal and revision dismissed.*

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MALIK C. J. AND SAPRU J.

Radhey Shyam Tandon — Applicant v. *The Judge (Appeals) Sales Tax, U. P. Lucknow and another — Opposite Party.*

Civil Misc. Writ No. 41 of 1952, D/- 11-8-1952.

Sales Tax — U. P. Sales Tax Rules (1948), Rr. 67, 68, 69 and 77A—Agent authorised by party — Rights of — Has no right to plead before Judges.

Rules 67, 68, 69 and 77A make it perfectly clear that while any agent has a right to act, that is, to present an application, to receive notices etc., the right to plead is restricted only to the party himself or a qualified pleader or a registered accountant engaged by a party. An agent who is neither a pleader nor a registered accountant has therefore, no right to plead before the Judge (Sales Tax), (Appeals) or (Revisions). [Para 2]

Surendra Nath Varma — for Applicant; Standing Counsel — for Opposite Party.

Malik C. J. — The applicant, Radhey Shyam Tandon, is a resident of Shahjahanpur and is engaged by a number of dealers of Shahjahanpur to look after their cases before the Sales Tax Officer, Judge (Appeals), Judge (Revisions) and Sales Tax Commissioner, U. P. In August or September 1951, he wanted to appear before the Judge (Appeals) and in November 1951 before the Judge (Revisions) and claimed the right to be heard by them, but his prayer was rejected. He has thereupon filed this application under Art. 226 of the Constitution and claimed that under the Rules framed under the Sales Tax Act (U. P. Act 15 of 1948, as amended by the U. P. Amendment Act 25 of 1948) he has a right to appear and plead on behalf of the merchants whose cases are pending before the Judge (Appeals) or the Judge (Revisions). Reliance is placed by learned counsel on R. 77A which reads as follows :

"Unless otherwise provided in the Act or the rules anything which is by the Act or the rules required or permitted to be done by a dealer may be done by an agent of the dealer authorised by him in writing in his behalf; and process served on or notice given to such agent shall be as effectual as if the same had been served on or given to the dealer in person; and all the provisions of the Act or the rules relating to the service of the process on or giving of notice to such agent."

[2] The question is whether this R. 77A gives the applicant, who has set himself up as an agent on behalf of all those who might seek his assistance before the Judge (Sales Tax), (Appeals) or (Revisions), (right?) to appear and plead on their behalf. The relevant rules relating to this matter are 67, 68 and 69. Rule 67 (1) provides that the memorandum of appeal can be presented by the appellant or by his pleader or by his duly authorised agent. Rule 68 (4) provides that on the date of hearing the appellant or his pleader or a registered accountant appointed by the appellant shall be heard. Similar provision is made in R. 69 (7) for cases before Judge (Revisions). There too a party himself or any practising lawyer of the High Court or of the District Judge's Court or a registered accountant has a right to be heard before the Judge (Revisions). These rules make it perfectly clear that while any agent has a right to act, that is, to present an application, to receive notices etc., the right to plead is restricted only to the applicant himself or a qualified pleader or a registered accountant engaged by a party. The applicant is neither a pleader nor a registered accountant and he had, therefore, no right to plead before the Judge (Sales Tax), (Appeals) or (Revisions).

[3] The application has no force and is dismissed with costs.

B/D.R.R. *Application dismissed.*

A. I. R. 1953 Allahabad 58

DESAI J.

State v. *Banarsidas and others — Opposite Party.*

Criminal Ref. No. 316 of 1951, D/- 29-7-1952.

(a) Criminal P. C. (1898), S. 350 (1) — "May act on the evidence so recorded."

The proceedings held before a Magistrate are not wiped off merely by the intention of the succeeding Magistrate to resummon the prosecution witnesses and recommence the trial and where the case is transferred to a third Magistrate, it is open to such Magistrate to continue the proceedings from the stage at which they were left by the first Magistrate : A.I.R. 1950 All. 669, *Disting.* [Para 2]

Anno. Cr. P. C., S. 350, N. 5.

(b) Criminal P. C. (1898), Ss. 350 and 439—Case transferred — *De novo* trial not wanted by accused — Magistrate deciding to act upon evidence recorded by his predecessor—High Court will not in revision interfere with his discretion and direct him to recommence trial. [Para 3]

Anno. Cr. P. C., S. 350, N. 5; S. 439, N. 17, Pt. 1.

(c) Criminal P. C. (1898), S. 350 (1), Proviso (a) — State has no *locus standi* to urge that Magistrate should not act upon evidence recorded by his predecessor. [Para 3]

Anno. Cr. P. C., S. 350, N. 9, Pt. 1.

J. R. Bhatt—for the State ; H. N. Kapoor — for Opposite Party.

REFERENCE: /Para

('50) 1950 All. L. J. 599 : (A.I.R. 1950 All. 669) 2

Order. — The question for decision in this case is whether it was open to the Magistrate Shri N. C. Jain, who is now trying the case, to resume proceedings from the stage at which they were left by the Magistrate Shri N. B. Singh. The case was first heard by Shri N. B. Singh who recorded all the evidence and was transferred before he could hear the argument. The case then went to the Court of Shri G. S. Seth who decided to resummon the witnesses and recommence the trial. He issued summonses against the prosecution witnesses but before he could examine any evidence, the case was transferred from his Court and went to the Court of Shri N. C. Jain.

Shri N. C. Jain has decided to resume proceedings from the stage at which they were left by Shri N. B. Singh, hear the argument and pass judgment. The learned Sessions Judge, at the instance of the prosecution, has made this reference recommending that Shri N. C. Jain be directed to resummon the witnesses and recommence the trial as decided by his immediate predecessor Shri G. S. Seth. The reference is opposed by the accused. Mr. Bhatt appearing for the State does not support it.

[2] Under s. 350 it was at the discretion of Shri N. C. Jain either to act on the evidence recorded by his predecessors or to resummon the witnesses and recommence the trial. He was not bound by the mere election of his immediate predecessor Shri G. S. Seth. Shri G. S. Seth had only elected to resummon the witnesses and recommence the trial; he had not examined any evidence afresh and so his election did not bind Shri N. C. Jain who had to exercise his own discretion when the case went to him on transfer. Had he recommenced the trial and examined even one witness for the prosecution afresh, it might not have been possible for Shri N. C. Jain to quash the proceedings held by him and to act upon the evidence recorded by Shri N. B. Singh.

As it is, even Shri G. S. Seth could have decided on the date fixed for the examination of the prosecution witnesses, not to examine them and not to recommence the trial but to act on the evidence recorded by Shri N. B. Singh. When the matter was still open to him it cannot be doubted that it was open to Shri N. C. Jain also. The learned Sessions Judge has relied upon *State* v. *Bansu*, 1950 ALL. L. J. 599, to which I was a party, but that case is to be distinguished from the present case. There the second Magistrate had actually recommenced the trial and dismissed the complaint on account of the complainant's absence. The first Magistrate had framed a charge against the accused but the charge was held to have been wiped off when the second Magistrate had decided to recommence the trial. The second Magistrate had not merely decided to recommence the trial ; he had also held proceedings in the retrial and dismissed the complaint on the ground of the complainant's absence.

Consequently, when the complainant filed a second complaint it was not open to the accused to urge that they had already been charged before

the first Magistrate and should be deemed to have been acquitted by the second Magistrate and that the second complaint was barred by the provisions of s. 403, Criminal P. C. I hold that the proceedings held before Shri N. B. Singh were not wiped off merely by the intention of Shri G. S. Seth to resummon the prosecution witnesses and recommence the trial, and that as he had not actually recommenced the trial, it was still open to Shri N. C. Jain to continue the proceedings from the stage at which they were left by Shri N. B. Singh.

[3] As the accused themselves do not want a *de novo* trial and the learned Magistrate has decided to act upon the evidence recorded by his predecessor, it will not be proper for this Court to interfere with the discretion of Shri N. C. Jain and direct him to recommence the trial. Section 350, Criminal P. C., gives certain right to the accused but not to the complainant or the State when it is prosecuting the case. Therefore the State has no *locus standi* to urge that Shri N. C. Jain should not act upon the evidence recorded by Shri N. B. Singh.

[4] The reference is rejected. Return the record to the Magistrate at once so that he may dispose of the case without any further delay.

B./V.R.B. *Reference rejected.*

A. I. R. 1953 Allahabad 59

P. L. BHARGAVA J.

Ramnath—Applicant v. *State.*

Criminal Revn. No. 625 of 1951, D/- 20-2-1952.

(a) Criminal P. C. (1898), Ss. 480 and 481—Omission to record proceedings as laid down in S. 481 — Illegality in mode of trial.

In a trial for an offence, of which cognizance has been taken under S. 480, the omission to record proceedings in the manner laid down in S. 481 is fatal to the proceedings. It is not merely an irregularity but an illegality in the mode of trial : A. I. R. 1931 Nag. 193, *Ref.* [Para 9]

Anno. Cri. P. C., S. 481 N. 1 Pt. 7.

(b) Penal Code (1860), S. 228—Insult or interruption—What record should show—(Criminal Procedure Code (1898), S. 481 (2)).

Where the record only shows that the accused was badly drunk and talked irrelevant in Court, it does not necessarily follow from this fact that he was behaving, so as to cause interruption or insult. The record should show how the accused had acted or what he had stated, caused interruption or amounted to insult. [Para 11]

Anno. Penal Code, S. 228 N. 7; Cr. P. C., S. 481, N. 1.

(c) Penal Code (1860), S. 228 — Intentionally.

Where the accused could not be presumed to have deliberately taken liquor out of his free will before coming to the Court in which he appeared and talked irrelevant :

Held, that the accused could not be held to have intentionally offered any insult or caused any interruption. [Para 12]

Anno. Penal Code, S. 228 N. 1.

B. N. Sapru — for Applicant; A. K. Kirty, Brief holder of Asst. Govt. Advocate — for the State.

REFERENCE: ... ... Para

('31) 32 Cri. L. J. 1221 : (A. I. R. 1931 Nag. 193). 10

Order.—This is an application in revision, which is directed against an order, dated 3-11-1950, made by a Magistrate of the first class of Pargana Rath, in the district of Hamirpur, and confirmed on appeal by the learned Sessions Judge of Hamirpur. The facts and circumstances which have given rise to this revision are these :

[2] As against the applicant, Ramnath, and certain other person, proceedings under s. 107, Criminal P. C., were pending in the Court of the Magistrate. In connection with the said proceedings, the applicant appeared in the Magistrate's Court. It is said that when the applicant appeared before the Court he was "badly drunk and could not control himself" and that "he was talking irrelevant thereby causing insult and interruption to the Court's work." The Magistrate being of the opinion that the applicant had by his conduct and behaviour committed contempt of Court, punishable under s. 228, Penal Code, took cognizance of the offence under s. 480, Criminal P. C. He immediately served upon the applicant a notice calling upon him to show cause, why proceedings for contempt of Court, be not taken against him.

In the notice, it was stated that the applicant had appeared in Court in connection with the case of *Dhaniram* v. *Ramnath*, under s. 107, Criminal P. C., and that he was badly drunk and talked irrelevant causing insult and interruption in Court. In reply to the notice, the applicant filed a writtten statement, saying that he had intentionally committed no wrong and that if he had committed any mistake, he might be excused. The Magistrate recorded the statement of the applicant, wherein he denied being drunk and his having uttered anything irrelevant. There is nothing else on the record, besides the order passed by the Magistrate.

[3] In the order which is on the record, the Magistrate has stated :

"Ramnath .... appeared today in my Court as an accused in the case, *Dhaniram* v. *Ramnath* under S. 107, Criminal P. C. He was badly drunk and could not control himself. He was talking irrelevant thereby causing insult and interruption to the Court's work."

Thereafter the learned Magistrate has stated that he took cognizance of the offence, called upon the applicant to show cause and he denied being drunk. Then he has observed :

"I am fully satisfied from his talk, way of walking and the smell coming from his mouth from a distance that he is badly drunk. He also interrupted the Court's work and also caused insult by his irrelevant and out of the point talk."

[4] In regard to the question whether the applicant had intentionally committed contempt, the learned Magistrate has pointed out that the fact that the applicant had taken the liquor of his own free will, before coming to the Court, was a direct proof of his committing the offence intentionally. Accordingly, the Magistrate convicted the applicant for contempt of Court and sentenced him, under s. 480, Criminal P. C., to pay a fine of Rs. 51 or in default of payment of fine to undergo 15 days' simple imprisonment. The applicant

went up in appeal before the Sessions Judge of Hamirpur, who has upheld the conviction and the sentence.

[5] In this revision, it has been contended on behalf of the applicant that the Magistrate did not comply with the mandatory provisions of S. 481, Criminal P. C., inasmuch as he did not "record the facts constituting the offence," and the record of the Magistrate does not "show the nature and stage of the judicial proceedings, in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult." It has been pointed out that the mere statement that the applicant was talking *irrelevant* was not sufficient, and the record should have shown the words actually uttered by him.

[6] In my opinion, the record of this case does contain record of the facts constituting the offence. The important fact which, in the opinion of the Magistrate, constituted the offence of contempt was that the applicant had appeared in Court in a drunken state. He was unable to control himself and was neither talking nor behaving like a normal man. The statement of the applicant was duly recorded and the order made by the Court contains the finding and sentence. Therefore the provisions contained in sub-s. (1) of S. 481, Criminal P. C. were duly complied with.

[7] As far as the provisions of sub-s. (2) of S. 481, Criminal P. C. are concerned, the record does not show

"the nature and stage of the judicial proceedings in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult."

All that appears from the record is that the applicant had appeared before the Court in the case, *Dhaniram* v. *Ramnath*, under S. 107 of the Code, but it does not appear whether at the time when the alleged offence is said to have been committed the case was up for hearing before the Court. It also does not appear from the record at what stage of any judicial proceedings the offence was committed and what was the nature of the interruption or the insult. Learned counsel holding the brief of the Government Advocate has not been able to show that the procedure laid down in sub-s. (2) of S. 481 of the Code was duly complied with.

[8] Learned counsel for the applicant has contended that the failure of the Magistrate to follow the mandatory provisions of sub-s. (2) of S. 481, Criminal P. C. is an illegality, which vitiates the entire proceedings and the conviction of the applicant ought to be quashed. On the other hand, learned counsel holding the brief of the Government Advocate has urged that the omission was a mere irregularity, which, in the absence of any prejudice to the applicant, is curable under S. 537 of the Code.

[9] In a trial for an offence, of which cognizance has been taken under S. 480, Criminal P. C., the omission to record proceedings, in the manner laid down in S. 481 of the Code, is, in my opinion, fatal to the proceedings. It is not merely an irregularity but an illegality in the mode of trial. The reason is obvious : S. 480 of the Code prescribes a summary procedure for trial of direct contempt of Court. In view of the summary nature of the trial, and in order to safeguard the interests of the persons dealt with in a summary manner, who are given a right of appeal, the proceedings must show the nature and stage of judicial proceedings in which the Court interrupted or insulted was sitting and the nature of the interruption or insult to prove the essential ingredients of the offence, under S. 228, Penal Code.

The section provides punishment for an offender who intentionally offers any insult, or causes any interruption to any public servant, *while such public servant is sitting in any stage of a judicial proceeding.* If the particulars required by sub-s. (2) of S. 481 of the Code are not recorded, the important evidence to show whether the offence had or had not been committed would be wanting.

[10] I find that a similar view was expressed in *Ramlal* v. *Emperor*, 32 Cri. L. J. 1221 (Nag) where it was held :

"In the case of proceedings for contempt of Court under S. 228, Penal Code, the record must show the nature and the stage of the judicial proceedings in which the Court interrupted or insulted was sitting and the nature of the interruption or insult, and omission to set forth the particulars as required by S. 481 (2), is not merely an irregularity which could be corrected by the application of S. 537 but is fatal to the proceedings."

[11] In this case it was, no doubt, stated that the applicant had appeared before the Court badly drunk and talked irrelevant; but the nature of interruption or insult had to be established to make him liable for contempt of Court. A man may appear in Court drunk but he may not behave in a manner so as to cause interruption or insult to the Court, and when questioned he may give irrelevant replies. Some persons, when they appear before the Court, do talk irrelevant, but it does not necessarily cause interruption in Court work.

Moreover, unless the actual words uttered were recorded it would be difficult to say that they were insulting. Consequently, the behaviour of the applicant and nature and details of the *irrelevant* talk should have appeared from the record. The record, however, only shows that he was badly drunk and *talked irrelevant;* and from that fact alone, it does not necessarily follow that he was behaving so as to cause interruption or insult. If the case in connection with which the applicant had been summoned, was before the Court at the time when the alleged interruption or insult was offered, even then, apart from the fact that he was in a drunken state, the record should have shown how the applicant had acted or what the applicant had stated caused interruption or amounted to

insult. That, however, does not appear from the record.

[12] In regard to the question whether the applicant had *intentionally* offered any insult or caused any interruption to any public servant the learned Magistrate has pointed out that the very fact that he took liquor of his own free will before coming to the Court is a direct proof of his committing the offence intentionally. The presumption is unwarranted as there is nothing on the record to show that the applicant had taken liquor of his own free will before coming to Court. He might have fallen in a bad company while coming to Court and induced to drink liquor. Consequently, it could not be presumed that he had deliberately taken liquor out of his free will before coming to Court. If he was drunk, he could not have known what he was doing or saying. In the circumstances, I find it difficult to hold that the applicant had *intentionally* offered any insult to or caused any interruption in the Magistrate's work, while sitting in any stage of a judicial proceeding.

[13] In view of the fatal defect in the procedure, in the absence of the particulars required by sub-s. (2) of S. 481, Criminal P. C. and in the absence of anything to show that he had intentionally done anything, the conviction of and the sentence imposed upon the applicant cannot be upheld. The revision is, accordingly, allowed and the conviction and the sentence imposed upon the applicant are set aside. The fine, if paid, will be refunded.

B/V.R.B. *Revision allowed.*

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SANKAR SARAN AND BIND BASNI PRASAD JJ.

Sanwal Das and others — Creditors-Objectors — Appellants v. *Dargah Sayed Shah Bazid Handi Mauquf and others — Criditors — Pro forma Respondents.*

First Appeal No. 438 of 1941, D/-1-8-1952.

† Civil P. C. (1908), O. 41, R. 22 — Applicability to proceedings under U. P. Encumbered Estates Act — (Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Ss. 45 and 47 and R. 6).

Inasmuch as the filing of a cross-objection is inconsistent with the provisions of S. 47, O. 41, R. 22 is not applicable to the proceedings under the Encumbered Estates Act. Nor can the word "appeals" occurring in S. 45 be held to include the word "cross-objection."

[Paras 5 and 6]

Anno. Civil P. C., O. 41, R. 22, N. 1a.

J. Swarup and J. N. Chatterji—for Appellants; M. L. Chaturvedi and A. K. Kirty —for Respondents.

Bind Basni Prasad J.—Today in the course of arguments learned counsel for the appellants made the following statement :

"The land on which stands the three storied house No. 596/1 to 3 with two shops bounded as below :
East—Shop No. 596/10 etc.,
West—Land of the Dargah,
North—House No. 595,
South—Drummond Road,
which property is described as item No. 9 in the written statement filed on behalf of the Dargah in Case No. 784 of 1936 before the Special Judge, 1st Grade, Agra, belongs to the Dargah, the landlord-applicant and the rights of creditors 1 to 8 in respect of that land are that of licensees and they are holding the land as licensees having built on it as licensees."

Learned counsel for the respondent made the following statement :

"In view of the fact that no lease was executed by the owner in favour of Sukhdeo, I concede that the position of Sukhdeo and his legal representatives, which expression includes creditors Nos. 1 to 8 (appellants in the appeal) is that of a licensee and not a lessee. This statement of mine refers to the land detailed by the learned counsel for the appellants in his statement. The respondents do not dispute the ownership of the appellants in respect of the building standing upon the aforesaid land."

[2] In view of these statements the appeal is allowed in part. The appellants are declared to be the licensees of the land upon which the disputed building is situated, and the owners of that building. The order of the lower Court declaring Dargah Syed Shah Bazid Handi Mauquf as the owner of that land is upheld. Parties will bear their costs throughout.

Cross-objection in First Appeal No. 438 of 1941

[3] Creditors NOS. 1 to 8 preferred this appeal against the judgment dated 25-8-1941, passed by the learned Special Judge, 1st Grade, Agra. Upon this the landlord-applicant which is a Dargah filed a cross-objection on 7-4-1942. Sri Kirty who is representing one of the creditors, *viz.* Creditor NO. 9, Bohrey Ram Gopal, raises a preliminary objection to the maintainability of the cross-objection. His contention is that there is no provision in chap. VI, U. P. Encumbered Estates Act about a cross-objection. Section 45 of that Act deals with appeals and S. 46 with revisions. Section 47 provides :

"Except as provided in Ss. 45 and 46, no proceedings of the Collector or Special Judge under this Act shall be questioned in any Court."

The argument is that orders passed in proceedings under the Encumbered Estates Act can be questioned only by appeals or revisions and not by cross-objections.

[4] Learned counsel for the appellants invites our attention to R. 6 of the Rules made under the U. P. Encumbered Estates Act, 1934, which provides :

"Proceedings under this Act shall be governed by the provisions of the Code of Civil Procedure of 1908, for the time being in force, so far as they are applicable and not inconsistent with the provisions of the Act and of these Rules."

The contention is that as the whole of the Code of Civil Procedure has been applied to the proceedings under the Encumbered Estates Act the provisions of O. 41, R. 22, Civil P. C., which provides for cross-objections also become applicable.

[5] The Code of Civil Procedure has not been applied in its entirety to the proceedings under the Encumbered Estates Act. They apply only "so far as they are applicable and not inconsistent

with the provisions of the Act and of the Rules." The question is whether the filing of a cross-objection is inconsistent with the Act. Section 47 of the Act is very emphatic. It says that no proceedings of the Special Judge shall be questioned in any Court except in the manner provided by ss. 45 and 46.

If the intention had been that the order of the Special Judge could be questioned also by means of a cross-objection there would have been a provision to that effect. We are of opinion that inasmuch as the filing of a cross-objection is inconsistent with the provisions of s. 47 of the Act, o. 41, r. 22 is not applicable to the proceedings under the Encumbered Estates Act.

[6] Sri Misri Lal Chaturvedi, learned counsel for the appellants (respondents?) has argued also that in essence there is no difference between an appeal and a cross-objection because the object of both is the same and the word "appeal" occurring in s. 45 must be interpreted as including a cross-objection. We do not agree with this. There is a great difference between an appeal and a cross-objection. A right of appeal is a substantive right, whereas a right of filing a cross-objection is a right which accrues only when the adversary files an appeal.

Moreover, sub-s. (1) of s. 45 provides that the period of limitation for appeals shall be 90 days. If the word "appeals" occurring there be interpreted as including cross-objections then it would mean that there is an independent right to file a cross-objection and the period of limitation for the same is 90 days. That would be meaningless and would run counter to the provisions of o. 41, r. 22. We hold that the word "appeals" occurring in s. 45 does not include the word "cross-objection."

[7] Learned counsel for the appellants (respondents?) has also argued that if the cross-objection is not maintainable it may be treated as a revision under s. 46. That section provides:

"Any Court empowered under S. 45 to hear an appeal under this Act may of its own motion, or on the application of any person concerned, call for the record of proceedings in any case under this Act pending in a Court from which appeals lie to such Court and after giving due notice to the parties concerned pass such order thereon consistent with the provisions herein contained as it thinks fit, and such order shall be final."

The case from which this appeal arises has been decided by the learned Special Judge. It is not pending. It is true that the proceedings under the Encumbered Estates Act are still pending before the lower Court, but the particular dispute between the parties to this appeal has been disposed of and that particular case is no longer pending there. We doubt whether we can exercise the powers under s. 46 in a case like this. Moreover, the learned Special Judge has based his decision in regard to ownership of the shop in dispute on a judgment of this Court and we see no good reason to exercise our discretion under s. 46 to convert this appeal into a revision.

[8] The preliminary objection prevails. The cross-objection is dismissed. The parties will bear their costs.

[9] The record of the case shall be sent down to the lower Court at a very early date.

B./V.R.B. *Order accordingly.*

A. I. R. 1953 Allahabad 62

SAPRU J.

Kedar Nath—Defendant—Appellant v. *Mool Chand—Plaintiff—Respondent.*

Second Appeal No. 175 of 1952, D/-23-7-1952.

Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3 and 2 (d)—"The District Magistrate" in S. 3 does not include Additional District Magistrate — Only District Magistrate and not State Government can delegate powers of District Magistrate under Act to Additional District Magistrate—(Criminal P. C. (1898), S. 10 (2)).

'The District Magistrate' contemplated under S. 3 does not include Additional District Magistrate. [Para 5]

The State Government is not competent under S. 10 (2), Criminal P. C. to delegate the powers under the Act, since the Act has expressly laid down that the power is exercisable by "the District Magistrate" that is to say, the Chief Magistrate in the District. [Para 6]

It is, however, competent under S. 2 (d), to the District Magistrate himself to delegate his authority to any authority he chooses. Whether in a particular case, this authority is delegated or not, is a question of fact, on which there can be no presumption one way or the other. [Para 8]

Anno. Cri. P. C., S. 10, N. 5.

Ambika Prasad and Sanker Sahai Varma— for Appellant; S. B. L. Gour—for Respondent.

REFERENCE: Para

('43) I L R (1943) Nag 154 : (A I R 1943 Nag 26: 44 Cri L J 345) 5

Judgment. — This is a tenant's appeal arising out of a suit for ejectment from a shop situate in the city of Agra. The suit for ejectment was brought by the plaintiff with the permission of the Additional District Magistrate. The suit was resisted by the tenant on various grounds. But the ground with which we are concerned in the present case is that the landlord was not competent to bring the suit for ejectment inasmuch as the District Magistrate or any person authorised by him had not given the permission requisite for bringing a suit under s. 3, U. P. (Temporary) Control of Rent and Eviction Act, 1947. Both the Courts decreed the plaintiff's suit and held that there was no force in the objection that the Additional District Magistrate was not competent to authorise the plaintiff to institute a suit for ejectment under s. 3 of the Act. The defendant has now come up in appeal to this Court.

[2] The question for consideration is whether the District Magistrate as contemplated under s. 3 includes an Additional District Magistrate or not. Section 3 lays down that:

"No suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation . . . ."

It will be noticed that the article which qualifies the District Magistrate is 'the.' There is no definition of the District Magistrate in the General Clauses Act. There is a definition of a District Magistrate in s. 10, Criminal P. C. Clause (1) of s. 10, Criminal P. C. lays down that:

"In every district outside the Presidency-towns the Provincial Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate."

In other words, this section makes it obligatory on the State Government to appoint in every District a Magistrate who shall be different from other Magistrates inasmuch as he shall be the Cheif Magistrate of the District.

[3] Clause (2) of s. 10 of this Code authorises the Provincial Government to appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force, as the Provincial Government may direct. Though Additional District Magistrates can be vested with all the powers of a District Magistrate under the Code of Criminal Procedure or under any other law for the time being in force as the State Government may direct they are not exactly District Magistrates.

[4] Clause (3) of s. 10 of the Code makes it clear that for certain purposes these Additional District Magistrates are deemed to be Subordinate to the District Magistrate. What cl. (3) does is to invest the District Magistrate with powers to transfer cases pending before one Additional District Magistrate to another Additional District Magistrate or some other Magistrate or allow appeals to be heard by one or the other of the Additional District Magistrates or Magistrates in his district or withdraw cases from the Court of one Additional District Magistrate or a Magistrate. Clause (3) makes it thus abundantly plain that there is a difference between the District Magistrate who is the principal executive officer in the District and Additional District Magistrates. They are not considered as exactly identical in all respects.

[5] Clause (d) of s. 2, U. P. (Temporary) Control of Rent and Eviction Act, 1947, defines the District Magistrate as including a person authorised by the District Magistrate to perform any of his functions under this Act. Now it is to be noted that the Legislature does not say that the District Magistrate includes an Additional District Magistrate as also an officer authorised by the District Magistrate to perform any of his functions under this Act. In other words, reading the reference to the District Magistrate in s. 3 in the light of the definition given in cl. (d) of s. 2, U. P. (Temporary) Control of Rent and Eviction Act, 1947, I am driven to the conclusion, whether intentionally or by inadvertence, that the Legislature intended the District Magistrate to be a *persona designata* in this particular and special Act to mean the District Magistrate and not any Additional District Magistrate. It must be assumed that the U. P. legislature which passed the U. P. (Temporary) Control of Rent and Eviction Act 1947, was fully familiar with the provisions of s. 10, Criminal P. C. which makes it incumbent upon the State Government to appoint in every district a District Magistrate and further authorises the State Government to confer all or any of the powers exercisable by the District Magistrate on Additional District Magistrates. Notwithstanding this provision, the U. P. Legislature laid down that the powers under s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, shall be exercisable by the District Magistrate or by a Magistrate or officer authorised in that behalf by him. I feel, therefore, that there is no alternative for me but to come to the conclusion that the power of delegation was intended by the legislature to be exercised only by the District Magistrate.

On this point I may be permitted to refer to the observations of an eminent Judge, who is now a Judge of the Supreme Court. In the case of *Prabhakar* v. *Emperor*, I. L. R. (1943) Nag. 154, Vivian Bose J. dealing with the question whether under the Defence of India Act, s. 2 (5), the Additional District Magistrate could be authorised to pass the orders that he had passed in that particular case, observed as follows:

"Rule 26 (1) (b) gives the Provincial Government power to detain a person if it is satisfied, etc. S. 2 (5) empowers the Provincial Government to direct that any power or duty which it could exercise itself under the Rules be exercised by certain other persons. The Provincial Government has authorised all District Magistrates and certain Sub-Divisional Magistrates to exercise those powers of detention by Notification No. 411-696-C.P.W, 7-4-1942. But the orders in the cases before us have been signed by A. G. F. Farquhar, Additional District Magistrate. No Additional District Magistrate appears to have been authorised to act—at any rate no such authority was shown to us by the Crown. The action of Farquhar would therefore appear to be unauthorised and illegal.

I am aware that there are other provisions which invest Additional District Magistrates with much the same powers and authority as the District Magistrate. But the Act and the Rules we are dealing with are special and in view of the importance which the House of Lords attached to the fact that in England only the Home Secretary could exercise the powers and not minor officials, I have grave doubts whether these very special and drastic powers can be exercised by those not specially authorised. As an illustration I give the fact that an Additional District Magistrate cannot marry persons under the Indian Christian Marriage Act unless specially authorised even when the District Magistrate is authorised to do so. The mere fact that he can exercise the powers of the District Magistrate for a great many purposes does not necessarily invest him with authority to exercise all the District Magistrate's powers."

[6] My attention has been drawn to the notification issued by the U. P. Government on 1-8-1947, which invested the Additional District Magistrats in this case with all the powers of the District Magistrate under the said Code and under any other law for the time being in force.

Undoubtedly had the statute not expressly laid down that the power is exercisable by 'the District Magistrate', that is to say, the chief Magistrate in the District, the State Government would have been competent under s. 10 (2), Criminal P. C. to delegate the powers under the U. P. (Temporary) Control of Rent and Eviction Act 1947, or for the matter of any Act exercisable by a District Magistrate to Additional District Magistrates. But the position, as I see it, is that under the U. P. (Temporary) Control of Rent and Eviction Act 1947, the power has been conferred not on 'a' District Magistrate but on 'the' District Magistrate and there can only be, as far as I can see, one District Magistrate under the Criminal P. C. in a district. For this reason, this notification is of no effect and cannot be allowed to override the written text of the law. It may be that the argument which has prevailed with me is of a technical nature but it is not for this Court to supply the defects and lacunae in a legislative enactment. Mistakes of drafting cannot be overlooked by this Court.

[7] Mr. Gour, who appears for the respondent, has invited my attention to the fact that there is no finding on the point whether the Additional District Magistrate in this particular case was authorised by the District Magistrate to perform any of his functions under the Act. The fact that the District Magistrate is subordinate to the Provincial Government and is bound to carry out the orders of the Provincial Government cannot, however, relieve him of the personal responsibility with which the Act has vested him. We are not concerned with political arguments or political subordination. What we have to see is what exactly the legal position of the District Magistrate is under the Act.

[8] The contention put forward by Mr. Gour is that it may well be that in this case the Additional District Magistrate, the City Magistrate, or some other officer chosen by him, was authorised by the District Magistrate to exercise the powers vested in him under s. 3 of the Act. Certainly it was competent to the District Magistrate to delegate his authority to any authority he choses. This, however, is a question of fact on which there can be no presumption one way or the other. This is a question on which it is necessary to frame an issue.

[9] If the Additional District Magistrate was authorised by the District Magistrate obviously the suit was competent. The question, however, is one of fact and has not been properly gone into by the Courts below. I consider it, therefore, necessary to frame the following issue:

"Had the District Magistrate authorised the Additional District Magistrate or the City Magistrate before the institution of the suit to perform any or all the powers under S. 3 of the Act?"

[10] Parties will be allowed to adduce fresh evidence. Three months' time from the date of the arrival of the record is given to the learned judge for transmitting his findings to this Court. The usual 10 days' time will be allowed for filing objections. After all this procedure has been gone through, the case will be listed for final disposal.

B/R.G.D. *Order accordingly.*

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(LUCKNOW BENCH)

MISRA J.

Ram Bharosey—*Appellant* v. *Mahadeo Singh and others*—*Respondents.*

Second Appeal No. 470 of 1948, D/- 6-8-1952.

(a) Debt Laws—U. P. Debt Redemption Act (13 of 1940), Ss. 8 and 9 — Amendment of decree — Preliminary decree in mortgage suit — Decree made absolute on proceedings taken after commencement of Act—Benefit of Act not claimed by judgment-debtor when decree was made absolute — Held, preliminary decree could not be amended after passing of final decree and that final decree was incapable of amendment because it was passed after Act came into force—Held also that judgment-debtor could not get benefit of S. 9 (1) as his application for amendment had not been made during pendency of suit : A. I. R. 1951 All. 155 (FB), *Foll.* [Para 1]

(b) Civil P. C. (1908), O. 22, R. 3 — Abatement of appeal—That success of appeal might bring into effect two conflicting decrees is by itself hardly reason for ordering abatement. [Para 2]

Anno. C. P. C., O. 22, R. 3, N. 24.

B. K. Dhaon — for Appellant; R. B. Lal and R. B. Chaudhri—for Respondents.

REFERENCES: Courtwar/Chronological/	Paras
('51) A I R 1951 All 155 : (1951 All L J 130 FB)	1
('42) A I R 1942 Oudh 155 : (17 Luck 327)	2

Judgment. — This is a mortgagee's second appeal against the appellate order of the learned District Judge of Bara Banki upholding the order for amendment of a final mortgage decree which was passed by the learned Munsiff, Ramsanchighat under s. 8, U. P. Debt Redemption Act. A preliminary decree for sale was made on 8-12-1938, that is to say before the U. P. Debt Redemption Act came into force in 1941. The decree was against the three sons of the original mortgagor, Lachhman Singh and two transferees, Sanoman Singh and Mata Prasad Singh. Proceedings for making the decree absolute took place after the commencement of the Act, but the mortgagors did not claim the benefits of the U. P. Debt Redemption Act at that time with the result that the final decree was passed on 26-8-1944, for RS. 1102-15-7. An application for amendment under s. 8 which gives rise to this appeal was filed subsequently on 9-9-1947, and it was opposed, amongst others, on the ground that the amendment was not warranted by the provisions of the Act. The two Courts below repelled the objection and reduced the decretal sum from RS. 1102-15-7 to RS. 575. The decree-holder has come up by way of second appeal. In view of the recent Full Bench decision in *Ram Kishore* v. *Shayaur Sunder Lal*, A. I. R. 1951 ALL. 155 (F.B.), it cannot now be disputed that where a preliminary decree in a mortgage suit passed

before the commencement of the U. P. Debt Redemption Act is superseded by a final decree for sale, the judgment-debtor cannot get the benefit of either s. 8 or s. 9. The preliminary decree cannot be amended because after the passing of the final decree, it is no longer an active or enforceable order having already served its purpose and exhausted itself. The liabilities of the parties are thereafter regulated only by the decree absolute. The final decree is incapable of amendment because it is passed after the Act come into force. It was further held by the Full Bench that the judgment-debtor cannot get the benefit of s. 9 (1) since the application for amendment was not made during the pendency of the suit. In this view, the decision of the Courts below amending the decree is obviously wrong and without jurisdiction.

[2] The respondents concede that on merits they have no case left but they raise a preliminary objection to the hearing of the appeal on the ground that the entire appeal has abated by reason of its abatement against Sanoman Singh, one of the transferees of a portion of the hypothecated property. It is urged that by reason of the abatement against Sanoman Singh, his liability has now been finally determined and it cannot be disturbed for if the appeal succeeds it will bring into existence a conflicting decree, an eventuality which must be avoided. I regret I am unable to accept the argument. There are three answers for it and each of them in my opinion is sufficient for overruling the contention. They are: (1) The mere fact that the success of the appeal might bring into effect two conflicting decrees is by itself hardly a reason for ordering the abatement of the appeal. As held in *Lachmi Narain* v. *Musaddi Lal*, A. I. R. 1942 Oudh 155:

"The law Courts as far as possible will avoid inconsistency but it is their business to do justice between parties, and if by a pedantic adherence to consistency injustice will be done, they will prefer justice to consistency . . . . . and therefore inconsistency is not an absolute test."

(2) The interest of Sanoman Singh in the mortgage deed and therefore in the decree is separate and refusal to amend the decree so far as the other respondents are concerned will not necessarily affect the rights of Sanoman Singh adversely, and (3) That the amendment was made at the instance of a Mahadeo Singh alone. The other debtors were not shown to be entitled to the benefits of the Debt Redemption Act and were not made parties to the proceedings under s. 8. The amendment of the decree, therefore, must be deemed to be for his benefit alone. Sanoman Singh and the other judgment-debtors were brought on the scene only when Ram Bharosey went up in appeal but that fact does not make them either interested in the result of the appeal or necessary parties thereto. The preliminary objection has no force and it must be rejected.

[3] I allow the appeal, set aside the decision of the Courts below and reject the application for amendment under s. 8, U. P. Debt Redemption Act. The appellant will be entitled to his costs here and heretofore.

B.M.K.S. *Appeal allowed.*

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MALIK C. J. AND V. BHARGAVA J.

Laxmiratan Cotton Mills Co., Ltd., Cawnpore — Applicant v. *Commr. of Excess Profits Tax, U. P., C. P., Berar & Lucknow—Respondent.*

Misc. Case No. 140 of 1946, D/- 23-9-1952.

(a) Excess Profits Tax Act (1940), S. 26 (1)—Application under—Determination of statutory average capital by Board.

There is no requirement at all that, while passing orders on an application under S. 26 (1), the Central Board of Revenue must necessarily determine the statutory average capital of the applicant during the standard period. [Para 4]

Anno. Excess Profits Tax Act, S. 26, N. 1.

(b) Excess Profits Tax Act (1940), Ss. 6 (1) and 21—Computation of capital—Errors in—High Court is not concerned with such errors.

It is not the function of the High Court to make calculations and compute the capital during the standard period. If there are any errors in computation they can be corrected only by the appellate authorities. The High Court is not concerned with such errors in computation. [Para 4]

Anno. Excess Profits Tax Act, S. 6, N. 1; S. 21, N. 1.

(c) Excess Profits Tax Act (1940), S. 21 — Question whether Excess Profits Tax Officer has correctly applied law—High Court will refuse to answer question.

It is the function of the Appellate Assistant Commissioner and the Appellate Income-tax Tribunal to examine the view that has been taken by the Excess Profits Tax Officer and, if he commits any mistake, to set him right. The High Court is only concerned with the correctness of decision on questions of law by the Appellate Income-tax Tribunal and consequently it will refuse to answer the question whether the Excess Profits Tax Officer had or had not correctly understood and applied the provisions of law and the directions of the Central Board of Revenue. [Para 5]

Anno. Excess Profits Tax Act, S. 21, N. 1.

(d) Excess Profits Tax Act (1940), Sch. 1, R. 5—Requirements of rule—Applicability.

All that R. 5 requires is that the increase in the capital employed in a business should have been effected at any time after the close of the standard period by means of a loan from a bank. The rule does not require that the loan itself should have been taken after the close of the standard period. The words "at any time after the close of the standard period" only qualify the words "increase in the capital" and not the words "the loan from a bank." Even if the loan may have been taken earlier the amount of that loan is to be deducted in case the increase in the capital is effected as a result of that loan at any time after the close of the standard period. [Para 5]

The correct interpretation of R. 5 therefore is that it will apply if any increase in the capital employed in a business is effected at any time after the close of the standard period as a result of a loan taken from a bank whether the loan is taken after the close of the standard period or earlier and that the rule does not require that the loan itself should have been taken after the close of the standard period. [Para 9]

Anno. Excess Profits Tax Act, Sch. 1. R. 5, N. 1.

Gopal Swarup Pathak — for Applicant; Jagdish Swaroop—for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('45) 1945-13 I T R 445 : (A I R 1946 Bom 60). 1
('50) 1950-18 I T R 722 (Cal). 1

V. Bhargava J. — This is a reference under s. 21, Excess Profits Tax Act, read with s. 66 (1), Income-tax Act. The assessee Messrs. Laxmiratan Cotton Mills Co., Ltd., Kanpur, is a director-controlled company incorporated under the Indian Companies Act, managed by its managing agents, Messrs. Beharilal Kailashpat. The company manufactures textiles at Kanpur. The share holders are either members of the family of Messrs. Juggilal Kamlapat or are closely connected with them. The company in addition to employing its own capital also borrows money from banks and other sources. The chief sources for borrowing money were the Imperial Bank of India and Messrs. Juggilal Kamlapat of Kanpur. The company started its operations before April 1936.

[2] A notice under s. 13 (1), Excess Profits Tax Act, was served on the company on 23-9-1940, and the return required by that notice was submitted to the Excess Profits Tax Officer on 15-12-1940. Subsequently on 3-2-1942, the company applied to the Central Board of Revenue under s. 26 (1) requesting that their standard profits may be fixed at a figure of Rs. 7,50,000 or alternatively twenty per cent. on the average capital including borrowing from all sources employed in the business during the chargeable accounting period, whichever be higher. In the application the company chose the period from 1-10-1936 to 30-9-1938 as the standard period.

In the grounds for this application, the company gave various reasons why the standard profits in relation to the chargeable accounting period arrived at under s. 6 would not be fair to the company. The two principal reasons given were, firstly, that the company had succeeded in obtaining the latest type of machines calculated to give better production than other mills situate in the same area at a very low price as the equipment was purchased at a time when the prices of machinery were at their lowest so that the initial capital investment was not high; and secondly, that the profits during the standard period were particularly low as during that period trained workmen were not available and the company had to work out a scheme for training workmen for extension, to adjust uneven and un-balanced equipment, and for further experimentation and adjustment of departmental operations of the production programme of the mill, the benefit of which did not become available to the company until after the expiration of the standard period.

On this application the Board of Revenue passed an order which was communicated to the assessee by the Secretary, Central Board of Revenue through letter dated 23-4-1942 and which is reproduced below as the learned counsel for the assessee has based his argument very considerably on it :

"The Central Board of Revenue, having considered your application, under sub-s. (1) of S. 26, Excess Profits Tax Act, 1940;

(a) That, by reason of special circumstances alleged by you, it is inequitable that the standard profits of your business in relation to the chargeable accounting period commencing 1-9-1939 and ending 30-9-1939 should be computed in accordance with the provisions of sub-s. (1) of S. 6 :

(b) that, by reason of a specific cause peculiar to the business alleged by you, it is just that their direction should not be limited to the statutory percentage of the average amount of capital employed in the business;

and having heard your representatives in support of such application, the Central Board of Revenue has directed,

that the standard profits of the business, in relation to the said chargeable accounting period shall be computed as if the profits of the standard period viz. the previous year commencing 1-10-1936 and ending 30-9-1937 ;

and the previous year commencing 1-10-1937 and ending 30-9-1938 were the sum of Rs. 3,20,000."

Subsequently the assessee in reply to some communication addressed by it to the Central Board of Revenue received a letter from the Excess Profits Tax Adviser of the Central Board of Revenue intimating that the directions of the Central Board of Revenue had proceeded on the basis that the statutory average capital of the company's standard period was the sum of Rs. 12,01,735.

[3] The Excess Profits Tax Officer, when making the assessment for the first chargeable accounting period, held that the average amount of capital employed during the standard period was Rs. 12,01,735 and that the average amount of capital employed during the first chargeable accounting period was Rs. 14,55,156, without taking into account the amounts borrowed by the assessee. To arrive at the amounts to be added to the capital employed during the chargeable accounting period in respect of borrowings from banks, the Excess Profit Tax Officer took into account the average bank borrowings during the chargeable accounting period as Rs. 13,85,304 and deducted from it bank loans at the end of the standard period which had amounted to Rs. 11,81,920, the difference of Rs. 2,03,384 was thus added by him to the capital of Rs. 14,55,156, for the chargeable accounting period arrived at without including loans from banks.

The assessee, however, claimed that in order to work out the figure to be added in respect of the loans from banks the Excess Profits Tax Officer should have deducted, from the average bank borrowings during the chargeable accounting period, the average bank borrowings during the standard period which were only Rs. 6,09,262 instead of the bank loans at the end of the standard period which were Rs. 11,81,920, so that the amount to be added should have been Rs. 7,76,042. This reference to us relates to three different chargeable accounting periods, viz. (1) 1-9-1939 to 30-9-1939, (ii) 1-10-1939 to 30-9-1940 and (iii) 1-10-1940 to 30-9-1941.

In the two succeeding chargeable accounting periods also, the average capital employed during those chargeable accounting periods was worked out

by the Excess Profits Tax Officer in the same manner as for the first chargeable accounting period which has been mentioned above. The contention of the assessee before the Appellate Assistant Commissioner, against the order of the Excess Profits Tax Officer, was that the Central Board of Revenue had determined the average capital employed during the standard period to be Rs. 12,01,735 and that the Excess Profits Tax Officer was not entitled to modify this figure. It was further contended that the Excess Profits Tax Officer was wrong in calculating the amounts to be added in respect of bank loans inasmuch as, when calculating that amount, he had wrongly deducted the bank loans at the end of the standard period instead of the average bank borrowings during the standard period from the average bank borrowings during the chargeable accounting period.

The Appellate Assistant Commissioner did not accept any of these two contentions of the assessee so that the assessee's appeal was dismissed. The Income-tax Appellate Tribunal agreed with the view of the Appellate Assistant Commissioner and dismissed the appeal. Thereupon the assessee applied that certain questions be referred to this Court for decision. The tribunal, after considering the questions as drafted by the assessee and after taking into account the contentions of the department, referred the following three questions to this Court for decision :

"1. What, in the circumstances of the case, must be deemed to be the amount of capital of the applicant company during the standard period for the purpose of comparison with the capital employed during the chargeable accounting period?

2. Whether under the provisions of the Act and particularly R. 5 of Sch. 1 of the Act, the increase in the average capital employed during the chargeable accounting period and the average capital employed during the standard period is (a) difference between the average bank borrowings during the two periods or (b) the difference between the average borrowings during the chargeable accounting period and the borrowed capital at the close of the standard period?

3, Whether the provisions of law as contained in Ss. 2, 6 and 26 and Schs. I and II, Excess Profits Tax Act, and the directions of the Central Board of Revenue, if any, have been correctly understood and applied by the Excess Profits Tax Officer to the facts of the case in computing the average capital during the standard and chargeable accounting periods."

[4] Mr. Pathak on behalf of the assessee contended with reference to the first question that the Excess Profits Tax Officer was not competent to modify the figure of Rs. 12,01,735 which had been determined as the average capital employed during the standard period by the Central Board of Revenue. But we are unable to see that there is any force at all in this contention. Neither in the statement of the case nor in the appellate order of the tribunal is there any finding of the fact that the Central Board of Revenue had determined the capital of the assessee in the standard period to be Rs. 12,01,735. In the statement of the case, the manner in which this figure was arrived at by the Excess Profits Tax Officer has been described.

Reference has been made to sheet CIII of the statements of account prepared by the Excess Profits Tax Officer during the assessment proceedings and this sheet CIII has been made a part of the statement of the case by being included as EX. A-3 in the appendix. In this sheet, the average amounts of capital during the previous years for the years of assessment 1938-39 and 1939-40 were added together and halved in order to work out the average for the full period of these two years which was taken as standard period. Exhibit A-6 which reproduces sheet CIII shows that the two figures for the average amount of capital during the previous years for the years 1938-39 and 1939-40 were taken from sheets CI and CII which are EXS. A-4 and A-5 in the appendix.

In these statements, these figures were calculated on the basis of relative capital as per statement *A*. This statement *A* is not before us as the Tribunal did not direct that it should form part of the statement of the case. However, we are not concerned with the detailed method of calculation adopted by the Excess Profits Tax Officer nor with the correctness of those calculations. Those are questions on which the decision of the Tribunal was final. It is, however, clear from these references and the statement of the case that the figure of Rs. 12,02,735 was worked out by the Excess Profits Tax Officer himself from various statements prepared by him presumably on the basis of the accounts produced before him by the assessee.

There is no indication at all that this figure was taken by the Excess Profits Tax Officer from the letter of the Excess Profits Tax Adviser to the Central Board of Revenue which has been relied upon by the assessee and which has been made part of the statement of the case as EX. L. The appellate order of the Tribunal makes the position clearer. The order of the Tribunal is EX. E1 and in Para. 3 of that order of the Tribunal says :

"The Central Board of Revenue never said that the capital employed by the appellant in his business, in the standard period was Rs. 12,01,735."

They proceeded to mention that they had been told that the Excess Profits Tax Adviser to the Central Board of Revenue wrote in a letter to the appellant that the statutory average capital of the company's standard period was the sum of Rs. 12,01,735. The Tribunal did not hold that this letter of the Excess Profits Tax Adviser to the Central Board of Revenue was proof of the fact that the Central Board of Revenue had determined the statutory average capital of the company's period to be Rs. 12,01,735. Learned counsel for the assessee further argued that when deciding an application under S. 26 (1), the Central Board of Revenue had to direct that the standard profits of the assessee shall be computed to be such greater amount, than the amount determined under the provisions of sub-s. (1) of S. 6, as the Central Board of Revenue thinks just; and in doing so,

the Central Board of Revenue was bound to determine the statutory average capital for the standard period so that this communication from the Excess Profits Tax Adviser must be deemed to be proof that the amount of Rs. 12,01,735 had been determined as such capital.

We do not think that there is any force in this argument as there is no requirement at all that, while passing orders on an application under s. 26 (1), the Central Board of Revenue must necessarily determine the statutory average capital of the applicant during the standard period. In these circumstances it cannot be presumed that the capital of the assessee during the standard period was actually determined by the Central Board of Revenue. The actual language of the order passed by the Central Board of Revenue which has been reproduced earlier also makes it clear that there was no such determination. The order only lays down that the standard profits of the business in relation to the chargeable accounting period are to be computed as if the profits of the standard period were the sum of Rs. 3,20,000.

This shows that the Central Board of Revenue instead of prescribing the amount of the standard profits of the assessee's business in relation to the chargeable accounting period only prescribed the profits of the business for the standard period. Since the Central Board of Revenue merely laid down in their order the profits for the standard period, it was incumbent on the assessing authorities to work out the standard of profits in relation to the chargeable accounting period in accordance with the provisions of s. 6 accepting the figure of the profits for the standard year to be laid down by the Central Board of Revenue. This is precisely what has been done in this case by the Excess Profits Tax authorities. Their calculations have proceeded on an acceptance of Rs. 3,20,000 as the profits of the standard period and with this figure, as the basis, they have worked out the standard profits in relation to the chargeable accounting period.

They have, therefore, in no way varied any figure which was actually determined by the Central Board of Revenue and it cannot be said that their computation is, therefore, incorrect. However, even on this view held by us it is not possible to answer the first question as it has been framed by the Tribunal. The question as framed requires us to give the exact figure which must be deemed to be the capital of the company during the standard period. It is not the function of this Court to make calculations and compute the capital during the standard period. If there are any errors in computation they could have been corrected only by the appellate authorities. This Court is not concerned with such errors in computation. The question as framed cannot, therefore, be answered.

[5] We may, at this stage, take the third question also before dealing with the second question. This question is, on the face of it, one that should not have been referred for decision to this Court. In this question, we are asked to decide whether the Excess Profits Tax Officer had correctly understood and applied the provisions of law as contained in certain specified sections and Schedules of the Excess Profits Tax Act and the directions of the Central Board of Revenue. It was the function of the Appellate Assistant Commissioner and the Appellate Income-tax Tribunal to examine the view that had been taken by the Excess Profits Tax Officer and, if he committed any mistake, to set him right. This Court is only concerned with the correctness of decision on questions of law by the Appellate Income-tax Tribunal and consequently we must refuse to answer the question whether the Excess Profits Tax Officer had or had not correctly understood and applied the provisions of law and the directions of the Central Board of Revenue.

The second question is the only question of law which, in our opinion, really calls for a decision by us. The appellate Income-tax Tribunal for the purpose of working out the average capital employed during the chargeable accounting period, did not take into account the difference between the average bank borrowing during the two periods and instead considered the difference between the average bank borrowings during the chargeable accounting period and the borrowed capital at the close of the standard period. The question as to which method was correct depends on the interpretation of R. 5 of Sch. I, Excess Profits Tax Act, which is reproduced below :

> "If at any time after the close of the standard period any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a *bona fide* banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and notwithstanding the provisions of R. 2 of Sch. II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business."

This rule has to be applied with reference to R. 2 (1) of Sch. II of the Act. Schedule II of the Act lays down the principles for computing the average amount of capital of the business in relation to a chargeable accounting period. Rule 1 of this Schedule gives the various items that have to be totalled together to work out the capital. Rule 2 directs that all borrowed monies and debts should be deducted when computing the average capital in relation to any chargeable accounting period. Rule 5 of Sch. I provides an exception to this R. 2 of Sch. II and lays down that certain loans and debentures are not to be deducted in arriving at the amount of the capital employed in the business. The loans which are not to be deducted are also those loans which may be taken from a bank carrying on *bona fide* banking business.

There is the further requirement that these loans are not to be deducted only if, at any time after the close of the standard period, any increase in the capital employed in the business has been effected by means of such loans from a bank. In this case, there is no dispute that the borrowings under consideration were from a bank carrying on *bona fide* banking business, and we have only to see what part of those loans are not to be deducted from the actual capital employed during the chargeable accounting period in accordance with R. 5 of sch. I mentioned above. Considering the case of the first chargeable accounting period, the finding is that the average bank borrowings during that period were Rs. 13,85,304. The average bank borrowing during the standard period which just preceded the chargeable accounting period were Rs. 6,09,262.

In the average capital employed during the chargeable accounting period there was thus an increase as a result of borrowings to the extent of Rs. 7,76,042. This was the increase in the capital employed in the chargeable accounting period as a result of the loans which had been taken by the assessee from a bank carrying on *bona fide* banking business and obviously this is the amount that should have been taken into account for the purpose of applying R. 5 of sch. I when calculating the capital employed in the business. Mr. Jagdish Swarup, on behalf of the department, contended that the whole increase of Rs. 7,76,042 was not the result of fresh loans taken from the bank during the chargeable accounting period and that it included some increase in the average capital which had resulted because there was a heavy loan at the end of the standard period which was continued during the chargeable accounting period.

His contention was that, in calculating the amount which is not to be deducted in arriving at the amount of the capital during the chargeable accounting period, only such parts of the loan from the bank can be considered as had been taken after the close of the standard period. It appears to us that this contention is based on an interpretation of R. 5 which is not justified. All that R. 5 requires is that the increase in the capital employed in a business should have been effected at any time after the close of the standard period by means of a loan from a bank. The rule does not require that the loan itself should have been taken after the close of the standard period. The words "at any time after the close of the standard period" only qualify the words "increase in the capital" and not the words "the loan from a bank". Even if the loan may have been taken earlier, the amount of that loan is to be deducted in case the increase in the capital is effected as a result of that loan at any time after the close of the standard period.

In the present case the average borrowings during the standard period were Rs. 6,09,262 whereas the average borrowings during the chargeable accounting period were Rs. 13,85 304. There was thus an increase in the average borrowings to the extent of Rs. 7,76,042 and the whole of this increase in the average borrowings resulted in an increase in the capital employed during the chargeable accounting period which followed the standard period. Since the increase in the capital took place after the close of the standard period the whole of this difference in the average borrowings which resulted in the increase in the capital must be the amount not to be deducted, under R. 5 of sch. I.

Learned counsel for the department, on the other hand, contended that only such loans were not to be deducted under R. 5 of sch. I as had not only effected an increase in the capital after the close of the standard period but as had actually been taken after the close of the standard period. Learned counsel referred us to certain examples which had been given by the Central Board of Revenue in the instructions issued by the Board to the assessing authorities for computation of excess profits. Since the method of computation given in these examples was the basis of the argument of the learned counsel before us, we may here set out one of them and consider where the error in interpretation has been committed in it. The fourth example in the instructions issued is as follows:

Example (4) (A)—Average capital on normal basis during the standard period, Rs. 10,00,000.

(B) Average capital on normal basis during the chargeable accounting period, Rs. 9,00,000.

(C) Average borrowed money during the standard period, Rs. 50,000.

(D) Actual borrowed money at close of standard period, Rs. 2,00,000.

(E) Average borrowed money during the chargeable accounting period, Rs. 2,00,000. In this case although there is an increase in the average business assets during the chargeable accounting period of Rs. 11,00,000 less Rs. 10,50,000 and that increase is all due to the increase in the average borrowed money of Rs. 2,00,000 less Rs. 50,000 the whole of this increase is due to the borrowings before the close of the standard period and, therefore, R. 5 is not applicable.

[6] It is quite clear from this example that the learned counsel wants us to interpret R. 5 as laying down not merely that the increase in the capital of the business should have been effected at any time after the close of the standard period but also that the loan which effected the increase should also all have been taken after the close of the standard period. In the example given above the average borrowed money during the chargeable accounting period was Rs. 2,00,000/- and the average borrowed money during the standard period was Rs. 50,000/-. The increase in the average borrowed money was Rs. 1,50,000/- and this was also the extent of the increase in the capital employed during the chargeable accounting period. The whole of this increase in the average capital employed was the result of borrowings though part of this increase was the result of borrowings during the standard period and not after the close

of the standard period. The increase in the average capital was, however, effected after the close of the standard period.

On the proper interpretation of R. 5 of sch. I it must be held that the whole of this difference in the loans to the extent of Rs. 1,50,000/- should not be deducted in computing the capital. We do not think that the language of the rule can justify the interpretation that the loans which effected the increase should itself all have been taken after the close of the standard period. In order to compute what amount of loan has been utilised in effecting the increase in the capital the loan taken even before the standard must be taken into account. Consequently, the correct method of computing the amount which is not to be deducted under R. 5 would be to take the difference between the average bank borrowings during the chargeable accounting period and the average bank borrowing during the standard period.

[7] The anomaly and injustice that would result if the interpretation put on behalf of the department on this rule is accepted can be best brought out by an example. There can be a case where an assessee takes a loan of one lac from a bank at the beginning of the standard period and maintains that loan for eleven months. In the twelfth and last month of the standard period he takes an additional loan of 12 lacs so that the borrowings from the bank in that month amount to thirteen lacs. In such a case the assessee would have the benefit of a loan of one lac for eleven months and a loan of thirteen lacs for one month during the standard period which would give him the benefit of average borrowings of two lacs for the whole standard period.

In the succeeding chargeable accounting period, the assessee maintains the loan of thirteen lacs for three months and thereafter repays twelve lacs, bringing down the loan to one lac which continues until the close of the chargeable accounting period. During the chargeable accounting period, the assessee thus has the benefit of loan from the bank to the extent of thirteen lacs for three months and one lac for nine months, giving him an increase in the average capital of four lacs during the chargeable accounting period as against two lacs in the standard period. In such a case there is an obvious increase in the capital employed in the business during the chargeable accounting period and this increase is effected during the chargeable accounting period.

The increase is also due to the borrowings from a bank and yet on the method of calculation contended by the department there would be no loan at all from the bank which can be said to have effected the increase and which should not be deducted in accordance with R. 5 of sch. I. In fact, on that method of calculation, instead of there being any increase in the loan there would be a decrease to the extent of nine lacs because the average borrowings during the chargeable accounting period were only four lacs and the actual loan at the close of the standard period was thirteen lacs. Since all the borrowings would have to be deducted in computing the average capital for this chargeable accounting period in accordance with R. 2 of sch. II, the result would be that the average capital employed during the chargeable accounting period so computed would be nine lacs less than the average capital of the standard period though, in fact, the average capital used by the assessee would be four lacs more than the average capital during the standard period.

[8] It appears to us that there is one more difficulty which arises if the interpretation put by the department is accepted. In some cases R. 5 may have to be applied where there has been lapse of a considerable period between the close of the standard period and the beginning of the chargeable accounting period. In such a case if the actual amount of the loan at the end of the standard period is deducted from the average borrowings during the chargeable accounting period, the method of calculation adopted would completely ignore the effect of all the borrowings that might have taken place during the intervening period and this would clearly be unjustified.

[9] Clearly, therefore, the correct interpretation of R. 5 is that it will apply if any increase in the capital employed in a business is effected at any time after the close of the standard period as a result of a loan taken from a bank whether the loan is taken after the close of the standard period or earlier and that the rule does not require that the loan itself should have been taken after the close of the standard period.

[10] This rule came up for interpretation before the Bombay High Court in *Killick Nixon & Co.* v. *Commissioner of Income-tax*, 1945-13 I. T. R. 445 (Bom.) and before the Calcutta High Court in *Commissioner of Excess Profits Tax West Bengal* v. *Karamchand Thapar & Bros.*, 1950-18 I. T R. 722 (Cal.). Both the High Courts held that for the purposes of applying R. 5 of sch. I of the Excess Profits Tax Act the amount which is not to be deducted has to be calculated by taking the difference between the average borrowings during the chargeable accounting period and the average borrowings during the standard period and not the difference between the average borrowings during the chargeable accounting period and the actual borrowings at the close of the standard period. The decisions of those Courts are thus in line with the view taken by us above. We answer question NO. 2. accordingly.

[11] We direct that the assessee shall get Rs. 500/- as costs from the department.

A/V.R.B. *Reference answered.*

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(FULL BENCH)

MALIK C. J., KAUL AND V. BHARGAVA JJ.

Mt. Naraini Devi—Claimant — Appellant v. *Sudhist Narain Anand and another— Landlord —Respondents.*

Second Appeal No. 2362 of 1944, D/- 8-9-1952, Decided by Full Bench on Order of Reference made by Agarwala and P. L. Bhargava JJ., D/- 22-9-1950.

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Ss. 9 and 11 — Property subject to a charge for monthly maintenance allowance payable to wife of predecessor-in-interest of landlord applicant — Claim by wife under S. 11—Maintainability.

A purchased certain property from *B* the previous landlord, who had created a charge over the property for the maintenance allowance payable to his wife *C* for her lifetime at a particular sum per month. On an application under S. 4 by *A*, *C* filed a claim under S. 11 praying that the decree to be passed in the proceeding should specifically provide that the property mentioned therein was subject to the charge of monthly maintenance allowance of *C*. The question was whether the claim application was maintainable:

Held that the claim for future maintenance which had not accrued due being merely contingent liability was, clearly not provable under S. 9, Encumbered Estates Act. [Para 7]

(ii) It is incorrect to say that an application under S. 11 can be filed only by a person who claims a proprietary interest in the property. The words in the section are very wide and an application can be made by any person having any claim to the property. Hence, it cannot be said that a person who has a claim to recover maintenance allowance from the property charged for such payment has no claim to such property. [Para 8]

(iii) The nature and the extent of landlord-applicants' proprietary rights not having been correctly specified it became necessary for *C* to file her objection under S. 11, Encumbered Estates Act. The application was therefore maintainable. [Para 9]

S. N. Seth, H. N. Seth and K. C. Saxena—for Appellant; Krishan Shanker—for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('45) 1945 All. L. J. 378 : (A. I. R. 1945 All. 321 F. B.). 6, 7

('42) A. I. R. 1942 Oudh 352 : (17 Luck 536). 5

Malik C. J.—One Pirthi Narain, who was the owner of the property now in question, created a charge in favour of his wife in a sum of Rs. 25 a month payable to her as maintenance. Thereafter he sold the property to one Parsidh Narain. After a partition in the family the property came to Sudhist Narain Anand and another. On 16th september 1936 Sudhist Narain Anand and another filed an application under S. 4, U. P. Encumbered Estates Act. On 27th september 1937, the landlord-applicants filed a written statement under S. 8 and notices under S. 11 were issued on 6th August 1938. On 9th November 1938, Srimati Naraini Devi, wife of Pirthi Singh, filed a claim under S. 11, Encumbered Estates Act, and prayed that

"it may specifically be provided in the decree of this Court after enquiry under S. 11, U. P. E. E. Act of 1934 that the property mentioned hereunder is subject to the charge of the maintenance money of Rs. 25 a month of your petitioner."

[2] The learned Special Judge, II Grade, decided the application in favour of Srimati Naraini Devi.

[3] On appeal the learned District Judge set aside the order and dismissed the application.

[4] A second appeal against the decision of the District Judge was filed in this Court. The bench before which the appeal came up for decision has referred the question whether the application was maintainable under S. 11, U. P. Encumbered Estates Act, for decision by a larger bench.

[5] In the referring order a reference was made to a decision of the Oudh Chief Court in *Chandra Bhushan* v. *Mt. Putta Devi*, A. I. R. 1942 Oudh 352. The learned Judges were of opinion that the view taken in that case was that the liability for payment of future maintenance was a debt under S. 9, Encumbered Estates Act and they were inclined to differ from that view. We have carefully read the judgment in the case mentioned above and though, at one or two places in the judgment, the learned Judges deciding that case have described the claim as for future maintenance and have held that it was provable under the Encumbered Estates Act, in the first paragraph of the judgment the facts have been clearly stated and they show that the amount for the realisation of which the application for execution was filed was the arrears for which a decree was passed in the year 1936 and the future maintenance that had accrued due after the date of the decree and before the application for execution was filed. It was not a case in which the learned Judges were called upon to decide the question whether a future liability, which may or may not come in existence, had to be claimed under S. 9, Encumbered Estates Act, and, if not claimed it would be deemed to be discharged under S. 13 of the Act. We do not think, therefore, that the view taken in *Chandra Bhushan's case* was really against the view that we are inclined to take.

[6] The other case mentioned in the referring order is *Mt. Khatoon Begam* v. *Saghir Husain Khan*, 1945 ALL. L. J. 378 (F. B.). In that case the three learned Judges deciding the case took three different views. Allsop J. was of the opinion that the debts claimable under S. 9, Encumbered Estates Act, were debts for which not only the liability had been incurred but debts which had become payable on the date of the application under S. 4, Encumbered Estates Act. Mathur J. took the view that all liability — whether in praesenti or contingent liability which may come in existence in future—had to be proved under the Encumbered Estates Act at the risk of its getting discharged under S. 13, Encumbered Estates Act, if not so proved. The third view taken by Malik J. (as he then was) was that only those debts need be claimed under S. 9 the liability for which had been incurred before the date of the application under S. 4, Encumbered Estates Act,—though its actual payment may have been postponed and the amount could not be realised by suit on the date of the filing of the application. And in a case where the liability was a mere contingent liability,

which may or may not arise, then such a claim could not be proved under s. 9, Encumbered states Act, for the simple reason that the ability had not arisen on the date when the application under s. 4 had been filed by the landlord-applicant.

[7] In the case before us the point is very simple. Smt. Naraini Devi could claim maintenance allowance at a rate of Rs. 25 a month during her lifetime and for each month the liability arose as she survived in that month. There is no provision in the Encumbered Estates Act for actuarial valuation of such a liability and for a decree to be passed on the basis thereof. The claim for future maintenance which had not accrued due was, therefore, clearly not provable under s. 9, Encumbered Estates Act. It is not necessary for us to deal with this point at any length as we are in full agreement with the judgment of Malik J. in the Full Bench case of *Mt. Khatoon Begam*, 1945 ALL. L. J. 378.

[8] When we come to s. 11, Encumbered Estates Act, we find that any person having any claim in the property is entitled to apply to the Special Judge. It must be admitted that Sm. Naraini Devi has a claim to the property as she holds a charge and is entitled to recover a sum of Rs. 25 a month so long as she is alive. Learned counsel appearing for the respondents has urged that an application under s. 11 can be filed only by a person who claims a proprietary interest in the property. The words in the section, however, appear to us to be very wide and an application can be made by any person having any claim to the property. We cannot say that a person who has a claim to recover maintenance allowance from the property charged for such payment has no claim to such property.

[9] The other objection is that the applicant can only object to the liability for attachment, sale or mortgage and in this case Sm. Naraini Devi is not objecting to the liability for attachment, sale or mortgage of the property; all that she is claiming is that she has got certain rights which have to be safeguarded at the time of the sale. Under s. 8 of the Act, a landlord-applicant has to specify the nature and extent of his proprietary rights in land and any claimant under s. 10, Encumbered Estates Act, has also to clearly specify the nature and the extent of the landlord-applicant's proprietary rights in land and the nature and extent, if any, of the landlord's property other than proprietary rights in land. If the nature and extent of the landlords' proprietary interest had been correctly described then it should have been mentioned that the property was subject to a charge. And in that case no occasion for an objection under s. 11, Encumbered Estates Act, would have arisen. The nature and the extent of the landlord-applicants' proprietary rights not having been correctly specified it became necessary for Sm. Naraini Devi to file her objection under s. 11, Encumbered Estates Act.

[10] We are of the opinion that the application was maintainable.

A/K.S. *Answer accordingly.*

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(LUCKNOW BENCH)

MISRA AND BEG JJ.

A. W. Lazarus — Appellant v. *The State.*

Criminal Appeal No. 69 of 1951, D/- 14-2-1952.

Penal Code (1860), S. 304A — Criminal rashness — Tests — To judge criminality of accused one should put oneself in situation in which accused found himself and see what would be his reaction — Driver of goods train not seeing raised signal which was meant for him due to visual obstruction caused by tree and other railway construction but wrongly thinking that the lowered signal was meant for him — Train carried to a line ending in dead end — Accident causing death of persons — Accused held not guilty under S. 304A.

Where a driver of goods train was misled by railway signals due to visual obstructions caused by railway constructions and a tree and could not see the raised signal meant for him and thinking that the line was clear (being misled by the lowered signals, not meant for him) drove on the train on a particular line, and dashed the train against the dead end with the result that some persons who were beyond the dead end unauthorisedly were killed, in order to judge of the criminality of the accused it is necessary, to put onself in his position and to see what in the circumstances which were before him would be the normal reaction to these signals of a man situated as he was. It is easy after the event to analyse the happenings and to find out possible methods or devices which if adopted may have averted the accident. But this would be a wrong approach. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused. The criminality in such a case lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence under S. 304A is gross and culpable neglect or failure to exercise that reasonable and proper care and to take precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances attending the charge, it was the imperative duty of the accused person to have adopted. Where the accused exercised the ordinary caution which was demanded of him inasmuch as he slowed down his train on entering the yard, it is difficult to saddle him with the knowledge that his train was to be received on the platform with a dead end line or failure to notice that a further signal which was intended for that particular line but which was obstructed from view, was not lowered. It is impossible, to insist in such a case that the driver should have discerned that the signals which misled him were not intended for him. His action might be unfortunate but could by no means be called grossly negligent : 3 All. 776 and A. I. R. 1926 Cal. 300, *Applied.* [Para 4]

S. D. Misra and Thakur Prasad Misra — for Appellant; Jogdish Gopal Mathur for Deputy Government Advocate — for the State.

REFERENCES : Courtwar/ Chronological/ Paras
('81) 3 All 776 : (1881 All W N 132) 4
('26) 53 Cal 333: (A I R 1926 Cal 300: 27 Cri L J 153) 4

Misra J.—The accused-appellant, A. W. Lazarus, has been convicted by the learned Sessions Judge of Hardoi under s. 304A, Penal Code, for rash

and negligent driving. He has been sentenced to four months' rigorous imprisonment. The incident in connection with which the appellant was tried took place on 15-1-1950, at 8.2 A. M. in the Railway yard of Hardoi station. Lazarus was driver of a fast goods train NO. 216 down coming from Saharanpur towards Balamau.

[2] The facts established by the prosecution, and not disputed on behalf of the accused, are that the aforesaid down goods train was not scheduled to stop at Hardoi station but it was to run through to Balamau, that shortly before its arrival at Hardoi another train running in the same direction had arrived on platform NO. 3 at 7.30 A. M., that it was due to leave at 7.51 but due to some trouble in one of the component wagons its departure was delayed till 7.56, and that while the 84 down parcel train was still at Hardoi, the Kaurha Station, which precedes Hardoi on the western side, asked for line clear for 216 down goods express and the control which was contacted authorised the reception of the train and the giving of the line clear expecting that by the time she reached Hardoi 84 down would have left. The line clear was given as directed but when the goods train approached Hardoi, the station master informed the Control of the fact that the parcel train was still standing on platform NO. 3 and asked for directions regarding the entry of the train driven by Lazarus and that in consequence of the instructions received by him he directed that the goods train should come on platform NO. 5 and be stopped there. Hardoi station has five lines altogether. Lines NOS. 1 and 2 are meant exclusively for up trains going from Lucknow towards Saharanpur. Line NO. 3 runs through the station and is common both for up and down trains, while lines NOS. 4 and 5 are exclusively meant for the use of trains coming from Saharanpur side and proceeding towards Lucknow Line NO. 5 normally terminates in a dead end at which there is a sand hump, but it is also connected with the other lines and can be so operated as to allow a train to pass through line NO. 5 on to the main track. The normal system adopted in guiding a through train at Hardoi station was that the outer or distant signal and the home or the inner signal had to be lowered and the two starters, i. e. both the starter and the advance starter signals had also to be depressed. If it was intended, on the other hand, to stop an incoming train at the station, the starter signal and the advance starter signal had to be raised. When NO. 216 down goods express reached Hardoi, the driver found that the two outer signals and the advance starter signal were down. The starter signal of platform NO. 5 was up but it was obstructed from view by a banyan tree and a raised water tank and a pump house. The accused saw that one of the starter signals was depressed, but as it turned out that signal related to NO. 3 and not line NO. 5. In bringing in the train Lazarus slowed down at the outer signal. He ran through the home signal and when his train was guided on to line NO. 5, he was running at a speed of about ten miles an hour, being under the impression on account of the lowering of the starter signal of the main line and the advance starter signal that he was to pass through in accordance with the schedule. When he proceeded further on platform NO. 5, the starter on line NO. 5 came into view. He then suddenly realised his mistake and tried to bring the train to a stop, but it was then too late. The train was sufficiently heavily loaded and it ran through the sand hump into some huts which lay beyond it, with the result that four persons, who were in unauthorised occupation of the huts were killed and two other persons belonging to the military personnel who were in third wagon of the train without anyone being aware of it also received fatal injuries.

The Court below has found that Lazarus should have known that the eastern advance starter signal controlled three lines, that the fact that the starter signal of line NO. 5 was not visible to him should have impelled him to exercise extreme caution and to have either stopped the train or to have brought it to a crawling pace and that in failing to observe the precaution the accused acted grossly negligently and was liable to conviction.

[3] It is urged on behalf of the appellant that the whole incident was occasioned by a mere error of judgment on the part of the accused, that Lazarus was not called upon to exercise any degree of care and caution that ordinarily a prudent driver of a Railway engine should do in the above circumstances and that the fact that the driver's view of the starter signal of platform NO. 5 was obstructed by the banyan tree and the other Railway constructions and the further fact that the huts which were not meant for human dwelling were occupied by unauthorised men and the two military men who according to the rules were not supposed to be in any wagon up to 10th wagon were in fact in the third wagon, were in fact the more proximate causes of the deaths.

[4] We have carefully and anxiously examined the case and in our estimation the facts narrated above do not fix any criminal liability on the accused. The unfortunate incident, it appears to us, was brought about by an extraordinary combination of events, the existence of which the accused could scarcely have divined. He reached the distant signal at 8-1 A. M. and he found the three signals, namely the outer signal, the home signal and the advance starter signal, down. He also found that another starter signal in the direction of Balamau was depressed. There is nothing to show that he was aware of the fact that the parcel train had just left Hardoi that the starter which was depressed was intended to guide that train and the pointsman had not yet had the time to put it 'off.' His own train was scheduled to run through Hardoi. The signal of the platform

into which Lazarus was to come was not visible and we apprehend that ordinarily a prudent driver in these circumstances could scarcely have sensed danger. It is easy after the event to analyse the happenings and to find out possible methods or devices which if adopted may have averted the accident. In order to judge of the criminality of the accused it is necessary, however, to put oneself in his position and to see what in the circumstances which were before him would be the normal reaction to these signals of a man situated as he was. Criminal rashness, as laid down by Straight J., in *Empress of India* v. *Idu Beg*, 3 ALL. 776 and by a Division Bench of the Calcutta High Court in *H. W. Smith* v. *Emperor*, 53 cal. 333, means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused. The criminality in such a case lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence under S. 304A is gross and culpable neglect or failure to exercise that reasonable and proper care and to take precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances attending the charge, it was the imperative duty of the accused person to have adopted. As stated above the accused exercised the ordinary caution which was demanded of him inasmuch as he slowed down his train on entering the yard. It is difficult to saddle him with the knowledge that his train was to be received on platform NO. 5 or failure to notice that a further signal which was intended for line NO. 5 but which was obstructed from view was not lowered. It is impossible, in our judgment, to insist that Lazarus should have discerned that the down advance starter and the more proximate starter were intended for the parcel train and not for him. His action was unfortunate but in our opinion it was by no means grossly negligent.

[5] Having regard to the result arrived at on a survey of facts, it is not necessary to go into the question whether the act of the accused was or was not *causa causans* of the deaths complained of.

[6] We hold that the accused is not guilty of the charge under S. 304A, Penal Code. We accordingly allow the appeal, set aside the order of the learned Sessions Judge and acquit A. W. Lazarus of the charge under S. 304A, Penal Code. The accused-appellant is on bail. His bail bonds will be discharged.

[7] The connected revision arises out of a notice for enhancement of sentence issued to Lazarus on a perusal of the Sessions statements by one of the learned Judges of this Court. In view of the finding reached above, this revision must be dismissed and the notice of enhancement of sentence discharged. We order accordingly.

B/R.G.D. *Order accordingly.*

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(LUCKNOW BENCH)

MALIK C. J. AND MISRA J.

Newazish Ali Khan — *Appellant* v. *Raja Bhanu Pratap Singh* — *Respondent.*

First Ex. Decree Appeal No. 34 of 1948, D/- 6-2-1952.

Civil P. C. (1908), S. 48 — Application for transmission of money decree to another Court for execution — Mode of execution not indicated — Property sought to be attached and sold not mentioned — Application is not under O. 21, R. 11 (2) — Application to transferee Court, indicating mode in which and property against which execution was sought — Such application held fresh application — Application filed beyond 12 years from date of decree is barred — (Civil P. C. (1908), O. 21, R. 11 (2)).

A simple money decree was passed on 14-8-1933. Both the judgment-debtor and the decree-holder had died. On 10-8-1945 an application was made for substitution of names and for transmission of decree to another Court for execution No property of the judgment-debtor was within the jurisdiction of the Court which passed the decree. This application for transmission did not furnish any list of properties which were to be sold in execution of the decree. No mention was made in what manner the decree was to be executed. It was not an application in accordance with O. 21, R. 11 (2). A certificate under S. 39, Civil P. C. was issued on 12-12-1946, transferring the decree to the Court where it was sought to be executed. This Court received the certificate on 16-12-1946. On 30-8-1947 an application for execution of the decree was filed in the transferee Court, praying that the properties mentioned therein be attached and sold. A list of properties was attached to the execution application :

Held that the application of 10-8-1945 was not an application as contemplated by O. 21, R. 11 (2) and that it could not be said that the application of 30-8-1947 was unnecessary. Application of 30-8-1947 was a fresh application and having been filed beyond 12 years was barred under S. 48, Civil P. C. *Case law referred.* [Paras 5, 6]

Anno. Civil P. C., S. 48, N. 7; O. 21 R. 11 N. 12.

A. P. Nigam and Shafiqur Rahman —for Appellant; Bishun Singh — for Respondent.

REFERENCES : Courtwar/ Chronological/	Paras
('29) A I R 1929 P C 209 : (118 Ind Cas 268)	8
('31) A I R 1931 All 134 : (53 All 419)	7
('11) 35 Bom 103 : (8 Ind Cas 168)	8
('23) 50 Cal 743 : (A I R 1924 Cal 131)	8
('48) A I R 1948 Nag 189 : (I L R (1947) Nag 497)	8
('29) 8 Pat 462 : (A I R 1929 Pat 407)	8

Malik C. J. — There was a decree for a large sum of money passed by the Civil Judge, Lucknow, on 14-8-1933. It was a simple money decree and various attempts were made to execute the decree. Both the judgment-debtor and the decree-holder died and on 10-8-1945, an application was made for substitution of names and for transmission of the decree to the Bahraich Court for execution. The prayer in the application is as follows :

"Jinab Ali sail degreedar mustadai Hai ki awallan hasb O. 21 Qaida 16 (sic) Zabta Dewani bajai Rani Manraj Kuer degreedar ke sail ka nam ba Zumre degreedar qaim farmaya jawe aur hasb dafa 50 Zabta Dewani bajai Nawab Mohammad Ali Khan Qazilbash madeeun mutwaffi ke warisan qabizan jaidad ashkhash munderja Khata No. 9 darkhuast haza ka nam qaim hokar bad hu hasb dafa 39 certificate

intaqali banam Civil Judge Sahib Bahadur Bahraich bheja jawe aur mutalba munderje ijrai haza mublikh Rs. 36043-7-3 ba izafa kharcha ijra haza wa sud ainda wasul kara diye jawen."

[2] Certain objections were filed by the other side and these objections were dismissed by an order dated 23-11-1946. An appeal filed to the Chief Court was dismissed on 11-9-1950. On 12-12-46 a certificate under s. 39, Civil P. C. was issued transferring the decree to the Court of the Civil Judge Bahraich for execution. The certificate was received in the Bahraich Court on 16-12-1946. On 30-8-47, an application for execution of the decree was filed in the Court of the Civil Judge, Bahraich, in which the prayer was as follows :

"Sir,

The decree-holder prays that according to O. 21, R. 54/66, Civil P. C. the immoveable property, the kothis, the houses, and the village mentioned in the list attached to the application for execution of decree, be attached and sold and that Rs. 38522-7-3, the amount due under the decree as detailed below be got realized.

The amount mentioned in the transfer certificate.	Interest from 11-8 45 to 30-8-47 on	Amount of interest	Grand Total
Rs. 36071-11-3	Rs. 20304 at 6 p. c. p. a.	Rs. 2450	Rs. 38522-7-3."

A long list of properties was given, by the sale of which the decretal amount was to be realized. An objection was taken that the decree having been passed on 14-8-1933, the application for execution filed on 30-8-1947, was barred under s. 48, Civil P. C., as it was filed more than 12 years after the date of the decree. This objection was disallowed and the lower Court held that the application for execution was within time, as it was in continuation of the previous application dated 10-8-1945. This appeal was filed against the decision of the lower Court and the only point for consideration is whether the application filed on 30-8-1947, was barred under s. 48, Civil P. C.

[3] Respondent's learned counsel has urged that the application dated 10-8-1945, was an application for execution of the decree and by the application dated 30-8-1947, merely a list of the properties to be sold was given and it was not a fresh application for execution.

[4] Section 39, C. P. C. provides for an application to be made to the Court for transfer of that execution to another Court within the jurisdiction of which the judgment-debtor has property. The entire property in the possession of the judgment-debtors was outside the jurisdiction of the Lucknow Court and was within the jurisdiction of the Bahraich Court. The judgment-debtors were also residing outside the jurisdiction of the Lucknow Court. No list of properties were given in the application filed on 10-8-1945, nor could the decree be executed against the person of the judgment-debtor's representatives as the decretal amount had to be realized from the property left by the judgment-debtor who was dead.

[5] Learned counsel for the appellant has drawn our attention to O. 21, R. 10, Civil P. C. and has urged that an application under S. 39 can in no circumstances be an application for execution and after the decree is transmitted to another Court an application for execution has to be made to that Court. He has also drawn our attention to R. 181 of the Oudh Civil Rules, which is as follows:

"A decree received for execution from another Court shall be entered in the Register of Non-Judicial Miscellaneous Cases. As soon as an application for execution of the same is made, along with such application, the documents mentioned in O. 21, R. 6, shall be laid before the Court."

This rule makes it clear that a fresh application for execution has to be made to the Court to which the decree is transmitted and that Court would take no steps to execute the decree so long as it is not moved in that behalf by the decree-holder. Order 21, R. 10 lays down to which Court an application for execution can be made and so far as we can see, prima facie, without finally committing ourselves to that view, it does not say that if the property, against which the decree-holder wants to proceed, is situate within the jurisdiction of another Court, a fresh application has to be made to that Court even if an application for execution has been made to the Court which passed the decree in which the properties against which the decree-holder wants to proceed have been included. In case, however, a proper application for execution had been made to the Court which passed the decree along with a prayer for transmission of the decree to another Court or along with a separate application under s. 39, and that Court had sent the application for execution to the Bahraich Court, it might have been necessary for us to consider whether an application for execution made to the Court to which the decree had been transferred in accordance with the provisions of R. 181 of the Oudh Civil Rules was a fresh application or was a mere 'continuance of the previous application. It is not necessary to express any opinion on this point as in our view the application filed on 30-8-1947, must be in the circumstances of this case deemed to be a fresh application.

[6] We have already said that the manner in which the decree was to be executed was not given in the application of 10-8-1945, nor did that application furnish any list of properties which were to be sold in execution of the decree. Order 21, R. 11 (2) sets out what an application for execution should contain and it provides that the application should mention the mode in which the assistance of the Court is required. It requires *inter alia* that the decree-holder should mention what properties are to be attached and sold or sold without attachment for the realization of the decretal amount. No such details, as we have already said, were furnished in the application. It cannot be said, therefore, that the application

of 30-8-1947, was unnecessary and it was merely to revive or to continue the previous application of 10-8-1945. In the application of 30-8-1947, a long list of properties was mentioned by the sale of which the decretal amount was to be realized.

[7] There are a number of decisions on the point and the view appears to be almost unanimous that the decree-holder cannot after the expiry of 12 years add fresh items of property to the list of properties already given by him in his previous execution application filed within 12 years and proceed against items of property which had not been included in it. If the decree-holder had no right to add new items of property after the expiry of 12 years, it follows that he cannot give a fresh list, not having given any such list within time. The case in point is *B. Bandhu Singh* v. *K. T. Bank, Lt., Gorakhpur*, A. I. R. 1931 ALL. 134, where a Bench of the Allahabad High Court held that:

"It seems to us that the decree-holder is now seeking to attach fresh property and his application for the attachment of this new property is a fresh application within the meaning of S. 48, Civil P. C., and having been made more than 12 years after the date of the decree, cannot be entertained."

The same view was taken in a number of decisions of this Court, but it is not necessary for us to give a reference to them.

[8] In *Hayatunnessa* v. *Achia Khatun*, 50 cal. 743, a Bench of the Calcutta High Court took the same view. It was held that:

"A decree-holder should not be allowed, by subsequent application made after the expiry of the period of limitation for execution of the decree, to add other properties to the list given in his original application, presented within the period of limitation."

This view was followed and the reason for it was given by a Bench of the Patna High Court in *Jagannath Das* v. *Chamu Raghunath*, 8 Pat. 462. At p. 467 the learned Judge said:

"It is contended that the fact that a previous application for execution was pending in which an amendment was sought to be made showed that the decree was still subsisting and had not been barred; but this in my opinion does not entitle the decree-holder to apply to the Court to proceed against the other properties, and the principle upon which amendments of pending execution petitions are allowed is, in my opinion, based upon the fact that a substantive application for execution could have been entertained on the date the application for amendment was filed."

With this view the other learned Judge Macpherson agreed. A learned single Judge of the Nagpur High Court considered all these cases and took the same view in *Prayagdas Shankerlal* v. *Mt. Indirabai*, A. I. R. 1948 Nag. 189. The view of the Bombay High Court to the same effect is in *Jeewandas* v. *Ranchoddas*, 35 Bom. 103. Lastly, the Privy Council seems to have affirmed that view in a case that went from Patna:—*Maharaj Bahadur Singh* v. *A. H. Forbes*, A. I. R. 1929 P. C. 209. A money decree was passed on 10-7-1896. The last application filed within 12 years was dated 9-5-1908. The prayer in the application was that certain items of property mentioned therein which were Patni rights were to be sold in execution of the decree. To the sale of these properties, however, various objections were taken and the litigation remained pending for a long time with the result that the decree-holder in 1915, 1917 and 1918 made fresh applications for sale of other properties belonging to the judgment-debtors. Their Lordships held that the applications filed in 1915, 1917 and 1918 must be held to be essentially different in character from the application filed on 9-5-1908, and these applications must be deemed to be barred by limitation under s. 48, Civil P. C.

[9] The result, therefore, is that this appeal must be allowed and the order of the lower Court set aside. The application for execution filed on 30-8-1947, must be deemed to be barred by limitation under s. 48, Civil P. C., and it is dismissed. In view of the facts of the case we do not feel disposed to grant any costs to the judgment-debtors. The parties will bear their own costs in both the Courts.

B./R.G.D. *Appeal allowed.*

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WALI ULLAH J.

Lakhpat Ram Sharma—Applicant v. *State.*

Criminal Revn. No. 903 of 1950, D/- 4-2-1952.

Criminal P. C. (1898), S. 344 — Section does not apply to appellate or revisional Court.

The provisions of S. 344, Criminal P. C., do not apply either to an appellate Court or to a revisional Court. The application of S. 344 must be confined to the Court which deals with either a trial or an enquiry. *Case law referred.* [Para 13]

Anno. Criminal P. C., S. 344 N. 2.

S. N. Divedi — for Applicant; Addl. Govt. Advocate— for Opposite Party.

REFERENCES: Courtwar/Chronological/	Paras.
('02) 1902 All W N 59.	2, 5, 7
('06) 28 All 207: (2 Cri L J 803).	2, 4, 7
('33) 55 All 301: (A. I. R. 1933 All 264: 34 Cri L J 414 F B).	12
('05) 9 Cal W N 18.	5
('20) 21 Cri L J 201 : 54 Ind Cas 985 : (A I R 1920 Lah 289).	2, 6
('36) A I R 1936 Sind 235: (38 Cri L J 119).	2, 8

Order. — This is an application in revision against an order passed by the learned Sessions Judge in whose Court the appeal of the applicant was pending at the time. By this order, the learned Judge adjourned the hearing of the appeal, but at the same time ordered the applicant to pay Rs. 100/- as costs of adjournment to the respondent.

[2] Against this order of the learned Judge, the applicant has come up in revision to this Court. It is contended by learned counsel for the applicant that the learned Judge had no jurisdiction to award costs on account of the adjournment of the hearing of the appeal. He has contended that s. 344 which occurs in chap. 14, Criminal P. C., which is headed as "General Provisions as to Enquiries and Trials" has no application to an

appellate Court or a revisional Court. It is conceded by learned counsel that adjournments ordered under s. 344, Criminal P. C., can be made on such terms as the Court thinks fit. These terms may include payment of costs. The argument of the learned counsel, however, is that the provisions of s. 344, Criminal P. C., are confined to the Court which is holding either an enquiry or a trial. In support of his contention, learned counsel has relied upon (1) the case of *Mathura Prasad* v. *Basant Lal*, 28 ALL. 207, (2) the case of *King Emperor* v. *Chhabraj Singh*, 1902 ALL. W. N. 59, (3) the case of *Suraj Bhan* v. *Emperor*, 21 Cri. L. J. 201 (Lah.) and (4) the case of *Jethanand Thawardas* v. *Tahil Ram*, A. I. R. 1936 Sind 235. In *King Emperor* v. *Chhabraj Singh*, the facts were that Chhabraj Singh was tried and convicted by a Magistrate of an offence under s. 384, Penal Code, and was sentenced to eighteen months' R. I. Chhabraj Singh appealed against his conviction and sentence to the Sessions Judge. At the date of the hearing of the appeal, an application for an adjournment was made by the Public Prosecutor. In the circumstances of the case, the learned Sessions Judge granted an adjournment and ordered payment of Rs. 75 by Government to the appellant.

[3] Against this order an application in revision was filed in this Court. Blair J. who decided the revision, expressed the view, "I know of no power to grant such costs" and allowed the revision and set aside the order in respect of costs.

[4] The next case referred to is that of *Mathura Prasad* v. *Basant Lal*, 28 ALL. 207. In this case the applicant, Mathura Prasad, had filed a complaint against Basant Lal under s. 500, Penal Code. The case was tried by a Magistrate of the first class. While the case was pending in the Court of the Magistrate, a date was fixed for the cross-examination of the prosecution witnesses. On that date, the complainant did not appear and it was represented to the Court that he was ill. The Court did not believe the excuse to be genuine, but eventually adjourned the case under s. 344, Criminal P. C., and ordered the complainant to pay Rs. 100/- to Basant Lal as the costs of the day.

[5] On a revision filed in the Court of the learned Sessions Judge to have the order relating to costs set aside, the Sessions Judge made a reference to the High Court. In that case, Richards J. considered the provisions of s. 344, Criminal P. C. The case of *King Emperor* v. *Chhabraj Singh*, 1902 ALL. W. N. 59 was also referred to, but it was distinguished on the ground that in that case costs had been awarded on adjournment of the appeal. The learned Judge further referred to the case of *Sew Prosad* v. *Corporation of Calcutta*, 9 Cal. W. N. 18, and held that, under the provisions of s. 344, Criminal P. C., the Magistrate was competent to order costs to be paid by a party in whose favour the order for adjournment was made. In this view of the matter, the reference was rejected.

[6] The next case which has been referred to by learned counsel is that of *Suraj Bhan* v. *Emperor*, 21 Cri. L. J. 201 : 54 Ind. cas. 985 (Lah). In this case, the point which arises in the present case directly arose. The applicant Suraj Bhan had been convicted by the District Magistrate under ss. 471/114 and 420/114. He filed an appeal against his conviction in the Court of the Sessions Judge. The hearing of the appeal was twice adjourned as the counsel for the Crown could not appear. Later, an adjournment was sought by the advocate for the accused as he wanted some papers to be sent for. Adjournment was allowed and the accused applicant was ordered to pay Rs. 100 as costs.

[7] Against the order in respect of costs, a revision was filed in the High Court of Lahore. This was allowed and it was held by the learned Judge, Abdul Raoof J., that a criminal appeal could not strictly be said to be either an enquiry or a trial. It did not, therefore, fall within the purview of s. 344, Criminal P. C. In this view of the matter, it was held that the learned Sessions Judge had no power to pass an order in respect of costs of adjournment. In this case, reference was made to the case of *Mathura Prasad* v. *Basant Lal*, 28 ALL. 207 and also to the case of *King Emperor* v. *Chhabraj Singh*, 1902 ALL. W. N. 59.

[8] Lastly, learned counsel for the applicant has referred to the case of *Jethanand Thawardas* v. *Tahilram*, A.I.R. 1936 Sind 235. That was a case in which a revisional application, which was pending before an Additional Sessions Judge, was adjourned on the ground that the applicant was unwell and was also away from the station. The learned Judge, however, granted the adjournment on condition that the applicant deposited the fee of the Special Public Prosecutor within a week. A Division Bench of the Sind Judicial Commissioners' Court held that the provisions of s. 344, Criminal P. C. did not apply to proceedings in revision at all.

[9] In view of the rulings referred to above, learned counsel has contended that the application of s. 344, Criminal P. C., must be confined to the Court which deals with either a trial or an enquiry and that it does not apply to the appellate Court or a revisional Court.

[10] I have heard the learned Assistant Government Advocate on the point. His contention is that an appeal is merely a continuation of an original trial or enquiry. That being the position, his contention is that provisions contained in ch. 14 of the Criminal P. C., including s. 344, Criminal P. C., can be applied not only to the trial Court or the Court which holds an enquiry in the first instance, but also to an appellate as well as a revisional Court.

[11] Learned counsel has, however, not been able to cite a single ruling in which it has been held that the provisions of s. 344, Criminal P. C., which authorise an order with regard to costs of an adjournment have been applied to an appellate Court.

[12] In the course of arguments reference was made to ss. 423 (1) (d) and 439, Criminal P. C. Section 423 (1), Criminal P. C., deals with the powers of an appellate Court in disposing of an appeal. Section 423 (1) (d) refers to the power of an appellate Court to pass any consequential or incidental order that may be just and proper. Section 439 (1), Criminal P. C., which deals with the High Court's power of revision, refers to s. 423, among other sections, and provides for the exercise of any of the powers conferred on a Court of appeal by those sections including s. 423 by the High Court in the exercise of its revisional jurisdiction.

In *Kapur Chand* v. *Suraj Prasad*, 55 ALL. 301, a Full Bench of three learned Judges of this Court had to deal with the question of costs in proceedings under s. 145, Criminal P. C. *Inter alia*, the Full Bench had to consider the scope of s. 423 (1) (d). It was held that under that provision the appellate Court had power to amend the order appealed from and further pass such orders as follow from or are accessory to the order passed. It was held definitely that those provisions "did not mean that the appellate Court may pass any order as to the costs of the appeal itself."

[13] In view of the authorities discussed above, it would seem to follow that the provisions of s. 344, Criminal P. C.,—the only provisions in the Code of Criminal Procedure which have been referred to by learned counsel in the course of his arguments—do not apply either to an appellate Court or to a revisional Court.

[14] For the reasons given above, this application in revision is allowed, and the order of the learned Sessions Judge in respect of the payment of Rs. 100 as costs of adjournment is set aside. The amount, if it has been paid, must be refunded.

B./R.G.D. *Revision allowed.*

A. I. R. 1953 Allahabad 78

RAGHUBAR DAYAL J.

Mauji Lal—Defendant-Appellant v. *Jagnandan Ram — Plaintiff and others, Defendants-Respondents.*

Second Appeal Nos. 517 of 1946 and 258 of 1948, D/-16-1-1952.

(a) Hindu Law — Widow — Alienation — Widow along with next reversioner executing a composite deed of surrender and gift—Deed held not binding on reversioners after widow's death.

K, a Hindu widow, along with the nearest reversioner executed a composite deed of surrender and gift. In the first portion of the deed she expressed that she surrendered all her life-interest in the property in favour of *J*. In the latter portion both *K* and *J* purported to make a gift of the entire property in favour of *M*, the step-son of *K*:

Held, that the deed could not operate either as a valid surrender of the rights of the widow in the property in favour of *J* or as a valid gift in favour of *M* and, therefore, it was not binding on the reversioners after the death of the widow *K*. When a deed of such a composite character is executed jointly, it cannot be said that there had been any priority in the surrender *vis-a-vis* the gift of the property. Moreover it was clear from the deed that the alleged surrender to *J* was not genuinely contemplated and that it was just a cloak which was considered necessary to validate the transfer of property to *M* in whom *K* was interested: A. I. R. 1918 P. C. 196, *Expl.*; A. I. R. 1935 All. 73, *Rel. on.*; A. I. R. 1934 Bom. 351 and A. I. R. 1939 Bom. 79, *Disting.* [Paras 4, 5, 6, 10 and 11]

(b) Limitation Act (1908), Arts. 61 and 120 — Suit by reversioner against Hindu widow for recovery of certain sums of money spent for widow — Suit brought after eleven years from date when it was spent is barred whether Art. 61 or Art. 120 is applicable. [Para 12]

(c) Civil P. C (1908), S. 11, Expl. VI — Previous suit by Hindu widow against reversioner *H* — *H* not contesting suit as manager of joint family consisting of himself and his brother *J* but defending suit by alleging that property in suit was joint family property—Subsequent suit by *J* for possession of property for benefit of himself and *H*—Decision in previous suit operates as *res judicata*. [Para 13]

Anno. C. P. C., S. 11 N. 63a.

Shambhu Prasad, Chatur Bhuj Sahai and Baleshwari Prasad — for Appellant; A. P. Pandey — for Respondents.

REFERENCES: Courtwar/Chronological/	Paras.
('18) A. I. R. 1918 P. C. 196: (42 Mad. 523 P. C.)	7, 8, 9
('30) 53 Mad. 692 : (A. I. R. 1930 P. C. 297)	8
('12) 34 All. 129 : (12 Ind. Cas 601)	10
('35) A. I R. 1935 All. 73 : (152 Ind. Cas. 19)	8
('34) A. I. R. 1934 Bom. 351 : (58 Bom. 521)	8
('39) A. I. R. 1939 Bom. 79 : (180 Ind. Cas. 629)	8, 9
('84) 10 Cal. 1102 (F. B.)	7

Judgment. — Srimati Kishan Dei, succeeding to the property in suit as a limited owner either in the capacity of a widow of Ram Swarup or as a mother of Parshottam, her son, remarried Har Narain and later she and Jai Karan executed a deed which ostensibly is a combination of a deed of surrender by her in favour of Jai Karan and a deed of gift by both Jai Karan and herself to Mauji Ram, son of Har Narain, her second husband. Jagbandhan sued Kishan Dei, defendant 1, Mauji Ram, defendant 2, Mahesh Ram, son of Jai Karan, defendant 3, and Hanuman Prasad, brother of the plaintiff, defendant 4, for an injunction against defendants 1 to 3 preventing them from interfering with his possession of the property in suit, it being alleged that he was in possession as a survivor of the joint family which originally consisted of Beni Prasad and Ram Lal, brothers, who reunited after there had been a partition between them and their other four brothers. The allegation of Ram Lal and Beni Prasad reuniting to form a joint family was not accepted by the Courts below. The alternative case of Jagbandhan was that the composite deed of surrender and gift executed by Kishan Dei and Jai Karan was not binding on him after the death of Kishan Dei, in case it be held that Beni Prasad and Ram Lal

had separated and did not reunite. Both the Courts held that this deed was not binding on Jagbandhan after the death of Kishan Dei. Mauji Ram, therefore, filed this appeal against this decree.

[2] Jagbandhan had also claimed in the suit ownership of house NO. 3 in list 'C' attached to the plaint on the ground that he had built it fifteen or sixteen years back. He also claimed Rs. 500 which he had incurred in meeting the expenses in connection with two suits instituted by Kishan Dei and in depositing Rs. 300 which she was ordered to deposit under a decree of the Court. These two claims were disallowed. The claim for the house was disallowed on the ground that a decision in a previous suit between Kishan Dei and Hanuman Prasad, defendant 4, brother of Jagbandhan plaintiff, operated as *res judicata*. The claim for Rs. 500 was disallowed on the finding that the claim was made after the expiry of the necessary limitation. Jagbandhan has preferred second Appeal NO. 258 of 1948 against the decree disallowing his claim with respect to these two items.

[3] I am of opinion that both the appeals should fail.

[4] The deed in suit was executed in 1940 by Kishan Dei and Jai Karan. In the first portion of the deed Kishan Dei expressed that she surrendered all her life interest in the entire property in favour of Jai Karan, executant NO. 2, and gave up all connection with that property. In the latter part both she and Jai Karan referred to the services which Mauji Ram had rendered to them without any compensation, to the fact that his services would remain uncompensated if they died and then stated that they voluntarily gifted the property and house to Mauji Ram and that Mauji Ram accepted the gift deed. The validity of this deed is challenged on various grounds. One is that one executant cannot create any right in the same document in favour of another executant. Even if this objection be not good and it be held that the expression of her desire for surrendering the property was enough to accomplish the surrender, the document as a whole does not indicate that Kishan Dei had surrendered the property to Jai Karan prior to Jai Karan's executing the gift deed in favour of Mauji Ram. The surrender should have been prior in point of time to the gift deed. In view of Kishan Dei's joining Jai Karan in executing the gift deed in the latter part of the document, indicating thereby that she had interest left in the property even after her using expressions in the earlier part of the document that she had surrendered and had left no interest in herself, I find it very difficult to agree with the contention for Mauji Ram, appellant, that Kishan Dei had really surrendered the entire estate in favour of Jai Karan and that her joining Jai Karan in executing the latter part relating to the gift was an unnecessary act. In law it would be unnecessary for her to join in a gift deed executed by Jai Karan to whom property passes after her surrendering the property, but her conduct is very much relevant in determining whether she had really surrendered. To my mind, her conduct does not indicate that. It only indicates that she was not probably trusting Jai Karan to do what might have been agreed upon between them with respect to the ultimate transfer of the property to Mauji Ram, in whom she was interested as a step-mother. Probably, for practical purposes the execution of this deed made no difference to her enjoying the fruits of this property. In this view of the matter, I hold that this deed falls short of proving that Kishan Dei had surrendered her rights in this property to Jai Karan, the nearest reversioner at the time.

[5] In the alternative, it has been argued for the appellant that this document be treated as a joint gift deed by her and Jai Karan, the nearest reversioner, to Mauji Ram and that, therefore, it should be held to be valid. I do not think so. Jai Karan's joining as a donor in this deed cannot make the execution of the gift deed by Kishan Dei valid. She could not execute the gift deed of the property which she held as a limited owner. Jai Karan could not execute a gift deed of property which he did not own and possess. He had no right over this property in the absence of a valid surrender of the property to him. His action may indicate his consent to the gifting of the property to Mauji Ram, but his consent to the gift cannot make it a valid gift.

[6] It has also been argued for Mauji Ram that such a composite gift deed by the limited owner and the nearest reversioner should be treated as a deed of surrender by the limited owner in favour of the nearest reversioner and then as a gift deed by the nearest reversioner in favour of a third person. I do not agree with this proposition, and the reason is what I have indicated above that surrender should precede the execution of the gift deed by the next reversioner. When a deed is executed jointly it cannot be said that there had been any such priority in the surrender vis-a-vis the gift of the property to the third person.

[7] Great stress is laid on behalf of Mauji Ram appellant on the case of *Rangaswami* v. *Nachiappa*, reported in A. I. R. 1918 P. C. 196, for the view that a conveyance of the entire property by a widow with the consent of the next reversioner will be valid. Special reference is made to the observations of the Judicial Committee at p. 199:

"The surrender once exercised in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he or they were entitled to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Nobokishore* v. *Hari Nath*, 10 Cal. 1102 (F.B.) already cited. The judgment went upon the principle of surrender, and it might do so, for, the surrender there was of the whole estate, but it is worthy of notice that the order of reference

showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth."

To my mind, these observations do not show that the Judicial Committee approved of the view which was said to be an obvious extension of the doctrine that "surrender once exercised in favour of the nearest reversioner or reversioners, the estate became his or theirs." It may be mentioned further that after the consideration of the whole subject of the power of a Hindu widow over an estate which belonged to her husband to which she had succeeded, either immediately on the death of her husband or on the death of her childless son her husband being already dead, their Lordships of the Judicial Committee summarized their conclusions at p. 201. They remarked as follows:

"The result of the consideration of the decided cases may be summarized thus:

(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde* and the alience does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

It will be seen from these conclusions that their Lordships did not lay down the proposition that an alienation by a widow of the entire estate of her husband with the consent of the nearest reversioner will be valid in law. They simply held that such an alienation by way of surrender to the nearest reversioner of the entire property would be valid if it be *bona fide*.

[8] After this decision of their Lordships of the Judicial Committee, this Court decided in *Ramratanlal* v. *Gangotri Prasad*, A. I. R. 1935 ALL. 73, that when a Hindu widow executes a document purporting to be a perpetual lease but which is in reality a deed of gift, the reversioners of the widow's husband who are alive at the time of her death can challenge the transaction, although at the time when the lease was executed the entire body of presumptive reversioners consented to it. The consent of the entire body of presumptive reversioners was not held sufficient to validate the deed of gift. The cases reported in *Yeshwant Bala* v. *Antu Navaji*, A. I. R. 1934 BOM. 351 and *Pandurang* v. *Ishwar*, A. I. R. 1939 BOM. 79 support the contentions for Mauji Ram appellant. With respect, I do not agree with the views expressed there which, as already indicated, are not consistent with the views expressed by this Court earlier. In the first case, a limited owner, the widow, and her daughter who was the next reversioner and could take an absolute estate joined in executing a gift deed of the entire estate in favour of another. The gift deed was held to be good. In view of the observations in the case of *Rangaswami* v. *Nachiappa*, A. I. R. 1918 P. C. 196, it was not considered in this case that though their Lordships considered the decision of the Full Bench of the Calcutta High Court as an obvious extension of the principle of surrender, they did not express their full approval of it. It may also be mentioned here that in *Narayanaswami Ayyar* v. *Rama Ayyar*, 53 MAD. 692 (P. C.), their Lordships of the Judicial Committee left the question of the validity of a deed of gift executed by a limited owner with the consent of the next reversioner open. This indicates that they did not consider that their decision in 1918 was a decision on this point. Further, it was not considered in the Bombay case as to when in point of time the widow can be said to have surrendered in favour of her daughter and the daughter became the absolute owner of the property.

[9] In *Pandurang* v. *Ishwar*, A. I. R. 1939 BOM. 79, the limited owner had executed a gift deed in favour of a third person with the consent of the next reversioner. The next reversioner had not joined in the execution of the deed. It was held that the next reversioner had no right and his consent was not necessary to be given by a registered document. It was then held that the widow could make a valid surrender of her entire interest in her husband's property in favour of a third person with the consent of the next reversioner. I do not think, in view of what I have said above, that this view finds support from the case of *Rangaswami* v. *Nachiappa*, A. I. R. 1918 P. C. 196.

[10] Another reason for challenging the validity of the deed of surrender is what has been mentioned by the Courts below, and it is that the deed does not appear to be a *bona fide* deed of surrender. This Court held in *Abdulla* v. *Ram Lal*, 34 ALL. 129, that the Court has to see that the transaction by which the limited owner transfers the entire estate without consideration to a third person with the consent of the next reversioner was a fair transaction. It is clear from this deed that the alleged surrender to Jai Karan was not genuinely contemplated and that it was just a cloak which was considered necessary to validate the transfer of the property to Mauji Ram in whom Kishan Dei was interested. Jai Karan was a very old man. He died soon after the execution of the deed. Even if he was in a fit condition to consider the nature of the entire transaction, he could not have taken much interest in it. The very fact that Kishan Dei did not execute a separate document and did not let Jai Karan execute a separate document gifting the property to Mauji Ram is an indication of the fact that probably she did not fully trust Jai Karan and did not wish to,

take a chance of Jai Karan's not executing the gift deed and thus taking advantage of the surrender deed executed by herself alone.

[11] I am, therefore, of opinion that the Courts below rightly held that this deed is not a valid deed and is not binding on the reversioners after the death of Kishan Dei.

[12] Jagbandhan's claim for Rs. 500 is clearly time-barred. The amount was spent in 1929. This suit was instituted in 1940. The claim would be time-barred whether Art. 61 or Art. 120, Limitation Act applied to the case. This amount did not become a charge on the property. There is no law which could make it a charge and, therefore, Jagbandhan cannot take advantage of the larger period of limitation extending to 12 years.

[13] The earlier suit by Kishan Dei against Hanuman Prasad was based on the allegations that house No. 3 of List 'c' belonged to her and that Hanuman Prasad had demolished certain portions. The suit was contested on the ground that the house did not belong to her and that Hanuman Prasad had been in possession for over 12 years. The pleadings as given in the judgment in suit No. 559 of 1938 do not indicate that Hanuman Prasad was sued as a manager of the joint family or that he contested the suit as manager of the joint family. But it appears that the real case of Hanuman Prasad was that the house belonged to the joint family consisting of himself and his brother Jagbandhan. Jagbandhan was examined in that suit and deposed to that effect. In the present suit too Jagbandhan took the same position. It was alleged that he had filed the suit for his own benefit and for the benefit of his brother Hanuman Prasad who was defendant 4 in the case. In the circumstances, I do not think that the finding of the Court below that the decision in the former suit operated as *res judicata* is wrong. Jagbandhan cannot claim house No. 3 of List 'c' in his own right. It is not for consideration in this case what rights he gets over this house in view of the other finding that the surrender by Kishan Dei is not binding on him after the death of Kishan Dei, who, it may be mentioned, died during the pendency of this appeal.

[14] I, therefore, dismiss both the appeals with costs. This order will govern second Appeal No. 258 of 1948 as well.

[15] Leave to appeal to a Bench is refused.

B/K.S. *Appeals dismissed.*

A. I. R. 1953 Allahabad 81 *[Vol. 40, C. N. 32]*

MALIK C. J. AND V. BHARGAVA J.

In the matter of the Income-tax Assessment of Gabdulal Tulsiram, Farrukhabad — Applicant.

Misc. Case No. 52 of 1950, D/- 8-1-1952.

Income-tax Act (1922), S. 10 (2) (xv)—Amount paid in compounding offence.

The assessee was a registered firm carrying on money-lending, *sarrafa* and cloth business. The assessee was required under the War Risks (Goods) Insurance Ordinance (9 of 1940) to get his full quantity of stock insured. Year after year the assessee was getting his goods insured but for an amount far below the actual value of the stock that was in hand. Ultimately, the assessee was caught and notice was served on him to show cause why he should not be prosecuted. The matter was, however, compounded under S. 12 (A) of the said Ordinance and a sum of Rs. 16,895-8-0 was paid by the assessee to the Central Government to compound the offence. The Income-tax Appellate Tribunal, however, allowed the amount which would have been payable as premia for War Risk Insurance but disallowed the rest of the amount which came to Rs. 11,265 :

Held that the amount of Rs. 11,265 was not deductable under S. 10 (2) (xv). [Para 2]

Anno. Income-tax Act, S. 10, N. 13.

G. S. Pathak — for Applicant ; Walter Dutt — for Respondent.

Malik C. J.—The following question has been referred to us under S. 66 (1), Income-tax Act :

"Whether, in the circumstances of the case and on the facts stated above, the sum of Rs. 11,265 paid by the assessee was an admissible deduction under S. 10 (2) (xv), Income-tax Act ?"

[2] The assessee is a registered firm carrying on money-lending, *sarrafa* and cloth business. The assessee was required under the War Risks (Goods) Insurance Ordinance (9 of 1940) to get his full quantity of stock insured. Year after year the assessee was getting his goods insured but for an amount far below the actual value of the stock that was in hand. Ultimately, the assessee was caught and notice was served on him to show cause why he should not be prosecuted. The matter was, however, compounded under S. 12 (A) of the said Ordinance and a sum of Rs. 16,895-8-0 was paid by the assessee to the Central Government to compound the offence. The assessee claimed the whole of this amount as a deductable expenditure under S. 10 (2) (xv), Income-tax Act, The Income-tax Appellate Tribunal, however, allowed the amount which would have been payable as premia for War Risk Insurance but disallowed the rest of the amount which came to Rs. 11,265. The question is whether this sum of Rs. 11,265 could be said, in the circumstances of the case, to have been wholly and exclusively expended for purposes of the business.

On the facts stated above which we have taken from the statement of the case and from the order of the Appellate Assistant Commissioner of Income-tax, it is clear that it is impossible to hold that the amount was spent wholly and exclusively for purposes of the business. It was not necessary for the assessee for purposes of his trade or business to declare the value of his goods at a figure far below their proper value. He did it not for the purpose of his business but for the purpose of making dishonest gain and when he compounded the matter with the Central Government, he did so to escape criminal prosecution. We think that, on the facts stated in the statement of the case, the only answer possible is that

the amount of Rs. 11,265 was not deductable under s. 10 (2) (xv), Income-tax Act.

[3] We answer accordingly. The Commissioner of Income-tax is entitled to his costs which we assess at Rs. 300.

B/V.R.B. *Answer accordingly.*

A. I. R. 1953 Allahabad 82 *[Vol. 40, C. N. 33]*

(LUCKNOW BENCH)

GHULAM HASAN J.

Keshawdas Wadhumal Advani — Plaintiff-Applicant v. *Murtaza Ali Khan—Defendant-Opposite Party.*

Applns. Nos. 230 and 256 of 1950, D/- 10-5-1951.

(a) Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4)—Proceeding for fixation of fair rent—Agreed rent alleged to be higher than reasonable annual rent and variation sought on ground of unfairness of transaction—Annual rental value assessed by municipality not challenged by applicant—Court has no jurisdiction to examine correctness or propriety of municipal assessment. [Para 8]

(b) Civil P. C. (1908), S. 115—Interference with findings of fact.

Though a finding of fact, when it has been reached upon an erroneous basis, by making enquiries which the Court had no jurisdiction to do, it must be set aside in revision. [Para 18]

Anno. C. P. C., S. 115 N. 2.

Uma Shanker—for Applicant; Iqbal Ahmad, Mohd. Haider and M. P. Srivastava—for Opposite Party.

Order.—These are two revisions under S. 115, Civil P. C., and arise out of proceedings for fixation of rent under the U. P. Temporary Control of Rent and Eviction Act (Act 3 of 1947). The former is a revision by the plaintiff and the latter by the defendant.

[2] The plaintiff, Dr. Keshodas Wadhumal Advani, according to the plaint allegations, is a displaced person from Sind, Western Pakistan and is a bona fide registered refugee in Lucknow. He needed accommodation for his residence and for his family members and relations. The defendant, Syed Murtaza Ali Khan is the owner of house styled as Crown Gate, No. 2393, Jagat Narain Road, Lucknow. The plaintiff took a portion of this house consisting of 8 rooms with necessary quarters on 14th February 1948, at a rent of Rs. 170 per mensem and gave cheque of Rs. 900 in advance. He paid this rent to the defendant for nearly 15 months upto 12th May 1949. The defendant told him that Rs. 170 per mensem was the monthly reasonable rent of the portion proposed to be let out to him, but he was unaware of the real rent and took the house on Rs. 170 p.m. as he was in sore need of accommodation. According to the plaintiff, the annual reasonable rent for 8 rooms was Rs. 600 per annum, as shown by the Municipal assessment record, and as he had taken only 7 rooms, the rent would be Rs. 43-12-0 per mensem, but since the house needed repairs, the rent should be fixed at Rs. 40 per mensem (see para. 6 of the plaint). In para. 7 the plaintiff alleged that Rs. 170 per mensem was very excessive and the transaction was very unfair. He accordingly sued for fixation of annual reasonable rent at Rs. 40 per mensem under s. 5 sub-clause (4) of the Act. He also prayed that for purposes of rent the tenancy should be fixed from 14th February 1948.

[3] The suit was brought on 13th August 1949. The short defence to the suit was that the house was constructed in 1947 and completed in April 1947. It was let out to one Pratap Singh on Rs. 175 per mensem in May 1947. The plaintiff willingly agreed to take the house on Rs. 170 per mensem, which he paid up to 12th May 1949, but later refused to pay and caused damage to the house. The defendant further stated that the plaintiff divided the house into four portions and sub-let three of them to three persons on Rs. 50 each and occupied the remaining portion himself. It was alleged that the newly constructed house was assessed by the Municipal Board for the first time on a total monthly rent of Rs. 170. It was pleaded that the rent agreed upon between the parties was reasonable and the plaintiff was not entitled to any abatement of rent.

[4] Two main issues were framed by the Court:

"1. Was the house in suit constructed in 1947 and completed in April '47, as alleged by the defendant?

2. Whether the transaction was unfair and the rent fixed excessive as alleged in para. 7 of the plaint? If so, its effect?"

No objection was raised to the frame of the issues and no other issues were pressed for.

[5] The Munsif, North Lucknow (Mr. Om Prakash Srivastava) in a lengthy judgment found the first issue in the negative and the second in the affirmative. He accepted the plaintiff's claim and fixed the rent at Rs. 40 per mensem, but confined the operation of the order from the date of the suit and not from the date of the tenancy. The defendant has preferred a revision against the abatement of rent and the plaintiff against the order confining the relief to the date of the suit. Both the revisions have been heard together.

[6] The judgment of the Munsif suffers from the defect of being prolix and verbose and a bare perusal shows a lack of intelligent appreciation of the controversy between the parties. It is to be regretted that a case which otherwise was so simple has been sought to be made complicated by the Munsif by indulging in irrelevant matters and by not concentrating on the real controversy in the case.

[7] Section 5 (4) reads thus :

"If the landlord or the tenant, as the case may be, claims that the annual reasonable rent of any accommodation to which the Act applies, is inadequate or excessive, or if the tenant claims that the agreed rent is higher than the annual reasonable rent he may institute a suit for fixation of rent in the Court of the Munsif having territorial jurisdiction, if the annual rent claimed or payable is Rs. 500 or less, and in the Court of the Civil Judge having territorial jurisdiction if it exceeds Rs. 500 provided that the Court shall not vary the agreed rent unless it is satisfied that the transaction was unfair, and in the case of lease

for fixed term made before 1-4-1942, that the term has expired."

It is obvious from a plain reading of the sub-section that it contemplates two kinds of suits. The first case is when the annual reasonable rent is inadequate from the point of view of the landlord, or excessive from the point of view of the tenant, and the second case is where there is an agreed rent, but the tenant claims that it is higher than the annual reasonable rent. In the two classes of cases contemplated by the sub-section, the right is given to the landlord and the tenant to institute a suit for fixation of rent and it is only in the latter case that the Court cannot vary the agreed rent in favour of the tenant unless it is satisfied that the transaction was unfair. Paragraphs 6 and 7 of the plaint which have been referred to above leave no manner of doubt that the simple case laid in the plaint is a case of reduction of the agreed rent from RS. 170 per mensem to RS. 40 per mensem on the ground that the transaction is unfair. This aspect of the matter requires to be emphasised because of the confusion which has resulted from the failure to distinguish between the two classes of cases mentioned in sub-s. (4).

[8] Section 2, sub-s. (e) defines 'Municipal assessment' as the annual rental value assessed by the Municipal Board in force on 1-4-1942, in respect of accommodation which was assessed on or before such date and the first assessment made after 1-4-1942, in respect of accommodation which was assessed for the first time after such date. Section 2, sub-s. (f) defines 'reasonable annual rent' in the case of accommodation constructed before 1-7-1946 :

(1) If separately assesssed to municipal assessment, such assessment plus 25 per cent. thereon. . . The rest of the definition is not relevant for our purposes. The plaint did not challenge the annual rental value assessed by the Municipal Board, in other words the annual reasonable rent assessed by the Board, and the case, therefore, did not fall within the first portion of sub-s. (4). It clearly fell within the second portion because the agreed rent was alleged to be higher than the annual reasonable rent and it was sought to be varied because the transaction was unfair. Keeping this distinction clearly in view it follows that the Munsif had no jurisdiction to examine the correctness or the propriety of the assessment by the Municipal Board and all that the Court was required to do was to determine whether the transaction was unfair.

[9] The judgment, however, contains an elaborate discussion about the propriety of the assessment and proceeds on the erroneous basis that that assessment being of no value, the earlier assessment of RS. 600 per annum was the correct assessment upon which the case should be decided. This error in assuming jurisdiction has permeated the entire finding in the case.

[10] It may be mentioned that according to the defendant, the previous tenant, Pratap Singh, was paying RS. 175 per mensem for the same building. He defaulted and a suit was filed against him (see plaint EX. A-10) and an ex parte decree was passed at the rate of RS. 170 per mensem (see EX. A-11). The Munsif has discounted the value of this decree by a curious process of reasoning. He says

"the said decree was passed on an ex parte scale against the previous tenant. As such it cannot be said that the rent agreed with the previous tenant was at Rs. 175 per mensem as alleged and the previous tenant agreed to that rate."

This remark is made without reference to any allegation or evidence on the record. Pratap Singh was not produced to rebut the allegation that he paid RS. 175 per mensem and no attempt was made to show that he was not traceable.

[11] In considering the question whether the transaction was unfair, the Munsif referred to four grounds mentioned by the plaintiff presumably in the course of arguments. The first of these is, that the agreed rent was in excess of the annual reasonable rent on the basis of the assessment made in 1940. Exhibit 1 is the assessment of April 1940. It shows that the proposed assessment was at RS. 300 per annum, but it was reduced upon appeal by the defendant to RS. 180. The Munsif is wrong in thinking that the assessment was at RS. 300 per annum and in not taking into consideration the result of the appeal. Exhibit 3 is the assessment of April 1948. The proposed assessment at RS. 600 per annum is in respect of property NO. 2393 garages, kothries on back and garden with open land and occupied by self, namely the defendant. It is this assessment which has been accepted as correct and final by the Munsif but the grave error into which the Munsif has fallen is to ignore the distinction between two portions of the building, one, the old portion occupied by the defendant and the other the new portion which was rented to the plaintiff. It will appear that on 16-3-1948, the defendant wrote to the Municipal Board stating in reply to the proposed assessment of RS. 600, that the whole building was not self-occupied, that a portion of it which was originally intended for his own convenience as now let out by him to the Sindh Refugees on RS. 170 per mensem. The letter also stated that four families will live in the rented portion, three of whom will pay RS. 50 per mensem and the fourth will pay RS. 20 per mensem. The defendant emphasised that besides this income of RS. 170 per mensem, the other portion of the building did not yield any income which was liable to assessment. He asked the Municipal Board to make a note of this fact in the Municipal records. The only mistake which the defendant was guilty of was that he thought that the self-occupied portion was not liable to any assessment. Whether this was due to ignorance or not need not be considered.

[12] Turning to EX. 3 again we find that the proposed assessment of RS. 600 on appeal is shown as RS. 2040 which shows RS. 600,600, 600 and 240 against four separate tenements. This variation is completely ignored by the Munsif in the same way as he had ignored in EX. 1. This, however, does not conclude the matter because the question of the self-occupied portion still remains to be settled. Accordingly we find in EX. A2, a letter of the Municipal Board, dated 14-4-1950, addressed to the defendant that the Assessment Committee after hearing him personally on 28-3-1949, had ordered that the portions of the building let out to (1) Dr. Keshodas, (2) to his brother, (3) Lala Kimat Ram and (4) to the brother of Lala Kimat Ram, be assessed on annual rental value of RS. 170 in four tenements of RS. 50, RS. 50, RS. 50 and RS. 20 only. This decision of the Assessment Committee was final unless and until it was altered by a competent authority. In the same letter the Municipal Board pointed out that the portions of the building in the occupation of the defendant and his ladies were not assessed at all by the Assessment Committee due to mistake and that necessary steps were being taken to assess those portions from April 1948. Exhibit A6 is Resolution NO. 42 of 28-3-1948 of the Assessment Revision Committee showing that the building was assessed on RS. 170 per mensem in four tenements. After considering these documents the Munsif observes as follows :

"Exhibit 3, remarks column, shows that the assessment of the house in suit was first made at Rs. 600 per annum i. e., Rs. 50 per mensem but was later increased to Rs. 170 per mensem on appeal made by the defendant, vide aforesaid Resolution No. 42 dated 28-3-1948. I have, therefore, no doubt in my mind that the said assessment of Rs. 170 per mensem was made by the Municipal Board on the representation and at the instance and direction of the defendant himself and that the same was done on unilateral evidence and sole representation of the defendant alone without making proper enquiries in the matter. As such the assessment rate from Rs. 50 per mensem to Rs. 170 per mensem for the same building was really excessive and unfair. It was made so purely due to the influence, representation and direction of the defendant in this connection."

This finding of the Munsif besides being beyond his competence was clearly erroneous and plainly suggests that the defendant deliberately, in order to raise the value of his property, prevailed upon the Municipal Board to assess it at RS. 170 per mensem although it should not have been assessed to more than RS. 50 per mensem. This is an impossible finding. There was no suggestion, much less evidence on the record, that any influence was brought to bear upon the Municipal Board to assess the defendant's property for more than it was worth. No question was put to the Municipal officials who gave evidence on the point.

[13] At another place the Munsif goes on to say that

"the assessment of the house at Rs. 170 per mensem and the rent at the same rate on the basis of this assessment was really excessive and unjustifiable. I, therefore, come to the conclusion that the former assessment made in 1948 was a true and reliable assessment."

This finding is repeated in more or less similar words. The Munsif concludes that the rent of RS. 170 per mensem was excessive and unconscionable. The Munsif was not called upon to decide whether the rent was excessive and unconscionable. All that he had to do was to see whether the transaction was unfair, but he goes on to say that "this excessive rent would itself be sufficient to show that the transaction of rent was unfair."

[14] The second ground urged by the plaintiff was that the defendant took undue advantage of the plight and the needs of the plaintiff and the plaintiff by paying RS. 900 as advance to the defendant submitted to the extortionate demand of the defendant. This ground is put briefly by the Munsif in the following words: "As such the transaction was induced by undue influence and pressure put upon the plaintiff by the landlord."

The third ground is that the defendant was guilty of misrepresentation and fraud inasmuch as he told the plaintiff that the monthly reasonable rent was RS. 170. Although at one place in the judgment the Munsif says that this case cannot be decided with reference to S. 16 or S. 19A, Contract Act, yet he goes on at another place to consider the pleas of undue influence, misrepresentation and fraud as vitiating the transaction and making it unfair. The finding of the Munsiff on this part of the case is equally interesting. He says :

"In the present case, as already held above, the rate of rent was excessive and the bargain was, therefore, hard and unconscionable. As such it will be sufficient to presume that there was undue influence."

At another place he goes on to say that the plaintiff being a respectable man, who had migrated from his home, stood in dire need of accommodation and there being shortage of housing accommodation, he had no doubt in his mind that "the defendant was safely in a position to dominate the will of the plaintiff who was in bodily and mental distress in those days." The use of these expressions and the manner in which the finding is arrived at show that the Munsif did not understand the implications of his words and failed to apply a judicial mind to the question before him.

[15] As regards the misrepresentation, he says that the defendant did not specifically deny the allegation and it was, therefore, proved. The plaint nowhere uses the word "misrepresentation." Para 4 of the plaint which refers to the ignorance of the plaintiff of the annual reasonable rent and his dire need, was not admitted by the defendant, and yet by invoking the provisions of R. 5 of O. 8 the Munsif took it to be admitted by necessary implication.

[16] The fourth ground was that the plaintiff was required under the terms to pay house and water-tax in addition to the agreed rent. This term was urged as being hard and unconscionable. There was an Urdu agreement written between the parties, but this was not produced by the

defendant. The Munsif thinks "the probabilities are and the presumption would be made to the effect that the terms must have been hard and unconscionable, as alleged, and the transaction of rent must have been of a shaky nature and, therefore, the defendant withheld the Urdu agreement which he was bound to produce in support of his contention that the agreed transaction of rent was fair and conscionable." It is difficult to see how the condition to charge house and water-tax from a tenant renders the contract hard and unconscionable. It is not an invariable rule that the taxes are paid by the landlord. That is a matter of contract between the parties. Admittedly the taxes have not been paid by the plaintiff on the basis of Rs. 170 per mensem.

[17] The final finding of the Munsif is as follows:

"I have, therefore, no doubt in my mind that the defendant has not come to the Court with clean hands. His conduct is such that the transaction of rent from the very beginning looks shaky, uncivil and unconscionable.

"I, therefore, hold that the transaction of rent was unfair and the rent fixed was excessive as alleged by the plaintiff and decide the first part of this issue in the affirmative."

The Munsif erroneously disregarded the evidence afforded by A-10 and A-11 which showed that Pratap Singh, the previous tenant was paying Rs. 175 p. m. for the portion let out to the plaintiff.

[18] His finding, though a finding of fact, has been reached upon an erroneous basis by questioning the municipal assessment of 1948 which the Munsif had no jurisdiction to do. Such a finding being beyond the powers of the Munsif cannot be accepted as binding on this Court. The finding, therefore, (is?) set aside. The plaintiff failed to discharge the burden of issue laid upon him and his suit for abatement of the agreed rent cannot be decreed. In this view it is unnecessary to consider the other issue whether the building was constructed before or after 1946 and what would be the annual reasonable rent under S. 6 of the Act.

[19] I accordingly hold that the plaintiff has not succeeded in establishing that the transaction was unfair and his suit was wrongly decreed. The defendant's revision No. 256 of 1950 is allowed and the suit of the plaintiff is dismissed with costs in both the Courts. The plaintiff's revision No. 230 of 1950 is dismissed with costs.

B/M.K.S. *Order accordingly.*

A. I. R. 1953 Allahabad 85 *[Vol. 40, C.N. 34]*

(FULL BENCH)

RAGHUBAR DAYAL, AGARWALA AND MUSHTAQ AHMED JJ.

Baba Mahadeo Das—Plaintiff—Appellant v. *Satyandra Kumar and others — Defendants—Respondents.*

F. A. F. O. No. 46 of 1948, D/- 15-9-1952.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 183, 206 (e) and 180—Applicability—Suit for possession of grove land—Cause of action arising before repeal of Tenancy Act by U.P. Zamindari (Abolition and Land Reforms) Act—Court having jurisdiction—(Tenancy Laws—U. P. Zamindari (Abolition and Land Reforms) Act (1 of 1951), Ss. 19 and 209)—(Tenancy Laws—U.P. Zamindari (Abolition and Land Reforms) Order (1952), Prs. 2 and 5)—(Civil P. C. (1908), S. 9).

Although S. 183 in terms applied only to tenants, and grove-holders are not tenants except for certain purposes, yet S. 206 (e), which applies to grove-holders, makes S. 183 applicable to grove-holders as well. Further S. 183 applies when the disputed property is a holding. Holding is defined as a parcel or parcels of *land* held under one lease, engagement or grant, or in the absence of such lease, engagement or grant, under one tenure. *Land* includes grove-land and consequently a holding includes both a grove-holder's holding as well as a tenant's holding. [Para 3]

Therefore, a suit filed before the repeal of U. P. Tenancy Act by the U. P. Zamindari (Abolition and Land Reforms) Act and in which the plaintiff alleges that the land of which he claims possession is a grove-land and that the defendants claim to be tenants of that land through various sale deeds from the original grove-holder and that those sale-deeds did not give them any rights in the land is a suit governed by S. 183, U. P. Tenancy Act and cognisable only by the revenue Courts : A.I.R. 1946 All. 379 (F. B.) and A.I.R. 1947 Oudh 133 (F.B.), *Disting.* [Paras 3, 5]

Even after the passing of the U. P. Zamindari (Abolition and Land Reforms) Act, the suit would have fallen within the jurisdiction of the revenue Courts and not the civil Courts because the plaintiff who became entitled to possession as a sirdar under S. 19 and who as such could file a suit under S. 209 for recovery of possession from persons who had no title, could file that suit, according to item 8, Sch. II of that Act as it was originally passed, only in the revenue Court. [Para 7]

The Zamindari (Abolition and Land Reforms) Order passed in 1952, will not affect the question of jurisdiction, since the cause of action for the suit which arose before the repeal of the Tenancy Act, would fall under para 2 of the order and consequently the question of jurisdiction will have to be determined according to provisions of the Tenancy Act. Para 5 which has to be read along with para 2 will not apply to the case and, therefore, the suit which was wrongly instituted in the civil Court cannot be allowed to be continued in that Court. [Para 9]

Anno. Civil P. C., S. 9, N. 51.

A. Sanyal—for Appellant; S. K. Verma—for Respondents.

REFERENCES : Courtwar/Chronological/ Paras
('46) 1946 All. L. J. 369 : (A.I.R. 1946 All. 379 F.B.) 1, 4
('47) A.I.R. 1947 Oudh 133 : (22 Luck. 71 F.B.) 1, 5

Agarwala J. — This appeal has been referred to this Full Bench on account of a supposed conflict between two Full Benches *D.N. Rege* v. *Kazi Muhammad Haider*, 1949 ALL. L. J. 369 (F. B.) and *Mahadeo Prasad* v. *Jokhan Ram*, A. I. R. 1947 oudh 133 (F. B.), and for an authoritative decision on the point involved in the case. The facts briefly are as follows.

[2] The appellant is one of the plaintiffs in the suit which has given rise to this appeal. He along with other plaintiffs, who have been arrayed as pro forma respondents, filed a suit in the Court of the Civil Judge, Banaras, for recovery of possession over four plots of land which they claimed to be grove-land. According to the plaintiffs the original grove-holder of the plots was one Bhawani Mali who sold them to one Birja Mali in the year 1849. Birja Mali made a usufructuary mortgage

of the plots to Jagat Ram Udasi by a deed dated 18-5-1851. Mahadeo Das, a successor-in-interest of Jagat Ram Udasi, treating the plots as his own property, usufructuarily mortgaged them to one Gajadhar Sonar in the year 1907. It will be noted that by this time the sixty years' period of limitation for redeeming the original mortgage of 1851 had not expired, but the original mortgagors do not seem to have ever claimed the property. In 1942 the plaintiffs, who are successors-in-interest of Mahadeo Das, brought a suit for redemption of the usufructuary mortgage executed by Mahadeo Das against Gajadhar, the mortgagee, and also impleaded the defendants respondents as defendants to the suit on the ground that they were in possession of the plots without any right. In this suit the defence of the defendants-respondents was that they were not trespassers but were the tenants of the land, having succeeded to the interest of Raja Moti Chand who had purchased the tenancy rights of the original tenant Birja Mali through various sale-deeds. The civil Court decreed the suit for redemption against Gajadhar Sonar but exempted the defendants respondents from the suit on the ground that they were not proper parties in a suit for redemption against the mortgagee, and that a separate suit might be filed against them if the plaintiffs be so advised.

The plaintiffs, then, in 1946, brought the suit, which has given rise to this appeal, in the Court of the Civil Judge for possession against the defendants-respondents, as already stated. In the plaint it was clearly mentioned that the land was grove-land, and that the defendants claimed to be the tenants of the land through various sale-deeds. It was also alleged that the defendants had not acquired any rights in the plots by virtue of the aforesaid sale-deeds. The defence to the suit, in the main, was that the defendants-respondents were tenants of the plots in dispute and were also permanent lessees, and that the Court had no jurisdiction to hear the suit. An application was made by the defendants to the Court below praying that the issue of tenancy right be referred to the revenue Court. This application was rejected. Ultimately, however, the Court below came to the conclusion that the suit was not triable by the civil Court but was triable by the revenue Court, and ordered the return of the plaint for presentation to the proper Court. Against this order the present appeal was filed in this Court by one of the plaintiffs, and the question which was canvassed before the Bench, before whom the case came up for hearing in the first instance, was whether the civil Court had jurisdiction to entertain the suit. Before us another question has been raised—whether in view of the Zamindari Abolition Act read with the Zemindari Abolition and Land Reforms Order, 1952, vide NOTIFICATION NO. 5569/1-A-548-1952, dated 26-8-1952, the suit should remain in the civil Court and should be tried by that Court.

[3] As pointed out by us before, the plaintiff stated in the plaint that the land was grove-land, that the defendants claimed to be the tenants of the land, having acquired the rights of the original grove-holder or tenant. The case, therefore, was one in which a claim was made by a grove-holder that he had been dispossessed by a person who claimed to hold the land through the land-holder. The section of the U. P. Tenancy Act which is applicable to such a suit is S. 183 read with S. 206 (e). Under S. 183 a tenant ejected from or prevented from obtaining possession of his holding or any part thereof, otherwise than in accordance with the provisions of the law for the time being in force by—(a) his land-holder or any person claiming as landholder to have a right to eject him, or (b) any person admitted to or allowed to retain possession of the holding by such land-holder or person, whether as tenant or otherwise, may sue the person so ejecting him or keeping him out of possession (i) for possession of the holding; (ii) for compensation for wrongful dispossession etc. Although S. 183 in terms applies only to tenants, (and grove-holders are not tenants except for certain purposes), yet S. 206 (e), which applies to grove-holders, makes S. 183 applicable to grove-holders as well. Again, S. 183 applies when the disputed property is a holding. Holding is defined as a parcel or parcels of *land* held under one lease, engagement or grant, or in the absence of such lease, engagement or grant under one tenure. *Land* includes grove-land. Therefore, a holding includes both a grove-holder's holding as well as a tenant's holding. By reason of the allegations in the plaint that the defendants were claiming as tenants the suit was, therefore, clearly cognizable by the revenue Court when it was instituted in the Court below.

[4] Both the Full Bench cases referred to at the threshold of this judgment are distinguishable from the facts of the present case. In the case reported in *D. N. Rege* v. *Muhammad Haidar*, 1946 ALL. L. J. 369 (F. B.), the proprietor of a plot of land sued for recovery of possession of agricultural land against a person whom he alleged to be a trespasser. The question was whether the suit was cognizable by the revenue Court under S. 180, U. P. Tenancy Act or by the civil Court. It was held that if the plaintiff's allegations in the plaint showed that the defendant claimed to be in possession of the land in dispute as a tenant, his suit was cognizable by the revenue Court under S. 180, but that if the plaintiff's allegation showed that the defendant claimed the land as proprietor then the suit was cognizable by the civil Court. Section 180 applies to 'land' to which some body could be admitted as a tenant and which land becomes the hereditary tenancy of the trespasser if he was claiming as tenant, or which becomes khudkasht land if the defendant was a co-sharer and was claiming the land as his khudkasht. Although 'land' as defined in the U. P. Tenancy Act

includes grove-land, yet the definition is subject to the exception "unless the contrary appears." The contrary appears from the context in which the word 'land' is used in S. 180. A grove-holder is not a tenant under the Tenancy Act except for certain purposes, and a trespasser of grove-land cannot become a hereditary tenant or a khudkasht-holder. It follows that the word 'land' used in S. 180 is confined to agricultural land. Section 180, therefore, does not apply to grove-land, and the Full Bench case *D. N. Rege* v. *Muhammad Haidar*, 1946 ALL. L. R. 369 (F.B.), does not decide anything about the forum in which a suit for possession of grove-land must be instituted.

[5] The other Full Bench case, *Mahadeo Prasad* v. *Jokhan Ram*, A. I. R. 1947 oudh 133 (F.B.), does deal with a suit for possession of grove-land against a trespasser. But that was a suit in which the plaintiff did not allege that the defendant claimed to be a tenant of the landholder. It is obvious that in the suit before the Full Bench there was no allegation which could bring the case under S. 183, U. P. Tenancy Act. In the present case, as we have already observed, the allegations in the plaint clearly bring the case under S. 183, U. P. Tenancy Act.

[6] This leads us to a consideration of the second point raised before us.

[7] Under S. 19, Zamindari Abolition Act all land, held or deemed to have been held, on the date immediately preceding the date of vesting by any person as ..... (VIII) a "grove-holder" shall ..... be deemed to be settled by the State Government with such person, who shall, subject to the provisions of this Act, be entitled ..... to take or retain possession as a *sirdar* thereof. Grove-holders, therefore, with the exception of certain purposes, have become *sirdars* under the Aboilition of Zamindari Act. Section 209 deals with ejectment of persons occupying land without title. It reads as follows :

"A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force, and

(a) where the land forms part of the holding of a *bhumidhar*, *sirdar* or *asami*, without the consent of such *bhumidhar*, *sirdar* or *asami*,

(b) where the land does not form part of the holding of a *bhumidhar*, *sirdar* or *asami* without the consent of the Gaon Sabha, shall be liable to ejectment on the suit of the *bhumidhar*, *sirdar*, *asami* or Gaon Sabha, as the case may be, and shall also be liable to pay damages."

The claim of the plaintiff would, it would seem, fall under S. 209 because the plaintiff having become a *sirdar* under the Act was, according to him, deprived of possession of his holding by a person "who has taken or is retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force." Under sch. II of the Act as originally enacted a suit by a *sirdar* under S. 209 was to be instituted in the revenue Court, the Court of the Assistant Collector 1st Class to be precise, vide item 8 of the said schedule. Thus even under the Abolition of Zamindari and Land Reforms Act the present suit would have lain in the revenue Court. But it is urged that the Zamindari Abolition and Land Reforms Order mentioned already has altered the position.

[8] Paragraph 5 of the Order provides that during the period of one year from the commencement of this order, the figure 206 shall be substituted for the figure 209 in serial NO. 8 in sch. II. The result of this amendment is that for a period of one year beginning from 1-7-1952, which is the date of the commencement of the Order, suits by *sirdars* and others under S. 209, Abolition of Zamindari Act (U. P. Act NO. 1 of 1951) would lie not in the revenue Court but in the civil Court, because when S. 206 is substituted in place of S. 209 in serial NO. 8, no other serial number in the sch. II refers to S. 209, with the result that such suits are not cognizable by the revenue Courts at all, and are consequently cognizable by the civil Courts alone. Paragraph 5 of the Order, however, has to be read along with para. 2 of the Order.

[9] Paragraph 2 of the Order provides that except as expressly provided in the U. P. Zamindari Abolition and Land Reforms Act, 1950, or under the U. P. Zamindari Abolition and Land Reforms Rules, 1952, every suit, appeal or legal proceedings in respect of any right, privilege, obligation or liability acquired, accrued or incurred under or in pursuance of the U. P. Land Revenue Act, 1901, or the U. P. Tenancy Act, 1939, shall (a) where pending on 30-6-1952 in any revenue or civil Court, be continued in such Court ; and (b) where not so pending, may be instituted or commenced in the Court in which it would, but for the enactment of the U. P. Zamindari and Land Reforms Act, 1950, have been instituted or commenced, and every such suit, appeal or legal proceedings shall be heard, inquired into and decided under and in accordance with the provisions of the U. P. Land Revenue Act, 1901, and the U. P. Tenancy Act, 1939. It is clear that para. 2 of the Order applies to all causes of action which had accrued before the coming into force of the U. P. Zamindari Abolition and Land Reforms Act, 1950, under the U. P. Land Revenue Act, 1901 and the U. P. Tenancy Act, 1939. These two Acts were repealed by the U. P. Zamindari Abolition and Land Reforms Act. The effect of para. 2 is that proceedings relating to causes of action which had accrued under the U. P. Land Revenue Act, 1901 or under U. P. Tenancy Act, 1939, prior to their repeal, shall be instituted or continued in the Courts in which they would have been instituted or continued. Sub-paragraph (a) deals with pending suits, appeals or other legal proceedings. Sub-paragraph (b) deals with causes of action about which no suit, appeal or other legal proceedings had been instituted or commenced. In the present case the cause of action, which is the basis of the plaintiff's claim, accrued under the U. P. Tenancy Act before

the Act was repealed by the U. P. Zamindari Abolition and Land Reforms Act. So far as the present appeal is concerned, it falls under sub-para. (a) of para. 2 of the Order, because it was pending on 30-7-1952. The appeal will, therefore, have to be decided by this Court in accordance with the provisions of the U. P. Tenancy Act. We have already held that if regard be had to the provisions of the U. P. Tenancy Act, under S. 183 the suit should have been instituted in the revenue Court. Thus the order of the Civil Judge, Banaras, directing the return of the plaint to be presented to the proper Court was correct. When the plaintiff presents the plaint to the revenue Court his case will fall under sub-para. (b). The order of 26-8-1952, therefore, does not at all affect the position. We, therefore, hold that the plaintiff's suit was cognizable by the revenue Court and the order of the lower Court was correct.

[10] The appeal is, therefore, dismissed with costs.

A./M.K.S. *Appeal dismissed.*

A. I. R. 1953 Allahabad 88 *[Vol. 40, C. N. 35]*

MALIK C. J. AND V. BHARGAVA J.

P. Stanwill & Co. Auctioneers, Cawnpore—Assessee v. *Commr. of Income-tax, U. P. & Ajmer-Merwara, Lucknow—Defendant.*

Misc. Case No. 320 of 1947, D/- 26-8-1952.

Excess Profits Tax Act (1940), S. 2 (5) — Business and profession — Distinction — Auctioneer's business held to be profession in circumstances of case.

A certain amount of skill and knowledge is required in every business; in a profession it is required in a larger degree, though that may not be the sole criterion for judging whether a particular business is a profession or not. [Para 9]

The income of an auctioneer depends mainly on the amount of business that the firm can attract, the price at which it succeeds in selling the goods and the rate at which commission is payable on the sale proceeds. All these are factors requiring and depending on personal skill and, *prima facie*, it is not possible to say that the business of an auctioneer does not require any personal qualifications for its being carried out successfully. [Para 17]

The assessee firm was an old firm of auctioneers and the partners thereof had acquired considerable experience in this line. One of them was a qualified engineer which enabled him to do the work of valuing the property and carrying on the business more efficiently than it could be carried on by any person not so qualified. By reason of efficient manner in which they were able to discharge their duties they had attracted a lot of Government work and, though there were several firms of auctioneers in Kanpur, they had done much better than other firms which was due to their personal qualifications :

Held, that though in India anybody can set up the business of an auctioneer, as no restrictions have yet been imposed as in England where a person is required to take out a licence, on the facts and circumstances of the case the income of the assessee must be held to depend mainly on the personal qualifications of the partners as contemplated by S. 2 (5). [Paras 12, 17]

Anno. Excess Profits Tax Act, S. 2 (5) N. 1.

G. S. Pathak — for the Assessee; J. Swarup—for the Defendant.

REFERENCES: Courtwar/Chronological/ Paras.
(1919) 2 K. B. 222. 6
(1919) 2 K. B. 731. 6
(1921) 2 K. B. 332: (90 L. J. K. B. 499). 7
(1944) 2 K. B. 163: (1944-2 All E. R. 163). 8
(1921) 12 Tax. Cas. 41: (88 L. J K. B. 752). 6

Malik C. J. — This is a reference under S. 21, Excess Profits Tax Act read with S. 66 (1), Income-tax Act. The assessee firm Messrs. P. Stanwill & Co. is a partnership firm and the partners work as auctioneers in the city of Kanpur. During the chargeable accounting period 1943-44 the assessee's income from this business amounted to Rs. 94,284. The Excess Profits Tax Officer considered that excess profits tax was leviable on the profits of the business made during the accounting period. The assessee, on the other hand, challenged their liability on the ground that they were carrying on a profession and the profits depended mainly upon their personal qualifications. A suggestion was also made on behalf of the department that the profession consisted wholly or mainly in the making of contracts on behalf of other persons. There were thus three points raised: firstly, whether the assessee carried on a profession; secondly, whether in that case the profits depended mainly on their personal qualifications and, lastly, whether the profession consisted wholly or mainly in the making of contracts on behalf of other persons.

[2] The first and the third points were decided in favour of the assessee. The second point was decided against the assessee. The assessee alone asked for a reference to this Court.

[3] The assessee formulated the question as follows:

"Whether in the circumstances of the case the activity of auctioneers conducted as profession did not depend wholly or mainly on the personal qualification of the partners?"

The Tribunal, however, changed the form of the question and the question referred to us is in these terms :

"Whether in the circumstances of the case, the income of the applicant derived from their activity of auctioneer's profession depend wholly or mainly on the personal qualifications of the partners of their firm as contemplated by S. 2 (5)?"

[4] Learned counsel for the assessee has urged that the Tribunal in deciding the question whether the income of the assessee depended mainly on the personal qualifications of the partners of the assessee firm has not based its finding on the facts found by it in its appellate order but has decided the question on the general but irrelevant consideration that in India auctioneering is not a profession which required any particular qualification and there being no law requiring a person to take out a licence any one may set himself up as an auctioneer.

[5] The relevant portion of S. 2 (5), Excess Profits Tax Act provides that

"unless there is anything repugnant in the subject or context—

. . . . . .

'business' includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not

include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts . . . ."

The reason for exempting from payment of Excess Profits Tax the profits made which depend wholly or mainly on the personal qualifications of the person making the profit is obvious. The primary object of the Excess Profits Tax Act was to deal with increased profits made due to war conditions. If, however, the profits did not depend upon the war conditions but depended mainly on the personal qualifications of the person making it, there was no reason why it should be subjected to Excess Profits Tax.

[6] As we have already said, the Tribunal has held that the business of an auctioneer is a profession. As the question whether the assessee was carrying on a profession was not referred to us, it is not necessary to go at any length into that question, but it may be pointed out that the main difference between ordinary commercial business and profession lies in the amount of knowledge or skill employed in carrying it on though that may not be sole criterion. As was pointed out by Rowlatt J. in *Christopher Barker & Sons* v. *Inland Revenue Commissioners*, (1919) 2 K. B. 222 :

"every businessman has to use skill and ability in the conduct of his business and, therefore, those qualities are not distinguishing marks of a profession."

The learned Judge in attempting to point out the difference says :

"All professions are businesses, but all businesses are not professions, and it is only some businesses which are taken out of the operation of the section, namely, those are professions, the profits of which are dependent mainly upon personal qualifications and in which no capital expenditure is required or only capital expenditure of a comparatively small amount."

In *William Esplen, Son & Swainston, Ltd.* v. *Commissioners of Inland Revenue*, (1919) 2 K. B. 731, the same learned Judge again said :

"it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on . . . . . ."

Scrutton L. J. in *The Commissioner of Inland Revenue* v. *Maxse*, (1921) 21 Tax Cas. 41 attempted, though with considerable diffidence, to define what is a ' profession ' and said :

"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me, as at present advised, that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production, or sale, or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions —the Church, Medicine and Law. It has now, I think, a wider meaning . . . . . ."

[7] In *Currie* v. *Commissioners of Inland Revenue*, (1921) 2 K. B. 332, Lord Sterndale, M. R. pointed out that

"whether a man was carrying on a 'profession' or a 'business' depended upon the circumstances of the case and there might be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession; and, therefore, looking at the matter from the point of view of a Judge directing a jury, the Judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there might be facts on which the direction would have to be given the other way. But between those two extremes there was a very large tract of country in which the matter became a question of degree ; and where that was the case the question was undoubtedly, in his opinion, one of fact; and if the Commissioners came to a conclusion of fact without having applied any wrong principle, then their decision was final upon the matter."

[8] That view was followed by the Court of Appeal in *Carr* v. *Inland Revenue Commissioners*, (1944) 2 K. B. 163.

[9] From an examination of these decisions it follows that a certain amount of skill and knowledge is required in every business; in a profession it is required in a larger degree, though that may not be the sole criterion for judging whether a particular business is a profession or not.

[10] It is urged that an auctioneer's business requires special skill and the personal factor goes a long way to make it a success and reliance is placed on Halsbury's Laws of England, 2nd Edn., vol. I, p. 695 where it is said :

"The licence is of a personal character, and every member of a firm of auctioneers who exercises or carries on the trade or business of an auctioneer or acts as such must take out a separate and distinct licence . . ."

And again at page 697 where it is said that "The agency of the auctioneer is personal and cannot be delegated." At page 705 of the same book it is pointed out that an auctioneer is held liable for negligence and at page 711 the passage is as follows :

"An auctioneer, being a person who professes to carry on a business requiring skill and knowledge, must display such skill and knowledge in acting for his vendor as is reasonably to be expected from competent auctioneers and must follow the course of business ordinarily recognised by custom or prescribed by statute . . ."

[11] There can, therefore, be no doubt that an auctioneer's business is recognised in England as a business requiring personal skill to be carried on by the person who has been engaged for the purpose by his customer and a personal licence has to be taken out by every member of the firm of auctioneers before they can work as such. The Tribunal has relied on the fact that in India no licence is needed for the work of an auctioneer. It is urged in reply that to practise any of the indigenous systems of medicine or even homœopathy it is not necessary to be a registered practitioner in India and yet it cannot be urged that the work of a *Kaviraj* or *Hakim* or that of a doctor practising homœopathy is not a profession. Learned counsel has, therefore, pointed out that the mere fact that there is no statutory provision yet setting out the requirements for carrying on

the business of an auctioneer does not make it any the less a business requiring skill and knowledge.

[12] The question whether the profits in the case before us mainly depended upon the personal qualifications of the partners of the assessee firm would depend upon the facts and circumstances of the case. The point was raised before the Appellate Tribunal and the circumstances were clearly set out on behalf of the assessee why the assessee claimed that the profits were mainly due to the personal qualifications of the partners.

The facts and circumstances relied on by the assessee were that the assessee firm was an old firm and the partners thereof had acquired considerable experience in this line; that one of them was a qualified engineer which enabled him to do the work of valuing the property and carrying on the business more efficiently than it could be carried on by any person not so qualified; that by reason of the efficient manner in which they were able to discharge their duties they had attracted a lot of Government work and, out of the total profits amounting to Rs. 94,284, Rs. 70,308 were derived from income made by sale of Government properties; and, lastly, that though there were several firms of auctioneers in Kanpur, they had done much better than other firms which must be due to their personal qualifications. As against this it is pointed out that there is nothing on behalf of the Department to show that there was any increase in business or income due to war conditions.

[13] The facts and circumstances relied on by the assessee do not seem to have been challenged before the Tribunal except that, while the assessee claimed that the business had been carried on for two generations, on behalf of the Department it was admitted that from the assessment records available it was clear that the firm had been assessed to income-tax at least since 1929-30.

[14] The Tribunal, however, decided the point against the assessee, not on the facts of this particular case, but in the view that it took that in India no special qualifications were needed to set oneself up as an auctioneer.

[15] Sri Jagdish Swarup on behalf of the Department has relied on the seventh paragraph of the appellate order of the Tribunal in which the Tribunal held that though in a sense they were exercising a profession but it was not one the income of which depended on personal qualifications of its partners. This finding was, however, not recorded, as would be apparent from the previous two paragraphs of the appellate order, on the facts and circumstances of the particular case, but on the reasoning that in India anybody can set himself up as an auctioneer and he need not possess any qualification to be able to carry on that business.

[16] When the application under S. 21, Excess Profits tax Act was heard by the Tribunal an objection was raised on behalf of the Department that the case did not raise a question of law but a question of fact and the Tribunal took the view that the point raised was a question of law as the point was not decided on the facts of the particular case but on the general view that no special qualifications being required for setting up the business of an auctioneer the assessee could not claim that the main part of their income depended on their personal qualifications.

[17] The income of an auctioneer depends mainly on the amount of business that the firm can attract, the price at which it succeeds in selling the goods and the rate at which commission is payable on the sale proceeds. All these are factors requiring or depending on personal skill and *prima facie*, it is not possible to say that the business of an auctioneer does not require any personal qualifications for its being carried out successfully. It may be that anybody can set up the business, as no restrictions have yet been imposed, but so far as the assessee firm is concerned, there can be no doubt that the circumstances relied on by them could lead to the conclusion that the main part of their profits depended on the personal qualifications of the partners and the Tribunal erred in rejecting the contention on general grounds. On the facts and circumstances stated by us above, which appear from the appellate order of the Tribunal and the statement of the case, in our view it is possible to come to the conclusion that the income of the assessee depended mainly on the personal qualifications of the partners as contemplated by S. 2 (5). That is our answer to the question referred to us.

[18] The assessee is entitled to its costs which we fix at Rs. 500.

A/V.R.B. *Reference answered.*

A. I. R. 1953 Allahabad 90 *[Vol. 40, C.N. 36]*

BIND BASNI PRASAD AND BASUDEVA MUKERJI JJ.

Ramesh Chandra Chaube—Petitioner v. *Principal Bipin Behari Intermediate College, Jhansi —Opposite Party.*

Civil Misc Writ No. 383 of 1952, D/- 10-9-1952.

Constitution of India, Arts. 226 and 29 (2)—Student refused admission in college on ground of discipline—High Court will not interfere.

There is no guarantee in the Constitution that if a student is studying in any institution then he has a right to continue his education in that particular institution, even though he may not be acceptable to the authorities of the institution. Thus, the Principal of a college can, without communicating the reasons, inform a student studying in the college that he cannot be admitted to the college during the next session where the Principal comes to the conclusion that such an action is necessary in the interests of discipline among the students. Such an action of the Principal is not hit by Art. 29 (2). And the High Court will not interfere under Art. 226 with the action taken by the head of an educational institution. [Paras 3, 4]

S. N. Divivedi—for Petitioner.

Bind Basni Prasad J.—This is an application under Art. 226 of the Constitution. The

applicant Ramesh Chandra Chaube was admitted as a student of the 1st year Intermediate Class in the Bipin Behari Intermediate College, Jhansi, in July 1951. It is alleged that a week after his admission the Principal struck off his name from the class register and told him verbally that he could not be permitted to study in the college as he was a Communist. Later on the students of the college threatened to go on strike and at that time the applicant gave an undertaking in writing to the Principal that he would not take part in any subversive activity whether inside or outside the college. Upon this the petitioner was re-admitted into the class and he recontinued his studies in the 1st year Class. He could not take the six-monthly examination on account of his illness; but in the annual examination, it is said, he got pass marks in all the subjects. He was required to appear in a supplementary examination to be held on 10-7-1952. On 2-7-1952, the petitioner's father was informed by the Principal that he could not be re-admitted in the college during the session 1952-53. No reasons for the order were stated in the letter of the Principal. It is contended that all efforts to find out from the Principal the reasons for the action he had taken were in vain. The Inspector of Schools was then approached. He looked into the matter and sent the following answer to the petitioner's father:

"I have made inquiries in that connection and have no reason to interfere with the Principal's decision. He has a right to ask you to withdraw your ward from his institution without communicating reasons which prompted him to come to that decision."

The petitioner states that his conduct during the last session in the college was good and in support of this he produces a good conduct certificate, dated 6-6-1952, given to him by the Principal. It appears that in June last the petitioner wanted to take a part-time job and, therefore, requested the Principal to grant him a character certificate. Thereupon this certificate was given to him.

[2] The contention is that it is against all principles of natural justice that the Principal should have refused to allow the petitioner to continue his studies in the 2nd year Intermediate Class without assigning any reason for the action which he has taken against him. This application under Art. 226 of the Constitution has, therefore, been made with a prayer that a writ in the nature of mandamus or any other suitable direction, order or writ be issued to the Principal of the College to re-admit the petitioner.

[3] No fundamental right has been infringed in the present case. The question is whether, it was necessary for the Principal to have held an inquiry and to have communicated to the petitioner the reasons for the action which he has taken against him. Reading between the lines it seems to us that the Principal came to the conclusion that in the interests of discipline among the students of the college it was not desirable that he should continue in it. The Principal was approached by one of the members of the Managing Committee and he informed him that he would explain to him the reasons. The Inspector of Schools was approached and he too was satisfied that there was no good reason to interfere with the Principal's decision. There is a tendency of indiscipline in the student community and it would be subversive of discipline if this Court were to interfere with the action taken by the heads of institutions in the interests of discipline. At all events, we do not feel satisfied that we should exercise our discretion under Art. 226 of the Constitution.

[4] Learned counsel has contended that this action on the part of the Principal is an infringement of the right to the freedom of speech and expression guaranteed by Art. 19 (1) (a) of the Constitution. We are unable to agree with this. All what the action of the Principal amounts to is that the petitioner cannot prosecute his studies in the Bipin Behari Intermediate College, Jhansi. No obstacles have been put in his way to the exercise of the right to the freedom of speech and expression. He has not been expelled or rusticated and he is at liberty to take a transfer certificate from that institution and to join any other institution in which he can find admission. Art. 29 provides for the protection of cultural and educational rights. Clause (2) of that article provides:

"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

The petitioner has not been denied admission on any of the aforesaid grounds. There is no guarantee in the Constitution that if a student is studying in any institution then he has a right to continue his education in that particular institution, even though he may not be acceptable to the authorities of the institution. Clause (o) of R. 96 of the Education Code of the Utter Pradesh provides:

"The name of a scholar who does not rejoin a school or college within 3 days of the commencement of a school term shall be struck off the rolls unless leave has been previously applied for and granted by the head of the institution, in which case he will be considered to be on the roll for the term whether or not he returns on the expiry of the leave.

Note.—This rule does not prevent the head of the institution from refusing for adequate reasons, to admit for the new sessions scholars who were on the rolls in the previous session."

There is nothing in the above rule to indicate that the Principal of the institution should communicate to the student the reasons for refusing admission to him. Indeed, sometimes it may be desirable in the interests of discipline itself not to communicate such reasons. The Principal has to refuse admission for adequate reasons. The fact that neither the Managing Committee of the college nor the District Inspector of Schools have taken any action to reverse the order of the Principal proves that the reasons for which he took the action against the petitioner were adequate.

[5] For the above reasons the application is dismissed.

[6] Learned counsel requests us to certify that the case involves a substantial question of law as to the interpretation of the Constitution within the meaning of Art. 132 of the Constitution. We are of opinion that no such question is involved in the present case. We refuse to grant the certificate asked for.

A/V.S.B. *Application dismissed.*

A. I. R. 1953 Allahabad 92 *[Vol. 40, C. N. 37]*

SAPRU AND BIND BASNI PRASAD JJ.

Mohammad Raza Ali Khan — Petitioner v. *The State of Uttar Pradesh and another — Opposite Party.*

Civil Misc. Writ No. 358 of 1952, D/- 5-9-1952.

(a) Tenancy Laws— U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) — Act has not ceased to be operative when provisional legislature which passed it was dissolved — (Constitution of India, Arts. 372 (1), 382 and 31 (4)).

Temporary and transitional provisions were made under Part 21 of the Constitution for tiding over the transitional period. Article 382 of the Constitution allowed the House of the Legislature functioning in the State of Uttar Pradesh to continue as a provisional Legislature. U. P. Act 1 of 1951 which was pending as a bill at the commencement of the Constitution in the Uttar Pradesh Legislature, was passed by the provisional legislature of Uttar Pradesh. From the mere fact that the State legislature was a 'provisional legislature' the inference cannot be drawn that the laws passed by it were only of a temporary nature, i. e, of a nature which could last only up to the time that the regular legislature contemplated by the Constitution came into existence after elections, for the provisional legislature was itself a creature of the new Constitution. It was vested with all the power enjoyed by a State legislature. Clearly the laws passed by it could operate beyond the time, until repealed, when it ceased to exist. The analogy between it and the legislature which was swept away by the Constituent Assembly is misleading. Unlike the legislature which had been set up by the Indian Independence Act read with the Government of India Act, 1935 the provisional legislature owed its origin to the Constituent Assembly. It came to an end when the new legislature was elected under the Constitution. Laws passed by it did not cease to be operative on the date that the provisional legislature gave place to the newly elected legislature under the Constitution framed by the Constituent Assembly. The provisional legislature did not represent a break with the past. It was intended to facilitate the transition to the new order and it would have been, therefore, quite unnecessary for the Constituent Assembly to enact a provision analogous to Art. 372 of the Constitution declaring that the laws passed by it shall continue in force until altered, repealed, or amended by a competent legislature or other competent authority.

Notwithstanding anything to the contrary the bill having been reserved at the commencement of the Constitution and having been passed and being assented to by the President is not liable to be questioned in any Court on the ground that it contravenes the provisions of cl. (2) of Art. 31 of the Constitution. The Supreme Court has held that the Uttar Pradesh Zamindari and Land Reforms Act is protected under that Article from attack in any Court on the ground that it contravenes the provisions of Art. 31 (2). The Court cannot, therefore, go into the question of the adequacy or otherwise of the compensation contemplated by the Act. That question has been finally decided by the Supreme Court and the controversies in regard to it have been set at rest by the recent amendments to the Constitution. (1916) 1 K. B. 688, *Disting.* [Paras 6, 8, 17]

(b) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act (1 of 1951) —Principle of compensation — Question decided by Supreme Court — It cannot be reagitated — Points which could have been raised before Supreme Court, cannot again be raised— (Constitution of India, Arts. 31 (2), 31A and 14).

The principles which govern land acquisition under Land Acquisition Act and acquisition of property under Art. 31 (2) of the Constitution are and were, perhaps, intended to be somewhat different. The question whether the acquisition under the U. P. Act 1 of 1951 was or was not for a public purpose was agitated both before the High Court and the Supreme Court. Both the Courts held that there was a public purpose behind the Act. Further both the Courts held that it was within the competence of the legislature to fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be determined and given. The question whether the principles underlying compensation in the Act could be different, having regard to the provisions of Art. 14 of the Constitution, from those to be found in the Land Acquisition Act could be raised before the Supreme Court or the Full Bench of this Court. It cannot be allowed to be reagitated again. Reading Art. 31 as a whole the position would seem to be that there is no force in the contention that inasmuch as the provisions of the Act are different from the principles laid down in the Land Acquisition Act, the Act contravenes the letter and spirit of Art. 14. [Para 9]

Bind Basni Prasad J. :—A perusal of the judgment of the Supreme Court would show that what the Supreme Court said was that if the Government made any rules and prescribed that compensation would be payable at some remote time and not within a reasonable period then it would be open to the parties affected to challenge the validity of the *rules* on the ground of abuse of power. The Supreme Court did not leave the door open to question the effectiveness or the operation of the U. P. Zamindari Abolition and Land Reforms Act when they held that the Act was valid. [Para 15]

There is Art. 31A in the Constitution which provides that notwithstanding anything contained in Part 3 of the Constitution no law providing for the acquisition by the State of any estate or of any rights therein for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part. Article 31-B of the Constitution also validates this Act. [Para 18]

(c) Precedents — Points covered and decided by Supreme Court and Full Bench cannot be reagitated. [Para 11]

(d) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act (1 of 1951), S. 4 — Date of vesting can be the same as the notification declaring the date.

There are no words in S. 4 to indicate that the date of vesting to be specified should be a future date. All what sub-s. (1) of that section provides is that the date must be specified and the persons affected must be in no doubt as to from what date they are going to be divested of their estates. It is in public knowledge that long before the notification was issued the public knew that the date of vesting would be 1-7-1952. It cannot be said that the proprietors were taken by surprise when the notification of 1-7-1952 giving the same date as the date of vesting was issued. [Para 16]

P. M. Verma — for Applicant.

REFERENCE. / Para

(1916) 1 K B 688 : (85 L J K B 537) 17

Sapru J.—This is an application under Art. 226 of the Constitution for the various writs detailed in Para. 22 of the petition. It is necessary to set

forth the reliefs claimed in order to make my position clear in regard to this case. The reliefs claimed are :

(a) That a writ in the nature of mandamus be issued on the opposite parties restraining them from acting in any manner by virtue of, or under the provisions of the U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), and interfering with the petitioner's exercise of his proprietary rights by any action taken through its servants and agents.

(b) That a writ or such other direction or order as the Court may deem proper be issued quashing the notification issued by the opposite party No. 1 under S. 4 of the said U. P. Act, 1 of 1951, and published in the State Gazette Extraordinary dated 1-7-1952, and directing the said opposite party to restore the petitioner back to his proprietary possession, and restraining it by means of a permanent injunction order from compulsorily acquiring the petitioner's property under the provisions of the said U. P. Act, 1 of 1951.

(c) That an interim injunction be issued restraining the opposite parties from acting in any manner by virtue of, or under the provisions of, the U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), and issuing any coercive processes under the said Act against the petitioner for the recovery of the arrears of revenue in respect of Rabi 1359-F. in pursuance of the writ of demand dated 22-7-1952 served upon the petitioner by the opposite party No. 2 by any action taken through their servants and agents.

(d) That such further or other writs, directions or orders be issued as this Court may deem fit and proper.

[2] I have quoted at length the reliefs claimed in this case in order to indicate unmistakably that what the applicant is seeking in effect today by this application, under Art. 226 of the Constitution, is to invite this Court to go into matters which were finally disposed of by the Supreme Court. As is well known, the law, as laid down by the Supreme Court, is binding on this Court. The questions, which are the subject-matter of this application, were considered at length both by the Supreme Court and a Full Bench of this Court. Suffice it to say that the arguments, which have been advanced could, and probably most of them were actually advanced have been advanced before the Supreme Court and the Full Bench. Learned counsel for the applicant has referred in an argument, which has taken a good deal of the time of this Court, at length to various points but I do not consider it necessary to discuss them.

[3] I indicated to learned counsel that we would be prepared to consider the question of notice on its merits if he was prepared to confine his attack to statutory rules made under the U. P. Zamindari Abolition and Land Reforms Act (hereinafter called the Act) and not to the main Act itself. Learned counsel rejected that suggestion. Indeed, learned counsel frankly concedes that his case is that the Act is incapable of being put into force and that it must be deemed to be an invalid piece of legislation. It is quite obvious from the reliefs claimed and the affidavit filed that what the applicant is seeking to do is to challenge the validity of an Act which has been declared to be *intra vires* the Constitution by the Supreme Court. Learned counsel has told us clearly that his purpose will not be served by challenging the validity of statutory rules and indeed according to his contention the vesting order passed by the Uttar Pradesh Government is null and void.

[4] As far as I have been able to understand the somewhat complicated argument which has been advanced by learned counsel for the applicant, the position seems to be this. The Act was passed by what Shri Varma calls the provisional Legislature which lasted until 19-5-1952, when the Legislature set up under the provisions of the Constitution framed by the Constituent Assembly came into existence. Shri Verma's point is that all legislation passed by the provisional Legislature came automatically to an end when it (the provisional Legislature) was dissolved on 19-5-1952, and the Legislature set up by the Constituent Assembly came into existence. The proposition is of a most startling character. It may be conceded that the Constituent Assembly represented a complete break with the past. The Constituent Assembly was not bound to preserve the laws which were existing in this country before the Constitution framed by it came into force. It, however, decided to do so and for that purpose enacted Art. 372. Article 372 (1) of the Constitution lays down that :

"Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the Law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

[5] I agree with Shri Verma that Art. 372 of the Constitution cannot cover the Act as the Act was not a law in force in the territory of India immediately before the commencement of the Constitution.

[6] Temporary and transitional provisions were, however, made under Part 21 of the Constitution for tiding over the transitional period. Article 382 of the Constitution allowed the Houses of the Legislature functioning in this State to continue as a provisional legislature. The Act which was pending as a bill at the commencement of the Constitution in the Uttar Pradesh legislature, was passed by the provisional legislature of Uttar Pradesh. From the mere fact that the State legislature was a 'provisional legislature,' the inference cannot be drawn that the laws passed by it were only of a temporary nature, i. e. of a nature which could last only up to the time that the regular legislature contemplated by the Constitution came into existence after elections, for let it be remembered that the provisional legislature was itself a creature of the new Constitution. It was vested with all the powers enjoyed by a State legislature. Clearly the laws passed by it could operate beyond the time, until repealed, when it ceased to exist. The analogy between it and the legislature which was swept away by the Constituent Assembly is misleading. Unlike the legislature, which had been set up by the Indian

Independence Act read with the Government of India Act, 1935, the provisional legislature owed its origin to the Constituent Assembly. It came to an end when the new legislature was elected under the Constitution. Laws passed by it did not cease to be operative on the date that the provisional legislature gave place to the newly elected legislature under the Constitution framed by the Constituent Assembly. The provisional legislature did not represent a break with the past. It was intended to facilitate the transition to the new order and it would have been, therefore, quite unnecessary for the Constituent Assembly to enact a provision analogous to Art. 372 of the Constitution declaring that the laws passed by it shall continue in force until altered, repealed, or amended by a competent legislature or other competent authority.

[7] I hope I have given sufficient reasons to indicate clearly that there is no merit in the argument which was ingeniously built up on this point by Shri Verma. I would also point out that the argument of Shri Verma ignores the provisions of Art. 31 (4) of the Constitution which were the subject-matter of interpretation by this Court and the Supreme Court. That Article is :

"*31 (4).* If any Bill pending at the commencement of this Constitution in the Legislatur of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of cl. (2)."

[8] Now undoubtedly after the U. P. Zamindari Abolition and Land Reforms Bill was passed by the provisional legislature it was submitted for the certification of the President. It received his assent. It follows, therefore, that, notwithstanding anything to the contrary the bill having been reserved at the commencement of the Constitution and having been passed and being assented to by the President, was not liable to be questioned in any Court on the ground that it contravenes the provisions of cl. (2) of Art. 31 of the Constitution. That Article has been the subject-matter of interpretation by the Supreme Court as also a Full Bench of this Court. As far as I can see, the Supreme Court has held that the Uttar Pradesh Zamindari and Land Reforms Act is protected under that Article from attack in any Court on the ground that it contravenes the provisions of Art. 31 (2). We cannot, therefore, go into the question of the adequacy or otherwise of the compensation contemplated by the Act. That question has been finally decided by the Supreme Court and the controversies in regard to it have been set at rest by the recent amendments to the Constitution.

[9] In regard to the argument that the compensation paid should have been in accordance with the principles of the Land Acquisition Act and that the compensation is illusory, I would like to say that the principles which govern land acquisition and acquisition of property under Art. 31 (2) of the Constitution are and were, perhaps, intended to be somewhat different. Sub-article (2) of Article 31 of the Constitution enables Government to acquire any movable or immovable property on what might be called a mass scale for public purposes and in such a case it is open to the legislature to fix the amount of compensation and lay down the principles and the manner in which the compensation is to be determined and given. As I see it, the question whether the acquisition under the Act was or was not for a public purpose was agitated both before this Court and the Supreme Court. Both the Courts held that there was a public purpose behind the Act. Further both the Courts held that it was within the competence of the legislature to fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be determined and given.

The question whether the principles underlying compensation in the Act could be different, having regard to the provisions of Art. 14 of the Constitution, from those to be found in the Land Acquisition Act could be raised before the Supreme Court or the Full Bench of this Court. It cannot be allowed to be reagitated again. As far as I can see, the point was actually raised before those Courts. Reading Art. 31 as a whole the position would seem to be that there is no force whatsoever in the contention of learned counsel that inasmuch as the provisions of the Act are different from the principles laid down in the Land Acquisition Act, the Act contravenes the letter and spirit of Art. 14, into the intricacies of which it is unnecessary to enter.

[10] I am not impressed with the argument that it was not competent for Government to direct that vesting of properties shall take place on the very date on which the vesting order was passed. It was not, in my opinion, incumbent upon Government to fix a future date for that purpose.

[11] The general conclusion, which I have arrived at after listening to the long and ingenious argument of Shri Verma, is that the points which he seeks to agitate are not new points. They are covered by the authority of the Supreme Court as well as a Full Bench of this Court.

[12] For this reason I do not think it necessary to consider *seriatim* some other arguments which were urged by Shri Verma in support of the many startling propositions with which he came out.

[13] For the reasons given above, this application is dismissed.

[14] **Bind Basni Prasad J.**—I agree with my learned brother and desire to add a few words.

[15] Learned counsel for the applicant was given a hearing for more than three hours and although he said that he did not question the

validity of the U. P. Zamindari Abolition and Land Reforms Act nevertheless when he was asked to confine his argument to the rules and not to the Act he said he was unable to do so. It was clear from his argument as well from a perusal of the petition that the object of the petitioner is to make the U. P. Zamindari Abolition and Land Reforms Act inoperative. All the points which have been raised in the petition could have been advanced before the Full Bench of this Court or the Supreme Court which considered the validity of the Act and if any of them was not advanced it is not possible for us to entertain it now. After a protracted litigation the U. P. Zamindari and Land Reforms Act was held a valid piece of legislation and the Superme Court pronounced to that effect. It is not open to us now to declare that Act invalid or inoperative. In para. 3 of the application certain quotations from the judgment of the Supreme Court have been made. A perusal of those quotations will show that what the Supreme Court said was that if the Government made any rules and prescribed that compensation would be payable at some remote time and not within a reasonable period then it would be open to the parties affected to challenge the validity of the *rules* on the ground of abuse of power. The Supreme Court did not leave the door open to question the effectiveness or the operation of the U. P. Zamindari Abolition and Land Reforms Act when they held that the Act was valid.

[16] The vesting order passed under S. 4 of the Act has been questioned on the ground that according to that section the date of the vesting has "to be specified" and it could not be on the same day as the date of the publication of the notification. I am unable to interpret S. 4 of the Act in that way. There are no words in it to indicate that the date to be specified should be a future date. All what sub-s. (1) of that section provides is that the date must be specified and the persons affected must be in no doubt as to from what date they are going to be divested of their estates. It is in public knowledge that long before the notification was issued the public knew that the date of vesting would be 1-7-1952. It cannot be said that the applicant or those belonging to his class were taken by surprise when the notification of 1-7-1952, was issued.

[17] The argument that the impugned Act came to an end when the new legislature came into being on 19-5-1952, has no force. The contention is that as the power of the provisional legislature set up under Art. 382 lapsed by the new legislature coming into existence, laws made by the provisional legislature lapsed, and in this connection reliance has been placed upon *Watson* v. *Winch*, (1916) 1 K. B. 688. It was held in that case that when a by-law is made under an Act of Parliament the repeal of the Act abrogates the by-law, unless the by-law is preserved by the repealing Act by means of a saving clause or otherwise. This authority is hardly of any help to the petitioner for in the present case there has been no repeal of the law in exercise of which the provisional legislature made the U. P. Zamindari Abolition and Land Reforms Act. The provisional legislature from its very nature was set up to tide over the transitional stage and nowhere it is provided in the Constitution that the laws made by the provisional legislature would cease to be operative when the new legislature is set up in accordance with the provisions of the Constitution. *Watson* v. *Winch* is not at all applicable to the facts of the present case.

[18] Reliance has also been placed upon Art. 14 of the Constitution. It is contended that the provisions in the impugned Act in regard to the payment of compensation are discriminatory inasmuch as they are different from those contained in the Land Acquisition Act. This is a matter which could have been urged before the Full Bench of this Court and the Supreme Court. Learned counsel has not been able to point out to us whether this point was urged in those Courts. It is too late now to contend this point. But apart from these considerations I can see no force in it. There is Art. 31A in the Constitution which provides that notwithstanding anything contained in Part 3 of the Constitution no law providing for the acquisition by the State of any estate or of any rights therein for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part. Article 31B of the Constitution also validates this Act.

[19] No point urged by learned counsel has appealed to me in view of the decision of the Full Bench of this Court and of the Supreme Court. I want to make it clear that it is only the validity of the U. P. Zamindari Abolition and Land Reforms Act, 1951, and its effectiveness and operation that I uphold. I express no opinion now as to the validity or otherwise of any statutory rules framed thereunder.

[20] **By the Court.** — This application is dismissed.

A/R.G.D. *Application dismissed.*

A. I. R. 1953 Allahabad 95 *[Vol. 40, C. N. 38]*

(LUCKNOW BENCH)

MISRA J.

Sadal and others, Accused-Applicants v. *The State.*

Criminal Revn. No. 9 of 1952, D/- 19-8-1952.

U. P. District Boards Act (10 of 1922), S. 174—Bye-laws under - Bye-law No. 1 of District Board Rae Bareli — Validity — (Constitution of India, Art. 19 (1) (g).)

The power to regulate offensive and obnoxious trades and practices must be deemed to include the power to prohibit such trades or practices being carried out in particular places or in particular areas and since the bye-law No. 1 only attempts to do this and no more, it is not

prima facie ultra vires the powers conferred on the Board by S. 174. Art. 19 (1) (g) of the Constitution likewise has no application to the matter inasmuch as the bye-law does not prohibit the carrying on of any profession or trade in contravention of the Constitutional injunctions. [Para 2]

Kalbe Mustafa—for Applicants; Dy. Govt. Advocate—for the State.

Order.—This criminal revision arises out of a summary trial at which the applicants Sadal, Manna and Chiddan were convicted of an offence under s. 174/2, District Boards Act, for contravention of bye-law NO. 1 of the District Board, Rae Bareli, published at pp. 352-53, PART 3, U. P. Gazette dated 19th AUGUST 1950. The trial was a summary one and the conviction was based upon admission of the accused to the effect that they slaughtered five bullocks at the Kanchana slaughter house within the limits of the District Board, Rae Bareli. The learned Magistrate found the accused guilty but released them under s. 3, First Offenders Act. Dissatisfied with the aforesaid order, Sadal, Manna and Chiddan went up to the Court of Session but their application was rejected and they have now approached this Court under s. 439, Criminal P. C. A number of technical arguments have been urged on their behalf. They are: (a) That the bye-law is ultra vires the District Boards Act, (b) that it is in violation of ART. 19 of the Constitution, (c) that the learned Magistrate was not competent to take cognizance of the case, and (d) that in any event trial should not have been a summary one.

[2] I am not impressed by any of those arguments. The bye-laws were framed under S. 174, District Boards Act which authorises a Board by special resolution to make bye-laws applicable to the whole or any part of the rural area of the district for the purpose of promoting or maintaining the health, safety or convenience of the inhabitants of such area and for the furtherance of the administration of the district under the Act. In particular and without prejudice to the generality of these powers, a Board is authorized to make bye-laws for the purpose of regulating slaughter houses and offensive, dangerous, and obnoxious trades, callings, or practices and prescribing fees to defray the expenditure incurred by a Board in that connection. The power to regulate offensive and obnoxious trades and practices must be deemed to include the power to prohibit such trades or practices being carried out in particular places or in particular areas and since the bye-law only attempts to do this and no more, it is not prima facie ultra vires the powers conferred on the Board by S. 174. Article 19 (1) (g) of the Constitution likewise has no application to the matter inasmuch as the bye-law does not prohibit the carrying on of any profession or trade in contravention of the constitutional injunctions. It is noticeable that by cl. 6 of the aforesaid article, the constitution expressly saves the operation of any existing law in so far as it imposes in the interest of the general public reasonable restrictions on the exercise of the right to practise any profession or carry on any occupation, trade or business.

[3] As regards the competency of the learned Magistrate to try the accused or the expediency of holding a summary trial, it cannot be doubted that the learned Magistrate was competent to take cognizance of the case on challan by the Station Officer of thana Nazirabad in view of bye-law 4 published in the U. P. Gazette referred to above which authorises every police officer on duty not below the rank of Sub-Inspector to send up complaints regarding the contravention of bye-law 1. The case arose within the jurisdiction of aforenamed police station. The Station Officer must be deemed to be on duty and, therefore, empowered to send up the complaint against the accused. The case was a petty one. It did not merit anything better than a summary trial and in my judgment there is no substance in the contention that the accused should have been tried in a regular manner.

[4] There is no miscarriage of justice. I dismiss the revision application.

A/D.H. *Revision dismissed.*

A. I. R. 1953 Allahabad 96 *[Vol. 40, C. N. 39]*

HARISH CHANDRA AND SAPRU JJ.

The U. P. Government — Appellant v. *Firm Brij Mohan Lal—Respondent.*

Ex. First Appeal No. 9 of 1949. D/- 11-9-1952.

Civil P. C. (1908), S. 82 — Time for performance of decree not specified—Decree cannot be executed.

A Court in passing a decree against the State has not only to declare that the State is liable either to pay some money or to do some act but has also to specify the time within which the decree has to be satisfied. Where no such time is specified, the decree though not void cannot be executed. (Decree was directed to be completed accordingly) : A. I. R. 1948 Pat. 179, *Rel. on.* [Para 2]

Anno. Civil P. C., S. 82, N. 1.

J. Swarup and Gopalji Mehrotra — for Appellant; Gopinath and J. C. Mukerji—for Respondent.

REFERENCE : /Para.
('48) A I R 1948 Pat 179 2

Sapru J.—The judgment-debtor in this case is the Uttar Pradesh Government and the appeal has been preferred on its behalf. In 1946 the respondent firm filed a suit NO. 7 of 1946, against the Government of U. P. for damages and the price of certain goods seized by that Government. A decree was passed in favour of the firm for a sum of RS. 35,000 and odd. An appeal is pending in this Court. During the pendency of the appeal the firm applied for the execution of the decree. It also applied for the attachment of a sum of RS. 23,000 deposited by the Government in the Ghazipur Treasury in its name. Objections were raised both to the execution of the decree and the attachment of the money by the Government. These objections were disallowed by the Court below and the Uttar Pradesh Government has come up in appeal to this Court.

[2] The first point which has been urged on behalf of the appellant is that it was incumbent on the Court passing the decree to specify in the decree the time for payment. Reliance is placed on s. 82, Civil P. C. and it is pointed out that no time for payment is specified in the decree. We have looked into the provisions of s. 82, Civil P. C. and are satisfied that the objection is well founded. In the case of *Governor-General of India in Council* v. *Piramal Marwari*, A. I. R. 1948 Pat. 179, the view was taken that though a decree of this nature is not void, yet all the same it is not capable of execution. It was pointed out that a Court in passing a decree against the State has not only to declare that the State is liable either to pay some money or to do some act but has also to specify the time within which the decree has to be satisfied. In case the Court does comply with that provision of law, it has a further act to do, namely, to send a report to the Government in case of non-satisfaction of the decree within the time specified by it. For a period of three months after such report has been made the decree cannot be executed. The Patna High Court in that case directed the Court to proceed to complete the decree in terms of s. 82, Civil P. C. before it could be executed in accordance with the provisions of that section. We agree with the view which found favour with the Patna High Court and direct that the decree be completed, if it has not already been so completed, in terms of s. 82, Civil P. C., by the Court which passed it. Thereafter the judgment-debtor will be entitled to put the decree into execution in accordance with the provisions of that section.

[3] In these circumstances we allow the appeal and direct that the decree be not executed until the provisions of s. 82, Civil P. C., have been complied with. We make no order as to costs in this case.

B/R.G.D. *Appeal allowed.*

A. I. R. 1953 Allahabad 97 *[Vol. 40, C. N. 40]*

(LUCKNOW BENCH)

V. BHARGAVA AND BEG JJ.

Banke Bihari Lal and another—Appellants—Applicants v. *Mahadeo Prasad—Creditor—Respondent.*

Second Appeal No. 4 of 1948, D/- 8-8-1952.

(a) Civil P. C. (1908), O. 22, R. 1—Appeal against a dead person—Substitution.

Where an appeal is filed against a party who has died prior to the filing of the appeal, there can be no substitution of his legal representatives under O. 22, Civil P. C. [Para 2]

Anno. C. P. C. O. 22 (Gen) N 2 Pt 2; O. 22 R 1 N 19.

(b) Limitation Act (1908), S. 5—Burden of proof—(Evidence Act (1872), Ss. 101 to 103).

Where an appeal is filed against a dead person and the appellant applies for substitution of the legal representative after the expiry of limitation with a prayer for condoning the delay on ground of want of knowledge of the death of the respondent prior to the filing of the appeal, the burden to prove the allegation lies on him. [Para 2]

Anno. Lim. Act, S 5 N 37, 47.

(c) Civil P. C. (1908), Ss. 107, 151 and O. 41, R. 30—Power of appellate Court to take notice of proceedings before trial Court—Appellate Court can call for report from trial judge without examining him as witness—(Evidence Act (1872), S. 121.)

Conduct of parties in Court as well as statements which might be made by counsel for the parties to the Court can always be used by the Court, for purposes of arriving at the decision in the case, as being part of proceedings in Court. Since the appellate Court can exercise all the powers of a trial Court by virtue of S. 107 (2), Civil P. C., the same rule will hold good with regard to the appellate Court and it would be competent for the appellate Court to take notice of what had happened as part of the proceedings in the trial Court. [Para 3]

But it should never be necessary for an appellate Court to examine as a witness the Presiding Officer of the trial Court in order to take notice of the proceedings which took place before the officer. It is enough for the appellate Court, in case those proceedings have not already been put down in writing, to ask the trial Court to record them in writing and send that record to the appellate Court. Under O. 41, R. 30, Civil P. C., the appellate Court is given the power, when delivering judgment in appeal not only to take into account the evidence on the record but also to refer to the proceedings which may have taken place in the appellate Court itself or in the trial Court. If, by chance, any proceedings have not been recorded in writing and the appellate Court has reasons to believe that certain proceedings did take place, it is certainly competent for the appellate Court under S. 151 of the Code to ask the trial Court to record those proceedings and send this record of the proceedings to the appellate Court. [Para 3]

Moreover, S. 121, Evidence Act, also empowers an appellate Court to question the trial Court on matters relating to the proceedings before him and the answers of such questions are certainly to be taken into account when deciding the appeal because reference to proceedings is permitted under the provisions of the Code of Civil Procedure. [Para 3]

Anno. C. P. C., S 107 N 9 ; Evi. Act S 121 N 1.

N. Banerji—for Appellants; Ramapat Ram—for Respondent.

V. Bhargava J.—This second appeal arises out of proceedings under s. 4, Encumbered Estates Act. The application under s. 4 of the Act was presented by one Shrimati Sharda who is now dead and who is now represented on the record by her sons, Bankey Behari Lal and Brij Behari Lal. One of the creditors of Shrimati Sharda was one Lal Bahadur. Lal Bahadur died and his widow Shrimati Brij Rani was brought on the record. The proceedings under the Encumbered Estates Act reached the stage when the learned Special Judge had to pass decrees under s. 14, Encumbered Estates Act, in respect of the proved debts in favour of the creditors. After the learned Special Judge had taken all the evidence for the purpose of passing decrees under s. 14 of the Act and had heard arguments, he reserved the judgment. Before the judgment could be delivered, he had the occasion to send for counsel for both the parties and then he was informed that Shrimati Brij Rani, the creditor, had died. He, however, proceeded to pass a decree in her favour in accordance with the pro-

visions of o. 22, r. 6, Civil P. C. This decree was passed on 12-10-1946.

An appeal against this decree was presented by the present appellants in the Court of the learned District Judge of Lucknow on 17-12-1946. When presenting the appeal, the appellants impleaded Shrimati Brij Rani as the respondent and it was on 2-1-1947, that they applied to the Court to substitute the name of the present respondent Mahadeo Prasad in place of the name of Shrimati Brij Rani. On 17-7-1947, the name of Mahadeo Prasad was substituted for the name of Shrimati Brij Rani under the orders of the learned District Judge. It was, however, felt necessary that the appellants should make an application under s. 5, Limitation Act, for condonation of the delay in bringing Mahadeo Prasad on the record in place of Shrimati Brij Rani. This application was presented on 18-7-1947. The learned District Judge rejected this application on 5-9-1947, and passed an order dismissing the appeal as being time-barred. It was against this order passed by the learned District Judge that the present appeal has come up before us.

[2] We entirely agree, in this case, with the learned District Judge that since Shrimati Brij Rani had died on 24-9-1946, prior to the filing of the appeal by the appellants in the Court of the learned District Judge, there could be no substitution of the name of Mahadeo Prasad in place of that of Shrimati Brij Rani under o. 22, Civil P. C. What was required was that the appellant should have impleaded Mahadeo Prasad as the respondent straightway in the appeal. His name was brought on the record on 17-7-1947, on the basis of the application of the appellants dated 2-1-1947. It may, therefore, be assumed that the appellants impleaded Mahadeo Prasad as the respondent on 2-1-1947, but even by that date the period of limitation for filing the appeal against Mahadeo Prasad had already expired. Consequently, it was necessary for the appellants to present an application under s. 5, Limitation Act, for condonation of the delay. The appellants sought this condonation on the ground that they came to know of the death of Shrimati Brij Rani on 31-12 1946, and consequently, they applied on 2-1-1947, the very next working day of the Court, that Mahadeo Prasad's name be substituted for the name of Shrimati Brij Rani. Mahadeo Prasad respondent, in this case, contended that the appellants had knowledge of the death of Shrimati Brij Rani at a much earlier stage. In fact, his contention was that the appellants knew of Shrimati Brij Rani's death even before the judgment was pronounced by the trial Court on 12-10-1946.

The contention raised by Mahadeo Prasad was that, before the trial Court delivered the judgment on 12-10-1946, the learned Munsif, who was working as the Special Judge, had occasion to send for counsel for both the parties and then Shri Jagannath Prasad, counsel for the appellants, had informed the learned Special Judge that Shrimati Brij Rani had died. This was a contention which it was necessary for the appellants to meet before their application under s. 5, Limitation Act, could be allowed. The burden lay on the appellants to prove their want of knowledge of the death of Shrimati Brij Rani before the appeal was filed and once an objection had been raised that their counsel knew of the death earlier, it was for them to give evidence to show that that objection had no force. We find that no evidence at all was given on behalf of the appellants on this point. All that happened was that the learned District Judge, who was hearing the appeal, himself sent for Shri Jagannath Prasad and questioned him on the point. Shri Jagannath Prasad stated that he had not given any information to the learned Special Judge that Shrimati Brij Rani had died. Thereupon the learned District Judge sent for a report from the learned Special Judge who, in his report, stated that the counsel for both the parties had appeared before him in his Chambers in connection with some enquiry on a point on which he wanted clarification before delivery of judgment. It was then that the learned counsel appearing for Shrimati Brij Rani had informed him of her death. Thereupon the learned Special Judge questioned Shri Jagannath Prasad who also corroborated the fact that Shrimati Brij Rani had died. This would show that Shri Jagannath Prasad, who acting for the appellants as their counsel knew that Shrimati Brij Rani had died before 12-10-1946. There is no suggestion at all that Shri Jagannath Prasad was working in his personal capacity or that the information of Shrimati Brij Rani's death was received by him in his personal capacity. Shri Jagannath Prasad's information about her death was in his capacity as counsel for the appellants and consequently, his knowledge of the death of Shrimati Brij Rani must be held to be the knowledge of his clients for whom he was acting, viz., the appellants.

[3] Learned counsel for the appellants has strenuously argued that, in this case, the learned District Judge was not justified in taking into account the report which he had obtained from the learned Special Judge about the conversation which he had with the counsel for the parties, in which the death of Shrimati Brij Rani was mentioned by the counsel for the appellant. Learned counsel's argument is that the report was not admissible in evidence at all and that the only proper way, by which the learned District Judge could have used the statement of the learned Special Judge, was by calling the learned Special Judge in Court and examining him as a witness. We are unable to agree with this argument of the learned counsel. This was not a case where the Special Judge had any personal knowledge apart from his capacity as Special Judge dealing with these very proceedings. The facts, which had to

be ascertained from him, were facts which came to his knowledge when dealing with these Encumbered Estates Act proceedings and while acting as a Court. The learned Special Judge could have used that knowledge himself at the time of delivery of judgment if it had been relevant to the points for decision before him and no exception could have been taken to the use of that knowledge. Conduct of parties in Court as well as statements which might be made by counsel for the parties to the Court can always be used by the Court, for purposes of arriving at the decision in the case, as being part of proceedings in Court. Since what happened before the learned Special Judge could have been used by him for a decision of the case as being part of the proceedings before him, it could also be used by the appellate Court because the appellate Court exercised all the powers which the trial Court had. Under sub-s. (2) of S. 107, Civil P. C., the appellate Court could exercise all the powers and perform all the duties which the trial Court could do.

The only question is as to whether, before taking notice of what had happened as part of the proceedings in the trial Court, it was necessary for the learned District Judge to examine the Presiding Officer of the trial Court or whether he could obtain that information from the trial Court by asking for a report. In our opinion, it should never be necessary for an appellate Court to examine as a witness the Presiding Officer of the trial Court in order to take notice of the proceedings which took place before that officer. It is enough for the appellate Court, in case those proceedings have not already been put down in writing, to ask the trial Court to record them in writing and send that record to the appellate Court. Under O. 41, R. 30, Civil P. C., the appellate Court is given the power, when delivering judgment in appeal not only to take into account the evidence on the record but also to refer to the proceedings which may have taken place in the appellate Court itself or in the trial Court. If, by chance, any proceedings have not been recorded in writing and the appellate Court has reasons to believe that certain proceedings did take place, it is certainly competent for the appellate Court under S. 151 of the Code to ask the trial Court to record those proceedings and send this record of the proceedings to the appellate Court.

In this connection, our attention has also been drawn to the provisions of S. 121, Evidence Act which permits a superior Court to question the inferior Court with regard to the conduct of the Presiding Officer of that Court and with regard to the knowledge which might have been derived by such Presiding Officer in that capacity. Section 121, Evidence Act, also thus empowers an appellate Court to question the trial Court on matters relating to the proceedings before him and the answers of such questions are certainly to be taken into account when deciding the appeal because reference to proceedings is permitted under the provisions of the Civil P. C. We are, therefore, of the opinion that the learned District Judge did not commit any irregularity in taking into account the report of the learned Special Judge relating to the proceedings that had taken place before him. Learned Counsel cited several cases before us and also read out to us an extract from Halsbury's Laws of England relating to the question whether the knowledge of the Presiding Officer of a Court can be used in deciding a case. None of those cases need be discussed in detail because all of them refer to cases where the information of the Presiding Officer sought to be utilised for delivery of judgment had been acquired by the Presiding Officer in his personal capacity and not in his capacity as the Judge presiding over the Court. In the present case, what is sought to be used by the appellate Court is not the knowledge of the Special Judge obtained in his personal capacity but a record of the proceedings which took place before the learned Special Judge in connection with this very case under the Encumbered Estates Act. Consequently, the view that has been taken by the learned District Judge that the appellants failed to show that they had no knowledge of the death of Shrimati Brij Rani up to 31-12-1946, is correct, and, on this view, the application for condonation of delay under S. 5, Limitation Act, had to be dismissed.

[4] There is, therefore, no force in this appeal which is dismissed with costs.

B/K.S. *Appeal dismissed.*

A. I. R. 1953 Allahabad 99 *[Vol. 40, C. N. 41]*

(LUCKNOW BENCH)

V. BHARGAVA AND BEG JJ.

Nem Chand — Applicant v. *The State.*

Criminal Misc. Regr. No. 119 of 1952, D/- 7-8-1952.

(a) U. P. High Courts (Amalgamation) Order (1948), Cl. 14, First proviso — "In respect of cases arising in such areas in Oudh."

The word 'cases' refers to the cases which come up for decision before the High Court and not to the cases pending in lower Courts which may have given rise to the cases coming up before the High Court. Where the case the High Court is dealing with is a Criminal Miscellaneous case for transfer of another case that is pending in the Court of the Special Magistrate at Lucknow, the case for transfer is a case which has arisen in Lucknow and consequently under the proviso to Cl. 14 the Bench sitting at Lucknow can exercise the jurisdiction and power for the time being vested in the Allahabad High Court in respect of it: A. I. R. 1950 All. 485, *Rel. on.* [Para 3]

(b) U. P. High Courts (Amalgamation) Order (1948), Cl. 14 — Lucknow Bench — Powers of.

When a transfer application is presented, the High Court has the power to transfer a case from any Court subordinate to it to any other Court subordinate to it. That power can now be exercised by Lucknow Bench, and consequently in ordering transfer Lucknow Bench can direct that the case be tried by any Court subordinate to the Allahabad High Court whether that Court is situate in Oudh or anywhere else in Uttar Pradesh. [Para 5]

(c) Criminal P. C. (1898), S. 526 — Fair and impartial inquiry or trial not being possible.

Where the Magistrate is going to be called upon to decide a case in which the evidence and the considerations of fact and law are going to be similar to or identical with the evidence and the considerations of fact in a case already decided by him, the applicant can have a reasonable apprehension that the evidence and the questions of fact may not possibly be considered afresh by the Magistrate uninfluenced by his previous decision and consequently it is desirable that the case should be transferred from his Court. [Para 7]

Anno. Criminal P. C., S. 526. N. 5.

(d) Criminal P. C. (1898), S. 526 — Affidavit verification.

An affidavit is completely useless when all the facts averred in it have been verified by the deponent as being true to his belief. The High Court cannot take into consideration what the deponent may believe. The affidavit should have been verified either on personal knowledge or on information derived from inspection of records. In case the deponent could not do it, it should have been sworn by a person who could do so. [Para 7]

Anno. Criminal P. C., S. 526, N. 2.

H. K. Ghose — for Applicant ; Addl. Government Advocate — for State.

REFERENCE. / Para.

('50) 1950 All L J 403 : (A I R 1950 All 435 : 51 Cri L J 1302) 4

V. Bhargava J.— This is an application for transfer of a case pending in the Court of Sri Girja Shanker Misra, Special Magistrate, first Class, Lucknow. Under a notification issued by the U. P. Government powers of a Magistrate of the first class were conferred upon Sri Girja Shanker Misra to try or commit cases investigated by the Government of India Special Police Establishment throughout Uttar Pradesh for so long as he held the office of the Special Magistrate.

[2] The case against Nem Chand applicant was investigated by the Government of India Special Police Establishment and consequently it came up for trial before the learned Special Magistrate. The transfer is sought mainly on two grounds. One ground is that it is highly inconvenient and expensive to the applicant to be tried in Lucknow when he resides in the District of Saharanpur and all his defence witnesses also come from Saharanpur. It is said that the balance of convenience would be in favour of having the case tried at Saharanpur, because there are only six prosecution witnesses, four of whom come from Saharanpur and the neighbouring district of Dehra Dun; whereas all the sixteen defence witnesses come from the district of Saharanpur. The second ground taken is that the same learned Magistrate has already decided another case against the applicant and the evidence in this case as well as in that case is similar, if not exactly identical, and the same considerations of fact and law are involved so that the accused apprehends that the learned Magistrate may not be able to give an unbiased consideration to the matters coming up before him in this case.

[3] When this application came up for arguments, we had to consider a preliminary question of law on account of which this application was referred to a Bench for decision. Some doubt arose as to the question whether this application for transfer could be heard by Judges sitting at Lucknow. The main facts which have to be considered in this connection are that the case which is pending before the learned Special Magistrate relates to all acts which were committed in Saharanpur district, so that the offence which is the subject-matter of the charge to be tried by the Special Magistrate was committed in the district of Saharanpur. Under the first proviso to cl. 14 of the U. P. High Courts (Amalgamation) Order 1948, the Judges of the High Court at Allahabad are to sit at Lucknow in order to exercise, in respect of cases arising in such areas in Oudh as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court. It was contended that the case which was pending before the Special Magistrate did not arise from any area in Oudh and consequently the Judges sitting at Lucknow could not exercise the jurisdiction of transferring the case from his Court.

This argument, in our opinion, proceeds on a misunderstanding of the words "in respect of cases arising in such areas in Oudh" used in the proviso to cl. 14, U. P. High Courts (Amalgamation) Order, 1948. The word 'cases' there refers to the cases which come up for decision before the High Court and not to the cases pending in lower Courts which may have given rise to the cases coming up before this Court. At present, the case we are dealing with is a Criminal Miscellaneous Case for transfer of another case that is pending in the Court of the Special Magistrate at Lucknow. This Miscellaneous case of transfer, there can be no doubt, arises out of proceedings which are going on at Lucknow in the Court of the Special Magistrate. The case for transfer is, therefore, a case which has arisen in Lucknow and consequently it is quite clear that, under the proviso, referred to above, this Bench sitting at Lucknow can exercise the jurisdiction and power for the time being vested in the Allahabad High Court in respect of it.

[4] We may make it clear that we refrain from going into the question as to whether the Benches of this Court sitting at Lucknow would or would not have jurisdiction to decide the case which is pending before the learned Special Judge itself, because that is a question which is not before us and we do not express any opinion on that question. All we are called upon to decide is whether this application for transfer can be decided by the Bench at Lucknow. The transfer application is a case by itself and that transfer application has certainly arisen out of proceedings going on at Lucknow, so that it is a case arising in such area in Avadh as is within the jurisdiction of the Lucknow Bench according to the directions of the Chief Justice under the provisions of that proviso. There can, therefore, be no doubt at all that the Bench at Lucknow has powers to pass orders on this application for transfer. We may mention

that the view which we are taking today was also taken by a learned Single Judge sitting at Allahabad in *State* v. *Hola Ram*, 1950 ALL. L. J. 403.

[5] Once it is held that, under the proviso to cl. 14, U. P. High Courts (Amalgamation) Order 1948, this Bench has jurisdiction to deal with the case, it can exercise all the powers which are, for the time being, vested in the Allahabad High Court in respect of this case. Under s. 526, Criminal P. C., when a transfer application is presented, the High Court has the power to transfer a case from any Court subordinate to it to any other Court subordinate to it. That power can now be exercised by this Bench, and consequently in ordering transfer this Bench can direct that the case be tried by any Court subordinate to the Allahabad High Court whether that Court is situate in Oudh or anywhere else in Uttar Pradesh.

[6] On merits we need only consider one of the grounds that has been urged for the transfer of this case, and that is the second ground which has been mentioned by us above.

[7] The applicant filed an affidavit alleging that the evidence in the case which he seeks to be transferred and which is pending before the learned Special Magistrate is similar to, if not identical with, the evidence in another case which has already been decided by the Magistrate and that the same considerations of fact and law are involved in the two cases. This allegation has not been controverted on behalf of the State. An affidavit was filed on behalf of the State, but on this particular point that affidavit is silent. Besides this that affidavit is completely useless as all the facts averred in it have been verified by the deponent as being true to his belief. This Court cannot take into consideration what the deponent may believe. The affidavit should have been verified either on personal knowledge or on information derived from inspection of records. In case this deponent could not do it, it should have been sworn by a person who could do so. We have, therefore, to proceed on the assumption that the allegations made by the applicant are correct, so that the Magistrate is going to be called upon to decide a case in which the evidence and the considerations of fact and law are going to be similar to or identical with the evidence and the considerations of fact in a case already decided by him. In such circumstances, the applicant can have a reasonable apprehension that the evidence and the questions of fact may not possibly be considered afresh by the learned Magistrate uninfluenced by his previous decision and consequently it is desirable that the case should be transferred from his Court. Once it is transferred from his Court, it will be convenient for all the parties that it should be tried by a competent Magistrate at Saharanpur.

[8] We, therefore, allow this application for transfer, withdraw the case from the Court of the learned Special Magistrate, Lucknow, and direct that it be sent to the District Magistrate of Saharanpur, who will either try it himself or send it for trial to some other Magistrate subordinate to him who may be competent to try it.

B/D.H. *Application allowed.*

A. I. R. 1953 Allahabad 101 *[Vol. 40, C. N. 42]*

(LUCKNOW BENCH)

BEG J.

Sital Prasad—Applicant v. *The State.*

Criminal Revn. No. 267 of 1951, D/- 25-7-1952.

(a) U. P. Foodgrains Control Order (1949), S. 3 (1) — Interpretation — Provision ambiguous — Benefit should be given to accused—Mens rea — (Interpretation of Statutes — Ambiguity) — (Penal Code (1860), S. 40)

The provisions of law as stated in S. 3 (1) are ambiguously worded and in interpreting the same benefit should be given to the accused. [Para 6]

The words "store for sale" in S. 3 (1) imply that the person contravening the provision shall have the power to sell the stored commodity. But where the position of the godown keeper was merely that of a bailee, the goods having been left at his godown not "for sale" but for safe custody, on payment of hire money for the use of space, he could not be convicted for stocking the articles in his godown than the owner of the land in the open bazar can be convicted for allowing the prohibited goods be kept on his land for the purpose of sale by their owners : A. I. R. 1947 P. C. 135 and A. I. R. 1944 Pat. 308, *Rel. on.* [Paras 5 and 6]

Further, mens rea is ordinarily the basis of all criminal offences unless its application is specifically excluded by the words of the statute. In the case of a godown-keeper mens rea is lacking. [Para 5]

(b) Evidence Act (1872), S. 18 — Admission by accused — All ingredients not made out — Prosecution case rejected — Conviction merely on admission cannot stand.

Where the accused merely made a general statement that he used to keep the bags of foodgrains left with him by the business men and nowhere he had stated that those particular bags were kept for sale and the Court had rejected the prosecution case that the accused was a grain dealer:

Held that the statement itself did not make out all the necessary ingredients of the offence to prove that the bags were stored 'for sale' under S. 3 (1) of U. P. Food Grains Control Order (1949) and the conviction could not stand. [Para 7]

Anno. Evi. Act, S. 18 N. 5a.

(c) Criminal P. C. (1898), S. 439—New plea—(U. P. Foodgrains Control Order (1949), S. 3 (1)).

A plea that the words 'for sale' in S. 3 (1), U. P. Food Grains Control Order (1949) did not necessarily indicate the object in the mind of the godown-keeper but it was enough if the object of the depositors was to sell the commodity and that the godown-keeper would be vicari ously liable for storing those goods and further that the case came under exceptional cases where mens rea has been ruled out of the statute, held was a new case which would materially prejudice the accused and, therefore, was not justified. [Para 8]

Anno. Cr. P. C., S. 439 N. 44.

Kalbe Abbas, M. P. Srivastava and Kalbe Mustafa — for Applicant; Addl. Govt. Advocate—for the State.

REFERENCES : Courtwar/Chronological/ Paras.

('47) A. I. R. 1947 P. C. 135 : (26 Pat. 460). 5

('49) A. I. R. 1949 Nag. 401 : (51 Cri. L. J. 81). 5

('44) A. I. R. 1944 Pat. 308 : (46 Cri. L. J. 264). 5

Order.—The petitioner Sital Prasad was prosecuted under s. 7, Essential Supplies (Temporary Powers) Act, 1946, read with s. 3, U. P. Food

Grains Control Order of 1949. He was convicted by the trial Court and sentenced to three months' rigorous imprisonment and a fine of Rs. 500, or in default to undergo two months further rigorous imprisonment. He filed an appeal against his conviction before the learned Sessions Judge of Rae Bareli who upheld the order of conviction but reduced the sentence by quashing the sentence of imprisonment maintaining only the sentence of fine of Rs. 500 or in default two months' rigorous imprisonment; the trial Court had also passed an order that the food grains seized should be forfeited and its price credited to the Government. This order of forfeiture was also maintained by the learned appellate Court.

[2] The case of the prosecution against the petitioner as disclosed by the first information report as well as by the evidence produced in the case would appear to be that the petitioner is a dealer in food grains in the town of Jais, which is declared to be a purchasing centre under the U. P. Food Grains Control Order, 1949. On 8th November 1950, at about 11. A. M. Sri Saxena, D. R. F. C. (Deputy Regional Food Controller), Sri Chandrapal Singh, Sub-Inspector of Rae Bareli and Sri Sheo Shanker Singh Deputy R. M. O., Lucknow, inspected the godown of the applicant in Jais and recovered 32 mds. 30 srs. 4 chhtks. of wheat, 29 mds. 39 srs. 8 chhtks. of paddy, 6 mds. 39 srs. of rice and 3 mds. 35 srs. of barley from it. As the petitioner was not found in possession of any licence authorising him to store goods for sale, he was prosecuted for the contravention of s. 3, sub-cl. (1), U. P. Food Grains Control Order, 1949, and convicted as mentioned above.

[3] The defence of the applicant was that he was not a dealer in foodgrains at all and the prosecution case that he was a dealer in food grains was false. He, however, clearly admitted the recovery of food grains from his godown and alleged that as a godown-keeper he merely kept the food grains for safe custody on a charge of 1 anna per bag for the use of his godown. These bags used to be left at his godown by business people and he had nothing whatsoever to do with the sale of the commodity contained in them. In fact, he had no power to sell them.

[4] The learned trial Court appears to have accepted the prosecution case that the accused was a grain dealer and convicted him. In appeal the learned Sessions Judge after a minute and thorough examination of the prosecution as well as the defence evidence came to the conclusion that the prosecution case that the petitioner was a grain dealer was not true. On the other hand he accepted the defence case that he was not a grain dealer to be correct. The finding arrived at by him is in these words :

"So the contention of the accused that he is not a grain dealer has not been disproved by the prosecution and I take it to be a fact that the appellant is not a grain dealer at all in the town of Jais."

He, however, maintained the conviction of the accused as he was of opinion that mere storage of the foodgrain irrespective of the fact whether the godown keeper had power to sell or not would be an offence if the intention of the persons who had deposited them there was to sell the same. The learned counsel for the applicant has urged two arguments in support of the petition in this Court. Firstly he has argued that the interpretation placed on s. 3 (1), U. P. Food Grains Control Order by the lower appellate Court was not correct. Secondly, he has argued that, in any case, the prosecution case as set out in evidence having been disbelieved, the accused could not be convicted on a new case which he was not called upon to meet. The procedure adopted has materially prejudiced the accused and should result in the reversal of the order of conviction of the petitioner.

[5] So far as the first point is concerned, lengthy and detailed arguments have been advanced before me by the learned counsel for the petitioner as well as on behalf of the State. Section 3, sub-cl. (1), U. P. Food Grains Control Order, runs as follows :

"With effect from the date on which this Order comes into force, no person shall sell or store for sale controlled foodgrains except in the Recognised Market, a Purchasing Centre, or a Regulated Town."

According to the contention of the learned counsel for the petitioner the words "store for sale" in the above provision imply that the person contravening the aforesaid provision shall have the power to sell the stored commodity. In this particular case his position was merely that of a bailee. The foodgrains were left at his godown "not for sale" but for safe custody. It would be different if he was a commission agent for sale or was authorised by the owner of the goods to sell the articles in question. These bags were merely deposited at his shop and he was to return them on payment of the hire money. The hire money only represented a kind of fee-rent charged by him for the use of space in his godown. He can no more be convicted for stocking these articles in the room of his godown than the owner of the land in the open bazar can be convicted for allowing the prohibited foodgrains to be kept on his land by the seller for the purpose of sale. The word "for" means "with the object of." In this connection, my attention has also been drawn to condition 3 of Form B of the Licence which is as follows :

"The licensee shall sell to the controller, at a price which may be or has been fixed by the United Provinces Government and published in the official Gazette, such controlled foodgrains stored by him as may be ordered by the Controller."

It is argued that the above condition indicates that the licensee contemplated by the licence is a person who should have power to sell to enable him to comply with condition 3 of Form B of the licence. It has to be conceded that the godown keeper had no power to sell, hence it is argued

that he is not a person contemplated by S. 3 (1), U. P. Food Grains Control Order, 1949. In support of this contention, it is also urged that in the case of a godown-keeper the necessary ingredient of mens rea is lacking. Mens rea is ordinarily the basis of all criminal offences unless its application is specifically excluded by the words of the Statute. Reliance in this connection is placed on a ruling of their Lordships of the Privy Council reported in *Srinivas Mall* v. *Emperor*, A. I. R. 1947 P. C. 135. The said case related to an offence under R. 81 (2), Defence of India Rules. In that connection their Lordships of the Privy Council laid down that it is of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules not (out ?) mens rea as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Offences against R. 81 (2), Defence of India Rules, are not within the limited and exceptional class of offences which can be held to be committed without a guilty mind. Offences which are within that class are usually of a comparatively minor character and a person who was morally innocent of blame cannot be held vicariously liable for a servant's crime involving contravention of penal provisions. Learned counsel for the applicant also invited my attention to cases reported in *Mahadeo Sheolal* v. *Emperor*, A. I. R. 1949 Nag. 401 and *Raghubar Lal* v. *Emperor*, A. I. R. 1944 Pat. 303. In the Patna case, the relevant clause alleged to have been contravened ran as follows :

"No person shall engage in any undertaking which involves the purchase, sale or storage for sale in wholesale quantities of any foodgrain except under and in accordance with a licence issued in that behalf by the Provincial Government."

The wording of this clause is obviously wider than the wording of S. 3 (1), U. P. Food Grains Control Order. Inspite of it, it was held in that case that mere possession not for purposes of sale would not be touched by the said provision of law and possession without licence in such a case would not be an offence.

On the other hand it is urged on behalf of the State that the words "for sale" do not necessarily indicate the object in the mind of the person with whom the goods were stored. It is quite enough if the object of the person who deposited the goods was to sell the commodity stored, and the godown keeper would in such a case be vicariously liable for storing such goods even though he himself had no intention or even power to sell. This is one of those exceptional cases where mens rea has been ruled out by the statutes.

[6] Having considered the arguments on either side I am of opinion that much can be said on both aspects of the case. This particular provision of law is ambiguously worded, and in view of the patent ambiguity in this provision of law, this ambiguity must be resolved in favour of the accused. This interpretation would be in consonance with the well-known canon of construction that in order to make a person liable for punishment under a penal statute such a statute must be clear, explicit and unambiguous. If it admits of more than one interpretation, the interpretation beneficial to the accused should be preferred and the benefit of doubt must go to the accused. The rule in question has been expounded in Crawford's Statutory Construction (1940 Edn.), S. 240 thus :

"Criminal and penal statutes must be strictly construed; that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Only these persons, offences and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit and the letter of the statute, and where there is any reasonable doubt, it must be resolved in favour of the person accused of violating the statute ; that is, all questions in doubt will be resolved in favour of those from whom the penalty is sought."

The danger of non-observance of this rule is that it might lead to the creation of offences by interpretation which may operate to entrap the unwary and the ignorant and threaten the rights of the people generally. It has grown out of tenderness of the law for the rights of the individual. Conclusions hostile to the accused should not, therefore, be drawn from merely ambiguous phraseology of penal enactments couched in dark and cloudy words. As observed by Maxwell at page 269 of the well-known book on Interpretation of Statutes (9th Edition) :

"Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language."

Under the circumstances I have no hesitation in accepting the interpretation placed on this provision of law by the learned counsel for the petitioner.

[7] The case can also be decided in favour of the petitioner on the alternative argument advanced by his learned counsel. It would appear that the entire case of the prosecution was that the petitioner himself was a dealer in foodgrains and that he had stored them as a grain dealer with the intention of selling the prohibited commodity. Therefore, according to the prosecution case, the intention and the power to sell was to be inferred from the fact that he was a grain dealer and owned the commodity to be sold. The accused categorically denied this case. As observed above the lower Court definitely rejected the prosecution case and accepted the defence case that the accused was not a dealer in grains. The lower Court, however, convicted him on his own admission. The entire evidence of the prosecution having broken down the accused cannot be convicted on his own admission unless the ingredients of offence are clearly and explicitly admitted by

him in his own statement. Having gone through the statement of the accused I find that there is no such clear or explicit admission either of the guilt or of the ingredients of the offence. He has merely made a general statement that he used to keep the bags of foodgrains left with him by business men. He has strenuously contended that he is not guilty and he has nowhere stated that these particular bags were kept "for sale." Thus with the rejection of the prosecution case that the petitioner was a grain dealer the foundation of the prosecution case seems to disappear and there is no evidence left to prove that the bags were stored there "for sale."

[8] Moreover in this particular case it would appear that the conviction of the accused on the new case would materially prejudice him in his defence. If the petitioner had been faced with this case, he might have taken other defences to shield himself. He might have tried to prove that the various individuals who left the goods with him did not intend to sell it at all or that they had actually it or even if they intended to sell it they possessed a licence and the amount stored by them with him did not exceed the target limit or that the bags in question were stored by growers of grains who were exempted persons. We are not concerned with the merits of those defences. They might be good, bad or indifferent but they were open to him and could have been taken by him. I am clear in my mind that the shifting of ground by the prosecution at the stage of appeal was neither proper nor justified. As mentioned by me above, the statement of the accused by itself is not sufficient in this case to make out all the necessary ingredients of offence. I am, therefore, of opinion that the revision must succeed on the alternative contention advanced by the learned counsel as well.

[9] For the reasons given above I allow this revision, set aside the conviction of the petitioner and order that the fine, if paid by him shall be refunded. The order of forfeiture is also quashed.

B/H.G.P. *Revision allowed.*

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(LUCKNOW BENCH)

MALIK C. J. AND V. BHARGAVA J.

Pashupati Pratap Singh—Appellant v. *Chairman District Board, Gonda and others — Respondents.*

Appeal No. 5 of 1949, D/- 4-8-1952.

Limitation Act (1908), Ss. 23 and 29 (2) — Special or local law — Period prescribed by S. 192 (3), U. P. District Boards Act — Section 23 has no application in view of S. 29 (2) — Suit for injunction restraining breach of plaintiff's exclusive right of ferry — Each breach giving rise to fresh cause of action — Suit filed within six months of last breach is not barred — (U. P. District Boards Act (10 of 1922), S. 192 (3)).

The plaintiff who had an exclusive right of ferry on a certain ghat, brought a suit for injunction in 1942 restraining the defendant, a District Board, from interfering with his right on the allegation that the defendant had begun in the year 1938 to operate a ferry on that ghat by granting licenses to other thekadars which constituted an infringement of his right. The question was whether the suit was barred by limitation prescribed by S. 192 (3), U. P. District Boards Act read with Ss. 23 and 29 (2), Limitation Act:

Held (i) that the period of six months prescribed by S. 192 (3), U. P. District Boards Act, being a special period of limitation within the meaning of S. 29, Limitation Act, S. 23 of that Act had no application by reason of S. 29 (2) (b), Limitation Act; [Para 3]

(ii) even though S. 23, Limitation Act, was not applicable to such a suit based on a continuous cause of action, on general principles the plaintiff was entitled to file a suit on the last cause of action within the period of limitation unless his suit was barred by S. 11 or O. 2, Civil P. C. or there was any other provision of the law putting an end to his right. Every time a boat not licenced by him plied for hire on the Ghat the plaintiff's right was invaded and each breach gave rise to a fresh cause of action for filing the suit. It was not a case where the cause of action had accrued once and for all. There was nothing in the District Boards Act which would debar the plaintiff filing a suit on a subsequent cause of action within limitation if he had not filed a suit on an earlier cause of action which had become barred. The suit was not, therefore, barred by limitation. [Paras 4, 5]

(Various kinds of causes of action giving rise to a right to file a suit discussed in para 4.)

Anno. Lim. Act, S 23, N. 14, 20; S. 29, N. 5, 6.

S. C. Das and J. S. Trivedi—for Appellant; Hyder Husain — for Respondent 1.

Malik C. J.—This is a plaintiffs' appeal which had been dismissed by a learned single Judge on the plea of limitation. The river Rapti separates Gonda and Basti districts and on the banks of the river there are numerous *ghats* from which ferries operate. On the Basti side of the river there is a ghat known as Betnar Ghat, the exclusive ferry rights to which were admittedly granted to plaintiff 1, the Raja of Bansi by the Government. Just opposite Betnar Ghat on the Gonda side there is Materia ghat which was declared by the Government as a public ferry several years ago. On the same side there is Jigna Ghat. From Betnar Ghat on the opposite side of the river a ferry was operated by Abdul Khalik as a Thekedar of Raja Bahadur Pashupati Pratap Singh of Bansi. In the year 1938 the District Board began to operate a ferry from Jigna Ghat to Betnar Ghat. The plaintiffs claimed that this was an infringement of their right and a notice under s. 192, District Boards Act (Act 10 of 1922), was given and the suit out of which this appeal has arisen was filed on 27-10-1942. Originally the plaintiffs had claimed both damages and injunction, but the claim for damages was given up and their claim for injunction alone has survived. The plaintiffs' right was denied on behalf of the District Board but after the decision of the lower appellate Court learned counsel has admitted that the finding of that Court that plaintiff 1 had an exclusive ferry right granted to him at Betnar Ghat by the British Government was a finding of fact. He has further admitted that the action of defendant 1 in allowing other contractors to ply boats is an interference with the plaintiff's rights. Learned counsel also admits that this

is a continuing breach. He has, however, relied on s. 29 (2), Limitation Act (Act 9 of 1908 and after its amendment by the Indian Limitation Act 10 of 1922) and has urged that s. 23, Limitation Act, is not applicable to a suit of this nature for which a period of six months' limitation has been fixed under s. 192 (3), District Boards Act.

[2] Section 29 (2), Limitation Act (Act 9 of 1908, after its amendment by the Indian Limitation Act 10 of 1922) reads as follows :

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law:

(a) the provisions contained in Ss. 4, 9 to 18 and 22, shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply."

After its amendment, therefore, the section makes it clear that sections other than ss. 4, 9 to 18 and 22, Limitation Act, do not apply where there is a special period of limitation fixed by a special or local law for any suit, appeal or application.

[3] The U. P. District Boards Act (Act 10 of 1922), s. 192 (3), provides that:

"No action such as is described in sub-s. (1) shall, unless it is an action for the recovery of immoveable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action."

The suits described in sub-s. (1) are suits against a board, a member, officer or servant or a board, in respect of an act done or purporting to have been done in its or his official capacity. Section 23, Limitation Act, therefore, does not apply to a suit against the board. That section provides that:

"In the case of continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be continues."

It has been urged by learned counsel for the respondents that though the wrong might be a continuing wrong yet as s. 23 is no longer applicable to a suit for which a period of six months' limitation has been fixed under the U. P. District Boards Act, the suit must be filed within six months of the first breach. There can be no doubt that where there is a single cause of action, which gives rise to a right to file a suit, the suit has to be filed within the period of six months as provided for by the District Boards Act. The question is whether where there are successive causes of action every time the cause of action arises or a wrongful act is done there is anything to debar a plaintiff from giving up his right based on the first cause of action and bringing a suit on the last cause of action within six months.

[4] Plaintiff 1 had an exclusive right of ferry at Betnar Ghat, that is, he was entitled to issue licences to all boats plying for hire between Betnar Ghat and other *ghats* and he had also the right to charge toll for boats touching and discharging passengers at that *ghat*. Every time a boat not licensed by him plied for hire between Betnar Ghat and other *ghats* the plaintiff's rights were invaded and it gave rise to a cause of action in his favour. If the plaintiff had not filed a suit on the first, second or the third breach so long as his rights were not terminated or his remedy was not barred, he would have a right to file a suit within six months from the date of the cause of action on which the suit was based. So even though s. 23, Limitation Act, may not be applicable each breach gave rise to a fresh cause of action and the plaintiff would each time have a right to file a suit. This is not a case where the cause of action had accrued once and for all. We can find nothing in the District Boards Act which would debar the plaintiff filing a suit on a subsequent cause of action within limitation if he had not filed a suit on an earlier cause of action which had become barred. If the action of the defendants had resulted in the dispossession of the plaintiff, then after the lapse of 12 years the plaintiff's right to file a suit would have come to an end by lapse of time. In our view, though s. 23, Limitation Act, does no longer apply to a suit based on a continuous cause of action, on general principles the plaintiff is entitled to file a suit on the last cause of action within the period of limitation unless his suit is barred by s. 11, or o. 2, Civil P. C., or there is any other provision of the law putting an end to his right.

Cause of action giving rise to a right to file a suit may broadly be divided into the following kinds:

(1) A wrongful act of fleeting nature which comes into existence once and for all and gives rise to a right to bring a suit. For example, if a man is assaulted the assault furnishes the cause of action on which a suit might be filed for damages.

(2) There may be successive such causes of action each complete in itself giving rise to a right of suit. Such causes of action are not continuous in the sense that the wrongful act is not continued all the time and there are breaks, however short during which period the rights of the owner are fully revived. In such cases the fact that s. 23, Limitation Act, has not been made applicable to the period of limitation fixed in a local Act would make no difference as, each time there is a fresh breach of the right, a fresh right to file a suit has accrued. The case before us falls in this category as the right of the Raja of Bansi to grant ferry rights to Abdul Khaliq have not been totally denied and he still works as *thekedar* on behalf of the Raja but each time passengers or cargoes are landed at the Ghat by

other *thekadars* the rights of the Raja are invaded giving rise to a fresh cause of action.

(3) A third kind might be where there is a total deprivation of a set of rights so that the wrongful act is complete but the effect thereof continues. In such a case, the cause of action is one which came into existence in the beginning but the effect of the wrong is continuous. For example where a man has been dispossessed from his property. Here the limitation begins to run from the date of the dispossession even though the person dispossessed is deprived of his rights during the whole period of his dispossession.

(4) Lastly, cases of continuous wrongs which mostly are in the nature of continuous nuisances. For example, where there is no total deprivation of the right but there is partial invasion which is neither intermittent nor fleeting but is continuous. In such a case there are no distinct and separate causes of action. We are inclined to the view that this is a type of case to which if s. 23, Limitation Act, is not made applicable the suit must be filed within the period of limitation fixed in the special or local Act. But we need not express any definite opinion as the point has not arisen in this case.

[5] As this case, in our view, falls in the second class of cases mentioned above where the Raja's rights are not totally denied but his rights are intermittently affected each time a boat is plied which has not been given the licence by the Raja, the plaintiff could have filed the suit within six months of the last invasion of his rights and the plaintiff's suit was not barred by limitation.

[6] We allow the appeal, set aside the decree of the learned single Judge and restore the decree of the lower Appellate Court with costs in all the courts.

B/K.S. *Appeal allowed.*

A.I.R. 1953 Allahabad 106 *[Vol. 40, C. N. 44]*

MUSHTAQ AHMAD J.

Sridhar Upadhya—Decree-holder—Appellant v. *Lakshmi Prasad—Judgment-debtor—Respondent.*

Exn. Second Appeal No. 877 of 1948, D/- 9-5-1952.

(a) Limitation Act (1908), S. 14 (2) — Good faith — Step taken in wrong Court with due care and attention.

If any one with due care and attention takes a certain step in a wrong Court honestly believing that he is seeking relief in the right Court but subsequently finds himself to have gone to a wrong Court, it can hardly be said that he was guilty of want of good faith. A firm conviction in the correctness of a certain procedure may reduce the degree of care and attention, but it can in no sense suggest a negation or absence of the same. [Para 6]

Anno. Lim. Act, S. 14, N. 20, Pts. 14 to 17b.

(b) Limitation Act (1908), S. 14 (2) — Good faith — Lawyer's wrong advice to client.

No hard and fast rule can be laid down as to when a lawyer's wrong advice to his client may be excused and may be taken as not amounting to an absence of good faith under S. 14. [Para 8]

Anno. Lim. Act, S. 14, N. 20, Pt. 17.

(c) Limitation Act (1908), S. 14 (2) — Same relief — Execution application presented to wrong Court — Same application presented to right Court — Note inserted in application that certificate of transfer be issued—(Civil P. C. (1908), S. 41).

The Court to which an application for execution is first made is the principal executing agency, and it continues to exercise its control and functions right up to the satisfaction of the decree. [Para 10]

Where an application for execution of a decree by attachment and sale of the judgment-debtor's property was made to a Court within whose jurisdiction the property was situate and the same application was ultimately presented to the Court passing the decree but as the property was not within the jurisdiction of that Court a note was inserted in the application itself that a certificate of transfer be issued and this prayer was also made by means of a separate application :

Held, that in the circumstances it was not possible to hold the relief prayed for in the Court passing the decree was in any sense different from the relief in the execution application presented to the wrong Court. [Para 10]

Anno. Lim. Act, S. 14, N. 17 and 19 ; C. P. C., S. 41, N. 2, Pt. 3.

Kanhayalal Misra — for Appellant; S. N. Singh—for Respondent.

REFERENCES: Courtwar/Chronological/	Paras.
('90) 12 All 571 : (1890) All W N 197).	10
('97) 19 All 348 : (1897 All W N 86 FB).	8
('29) A I R 1929 All 677 : (118 Ind Cas 670).	9
('37) A I R 1937 All 333 : (168 Ind Cas 936).	8
('05) 28 Mad 466 : (15 Mad L J 116 FB).	10
('29) A I R 1929 Mad 199 : (116 Ind Cas 113).	10
('44) A I R 1944 Mad 47 : (211 Ind Cas 480).	8
('38) A I R 1938 Oudh 112 : (173 Ind Cas 956).	8
('41) A I R 1941 Rang 56 : (1940 Rang L R 725).	10

Judgment. — This is a decree-holders' appeal and it raises only a question of limitation.

[2] The suit in which the decree was passed had been filed in the Court of the City Munsif Azamgarh. It was then transferred to the Additional Munsif who later became Munsif Haveli, Azamgarh. As Munsif Haveli he passed the decree in question on 28-8-1942. The decree was affirmed in appeal on 3-6-1943.

[3] On 23-10-1945, the decree-holders made their first application for execution in the Court of the City Munsif, Azamgarh, instead of in the Court which had passed the decree, namely that of the Munsif Haveli, Azamgarh. The judgment-debtor objected to this application on several grounds, though not on the ground that the Munsif City Azamgarh had no jurisdiction to execute the decree. On 12-12-1945 the said application for execution was dismissed for default.

[4] On 13-2-1946 the decree-holders made their second application for execution again in the Court of the City Munsif Azamgarh. Then also objections were taken by the judgment-debtor, and *inter alia* it was pleaded that this learned Munsif had no jurisdiction to execute the decree which had been passed by the Munsif Haveli. The learned City Munsif allowed this objection and returned the application for presentation to the proper Court on the ground that he had no jurisdiction to proceed with it. The same day, 20-7-1946, the aforesaid second application for execution was presented by the decree-holders to the Munsif

Haveli with a prayer inserted in the application that a certificate of transfer of the execution case to the City Munsif might be issued, as the judgment-debtor's property against which the decree-holder wanted to proceed lay only within the jurisdiction of that Munsif.

There was also a separate application made by the decree-holders to that effect. The judgment-debtor objected to this request for a transfer-certificate on the ground that the application for execution, taking it to be the application of 20-7-1946 presented to the Court of the Munsif Haveli, was barred by time. The decree-holders met the objection by invoking s. 14, Limitation Act. The question, therefore, was whether under this section the decree-holders were entitled to exclude the period between 23-10-1945, when they made their first application for execution to the Court of the City Munsif and 20-7-1946, when they subsequently presented their second application for execution in the Court of Munsif Haveli.

[5] The execution Court, answering the above question in the affirmative and holding that the decree-holders were entitled to exclude the above period, held that the application for execution was within time, and it ordered the execution to proceed. The lower appellate Court reversed this order and dismissed the application as time-barred. Section 14, Limitation Act, according to that Court, did not apply mainly because Mr. Bishnath Singh, the lawyer through whom the decree-holders had filed all the applications, should have known that a decree passed by the Munsif Haveli could not be executed by the City Munsif and that there was no good faith or due diligence on the part of the decree-holders in filing their application for execution each time in the Court of the City Munsif. Another ground on which this section was held inapplicable was that the relief in the application made to the Munsif Haveli on 20-7-1946 was not the same as that in the application for execution.

[6] Learned counsel for the decree-holders has challenged the findings of the lower appellate Court as erroneous. In anticipation of an argument to that effect by the judgment-debtor he contended that the finding against the decree-holders' good faith within the meaning of s. 14, Limitation Act, though apparently one of fact, should not be upheld by this Court. The learned Civil Judge, relying on the definition of 'good faith' in s. 2 (7), Limitation Act, that "nothing shall be deemed to be done in good faith which is not done with due care and attention" and holding that Mr. Bishnath Singh, counsel for the decree-holders in the Courts below had not acted with due care and attention in filing the applications for execution in the Court of the City Munsif, although the decree had been passed by the Munsif Haveli, came to the conclusion that there was no 'good faith' within the meaning of s. 14 of the said Act, in the decree-holders having filed those applications in a wrong Court.

This reasoning, in my view, was essentially wrong. If any one with due care and attention takes a certain step in a wrong Court honestly believing that he is seeking relief in the right Court but subsequently finds himself to have gone to a wrong Court, it can hardly be said that he was guilty of want of good faith. A firm conviction in the correctness of a certain procedure may reduce the degree of care and attention, but it can in no sense suggest a negation or absence of the same. Applying this rule to the present case, if Mr. Bishnath Singh was honestly convinced that he had filed the applications for execution in the right Court, namely the Court of the City Munsif Azamgarh, it cannot be necessarily argued that he was guilty of want of care and attention.

One of the reasons that may have prompted a false belief in the mind of that gentleman was, as pointed out by the execution Court, that the suit had been initially filed in the Court of the City Munsif. It is no doubt conceivable that different Courts may come to different conclusions on this point after exercising their minds on all its aspects. But there is one thing which I cannot avoid taking into account as a feature of foremost importance. It is said that Mr. Bishnath Singh is a lawyer of good standing and long experience. Nothing is suggested about him in the nature of a general habit of carelessness on his part in the discharge of his professional duties.

In this perspective it is rather difficult to understand why a lawyer of such a position should have filed the applications for execution in a wrong Court if he was not actually convinced that he was doing so in the right Court. And once it is assumed or found that Mr. Bishnath Singh filed these applications in the Court of the City Munsif under an honest belief that that Court had jurisdiction to entertain them, the question of want of care and attention would assume a less serious aspect in the sense that an honest and firm belief in the correctness of a certain procedure may itself render it unnecessary for the person concerned to take any particular care to ascertain whether the procedure adopted was wrong.

In this view of the matter I am unable to accept the contention of the learned counsel for the judgment-debtor that the finding with regard to the absence of good faith in this case should be affirmed by me as a finding of fact binding on the decree-holders.

[7] The main question argued by the learned counsel for the parties was whether s. 14, Limitation Act, did or did not apply in the present case. Of course, the conditions necessary for the application of this section are that the applicant should have prosecuted the previous proceeding with due diligence, in good faith, and for the same relief. Mr. Bishnath Singh as a witness for the

decree-holders stated that he had filed and prosecuted the applications for execution in the Court of the City Munsif in good faith and with due diligence, and the execution Court accepted his version.

The lower appellate Court simply remarked that 'this statement, as it stands, is not satisfactory to prove good faith'. This was a much too cryptic comment, and it is not clear why the learned Civil Judge without expressly disbelieving Mr. Bishnath Singh felt hesitant to accept his explanation. At all events I cannot conceive why Mr. Bishnath Singh should have presented those applications in that Court unless he believed that it had jurisdiction to entertain them.

[8] A number of cases were cited by the learned counsel for the parties on the question of the effect of a lawyer's wrong advise to his client as a matter to be considered under S. 14, Limitation Act. The net result of a study and scrutiny of those cases is that no hard and fast rule can be laid down as to when such a mistake may be excused and may be taken as not amounting to an absence of good faith under this section. A Full Bench of this Court in *Brij Mohan Das* v. *Mannu Bibi*, 19 ALL. 348 (F.B.) laid down that ignorance of law might afford a good ground for the application of this section, and that case was followed in a much later decision of this Court in *Ahmad* v. *Ram Chander*, A. I. R. 1937 ALL. 333.

The cases cited by the learned counsel for the judgment-debtor do not lay down any absolute prohibition against this rule, for instance, in *Ram Dutta* v. *Mahpal Singh*, A. I. R. 1938 oudh 112, it was held that 'speaking generally' negligence on the part of counsel could not be relied upon by his client. The word 'generally'' itself suggests that there may be exceptions to the rule. Similarly in *Raghavayya* v. *Vasudevayya Chetty*, A. I. R. 1944 Mad. 47, it was held that in certain cases a counsel's mistake might be condoned, though if he did not act in good faith, that is, with due care and attention, his client would not be entitled to indulgence. This, again, makes the rule depend on the question whether the counsel acted with due care and attention. In the present case, I have already shown that, if the counsel had acted in an honest belief about the correctness of the procedure he adopted, it did not necessarily imply that he was guilty of lack of care and attention.

[9] As regards the second ground mentioned by the lower appellate Court for the non-applicability of S. 14, the position is much simpler. Admittedly, the application for execution dated 13-2-1946 had a prayer for the execution of the decree in a certain manner. The same application was ultimately presented to the Court of the Munsif Haveli on 20-7-1946. That is to say, an application was presented to that Court for execution of the decree by attachment and sale of the judgment-debtor's property. As this property was not within the jurisdiction of the Munsif Haveli but within that of the City Munsif, a note was inserted in the application for execution itself that a certificate of transfer to the Court of that Munsif might be issued. This prayer was also made by means of a separate application, supported by an affidavit.

It is not quite clear what the lower appellate Court meant when it said that the first application for execution dated 23-10-1945 had not been made for the same relief as the second application for execution dated 13-2-1946, as presented to the Munsif Haveli on 20-7-1946. As an application for execution, the later application did quite naturally embody a prayer for the execution of the decree. Such was the case in respect of the first application for execution dated 23-10-1945 also.

It is true that by means of a note inserted in the second application for execution and also by a separate application made in that behalf, the decree-holders requested the Munsif Haveli to issue a certificate of transfer of the execution to the City Munsif as the judgment-debtor's property sought to be proceeded against lay only within his jurisdiction, but neither this note nor this application was the real substantive matter for which the application for execution of 13-2-1946, as presented to the Munsif Haveli, had been made. I cannot imagine how it could be said that the decree-holders had asked for a relief in their second application for execution which was not the same as in their first application for execution.

If the learned Civil Judge, in holding that the two reliefs were different meant to say that the request for a transfer certificate made in the note and also in the separate application already referred to was not the same as the prayer for execution either in the earlier or in the later application for execution and that, therefore, S. 14, Limitation Act, did not apply, he put himself under a serious misapprehension. He seems to have imagined that the only part which the Court of the Munsif Haveli was to play was to grant or reject the request for a transfer certificate, the prayer for execution of the decree being meant entirely for the Court of the City Munsif within whose jurisdiction only the judgment-debtor's property lay.

On this assumption alone it is possible to understand the learned Judge's reasoning. But if this was his view, it certainly proceeded on a wrong assumption. In emphasising his point that S. 14, Limitation Act, did not apply also because of a difference in the reliefs the learned Judge referred to the case of *Maqbul Ahmad* v. *Pateshri Pratab Narain Singh*, A. I. R. 1929 ALL 677. In that case, first an application for the preparation of a final decree under O. 34, R. 5, Civil P. C. had been made in a wrong Court and then an application for execution in the right Court, and it was held that the reliefs in the two applications were quite different. These reliefs were on the face of them

different, and that ruling afforded no authority for the view taken by the learned Civil Judge.

[10] It may be remembered that, even after a certificate of transfer has been issued by the Court in which an application for execution of a decree was first made, that Court continues to have control over the execution proceedings and may exercise its powers in a number of ways, although the execution is proceeding elsewhere, i. e. in the Court to which the execution was transferred. Under S. 41, Civil P. C., the Court to which a decree is sent for execution has to notify to the Court which passed it the fact of such execution or, where the former Court fails to execute the same, the circumstances attending such failure.

The transferring Court is, therefore, not only a medium through which the decree is transmitted for execution to another Court, but it is really the principal authority in control of the execution, although for a particular reason the same was sent to another Court. The transferring Court, as I have already suggested, can exercise its authority in respect of the decree, even after a transfer certificate has been issued, in a number of ways. For instance, that Court alone is entitled to determine an objection to the executability of the decree, vide *Subramanian Chettiar* v. *Ramanadhan Chettiar*, A. I. R. 1929 Mad. 199, and a plea of limitation, vide *Subramanian Chettiar* v. *L. N. Chettyar Firm*, A. I. R. 1941 Rang. 56. The question of substitution of heirs on the death of the decree-holder or of the judgment-debtor is one only for that Court to decide, vide *Swaminatha* v. *Vaidyanatha*, 28 Mad. 466.

Again, where the judgment-debtor seeks an order for the payment of the decree by instalments, he must approach the transferring Court and not that to which the decree was sent for execution, vide *Gandharap Singh* v. *Sheodarshan Singh*, 12 ALL 571. All this would show that the Court to which an application for execution is first made is the principal executing agency, and it continues to exercise its control and functions right up to the satisfaction of the decree. In this sense the second application for execution dated 13-2-1946, as containing an express prayer for execution by attachment of the judgment-debtor's property, shall be deemed to be an application with which the Munsif Haveli was as much concerned, in spite of the transfer of the execution to the City Munsif, as the latter officer was.

This application was actually presented in the Court of the Munsif Haveli on 20-7-1946 and it was bound to come back to it after a report of satisfaction had been made by the transferee Court under S. 41 of the Code. In these circumstances it is not possible to hold that the relief prayed for in the Court of the Munsif Haveli was in any sense different from the relief in either or both of the applications for execution. Neither of the two grounds on which S. 14, Limitation Act, was held by the lower appellate Court as inapplicable can, therefore, be rightly pressed against the decree-holders in this behalf.

In my view the section applied and the decree-holders, in computing the period of limitation for their second application for execution, were entitled to exclude the entire period between 23-10-1945, the date of their first application for execution, and 20-7-1946, the date on which their second application for execution was presented in the Court of the Munsif Haveli Azamgarh. By this process the second application for execution would fall within time from 3-6-1943, the date of the appellate decree confirming that of the trial Court.

[11] For these reasons I allow the appeal, set aside the decree of the lower appellate Court, restore that of the execution Court and send the case back to the latter Court for execution of the decree according to law. In the circumstances of the case I allow the decree-holders appellants only one half of their costs against the respondent who shall bear his own in all the Courts.

[12] Leave to appeal to a Division Bench is granted.

B/V.R.B. *Appeal allowed.*

A. I. R. 1953 Allahabad 109 *[Vol. 40, C. N. 45]*

MALIK C. J. AND V. BHARGAVA J.

Qazi Muniruddin and others — *Applicants* v. *The Chairman Town Area Committee, Mau Aima, and another*—*Opposite Parties.*

Civil Miscellaneous Writ No. 572 of 1952, D/- 29-10-1952.

Constitution of India, Art. 226 — Other adequate remedy open to applicant — Application will not be entertained—(High Court Rules and Orders—Allahabad High Court Rules, Ch. 22 R. 6).

Applications under Art. 226 of the Constitution would be entertained only in those cases where the rights of a person had been seriously infringed and he had no other adequate and specific remedy available to him.

Hence, where the applicant is not able to satisfy the Court that the remedy by way of suit which is open to him is not equally efficacious or adequate, the application will not be entertained : 1950 A. L. J. 767 (F. B.) and 1951 A. L. J. 576 (F. B.), *Foll.* [Paras 2, 3]

S. C. Khare—for Applicants.

Malik C. J. — This is an application under Art. 226 of the Constitution. The case of the applicants is that, as the Ganjia Bazar is held on land belonging to them, the officer in charge of the Town Area, Allahabad, had no right under the Town Areas Act to realise the Teh-Bazari dues from the shopkeepers keeping stalls on the land belonging to the applicants. Learned counsel has urged that the orders of the officer incharge of the Town Areas dated 14th october 1952, and 27th october 1952, are clear invasion of their right to property.

[2] The applicants, however, have a remedy by way of a suit and they can in that suit file an application for injunction and pray for the reliefs that they have asked for in this application. The only reason given for not proceeding in the

ordinary course by way of a suit but by moving this Court under ART. 226 of the Constitution is : "That irreparable loss shall occur to the petitioners and they have no other alternative remedy equally convenient and efficient available to them."

It has not been explained in the affidavit or the application why the remedy by way of suit is not an adequate remedy. There are two Full Bench rulings of this Court on the point, *The Indian Sugar Mills Association, through its President, Hari Raj Swarup Lucknow* v. *The Secretary to Government, Uttar Pradesh, Labour Department, Lucknow and others*, (1950 A. L. J. 767) *and The Asiatic Engineering Co.* v. *Achhru Ram and others*, (1951 A. L. J. 576). In the Sugar Mills Association case it was held by this Court that applications under ART. 226 of the Constitution would be entertained only in those cases where the rights of a person had been seriously infringed and he had no other adequate and specific remedy available to him. In the Asiatic Engineering Co., case this Court held that we would exercise our jurisdiction and issue writs in the nature of Mandamus under ART. 226 of the Constitution only in those cases where there was no legal remedy of an equally convenient, beneficial and effectual nature.

[3] A rule has also been framed by this Court (chap. 22, R. 6) that no application under this chapter shall be maintainable if adequate relief is obtainable by the applicant by any other process of law.

[4] As there is nothing in the affidavit or the application to satisfy us that no other suitable remedy is open to the applicants, the application must fail and is dismissed.

A/K.S. *Application dismissed.*

A. I. R. 1953 Allahabad 110 *[Vol. 40, C. N. 46.]*

MUKERJI J.

Mahfuz Ali—Appellant (in Jail) v. *State — Respondent.*

Criminal Appeal No. 215 of 1951, D/- 17-9-1952.

(a) Criminal P. C. (1898), S. 537—Error in charge—Charge not indicating the manner in which accused had abused his position in order to have pecuniary advantage and illegal and corrupt means—Illegal and corrupt means employed not also indicated—Defect is a petty irregularity and is curable when there is no prejudice to accused —(Prevention of Corruption Act (2 of 1947), S. 5 (2)). [Para 13]

Anno. Cr. P. C., S. 537, N. 10, Pts. 2, 3.

(b) Prevention of Corruption Act (2 of 1947), S. 5—Scope.

Section 5 not only applies to habitual offenders but also applies to a case where the accused is charged with having taken illegal gratification on a solidary occasion as is provided for in S. 5 (1) (d). [Para 15]

(c) Prevention of Corruption Act (2 of 1947), S. 5 (1) (d)—'Pecuniary advantage' includes cash.

It is incorrect to say that S. 5 (1) (d) contemplates cases where the accused takes some object in species or gains some pecuniary advantage and not merely takes cash. The words "pecuniary advantage" are wide enough to include cases of cash payment. A man when he gets some money in cash certainly makes a pecuniary gain, and therefore, has a pecuniary advantage. [Para 16]

(d) Prevention of Corruption Act (2 of 1947), Ss. 4 and 5 (1)—Charge under S. 5 (1)—Presumption under S. 4 can be invoked.

The presumption available under S. 4 is not confined to those cases only where the accused is, in fact, charged under S. 161, Penal Code, but it is also available in cases where the accused is charged under some other section where the gravamen of the charge is the same as that under S. 161, Penal Code. Section 5 (1) provides for the same type of offence — the gravamen of the charge being the same—as in S. 161, Penal Code, and, therefore, where the accused is charged under S. 5 (1) of the Act, the trial Court is fully justified in relying upon the presumption available under S. 4. [Para 18]

(e) Evidence Act (1872), Ss. 21 and 24—Admission of guilt in recovery memorandum — Use of against accused—(Criminal P. C. (1898), S. 164).

The admission of the accused, which amounts to a confession of his guilt and which finds place in the recovery memorandum cannot be used by the Court against the accused at the trial, the same not having been recorded with the formalities required by the law, for the record of confessions : Cr. A. No. 908 of 1949 (All.), D/- 2-4-1951, *Rel. on.* [Para 20]

Anno. Evidence Act, S. 21, N. 2 ; S. 24, N. 1 ; Criminal P. C., S. 164, N. 11a ; S. 533, N. 2, 9.

(f) Prevention of Corruption Act (2 of 1947), S. 7—Section does not cast obligation on Court to invite accused to offer himself as witness.

Section 7 does not cast any obligation on the Court to invite the accused to offer himself as a witness for himself. The section never contemplated Courts giving a kind of warning or offering a kind of a reminder, to the accused about the right or privilege conferred upon him by S. 7. The provisos to the section clearly indicate that a Court cannot ask the accused to appear as a witness for himself, nor can the Court draw a presumption against the accused, if the accused has chosen not to appear as a witness for himself. [Paras 22, 23]

P. C. Chaturvedi — for Appellant; J. R. Bhatt, Assistant Government Advocate—for Respondent.

Judgment. — Mahfooz Ali, the appellant, was charged under S. 5 (2) of Act 2 of 1947, for having committed "criminal misconduct" on 11-10-1949, by abusing his position as a head constable, for the purpose of deriving from one Shivlal pecuniary advantage to the extent of RS. 20 for himself by illegal and corrupt means. The learned Additional Sessions Judge of Agra convicted the appellant on the aforesaid charge and sentenced him to undergo two years' R. I. and a fine of RS. 200, in default of payment of fine the accused was ordered to undergo further rigorous imprisonment for six months. The appellant has preferred the aforesaid appeal from his conviction.

[2] The facts giving rise to his conviction briefly put were these.

[3] The appellant, Mahfooz Ali, was posted as a head constable at the Idgah outpost in the City of Agra at the time when he is alleged to have committed the offence with which he was charged and for which he was convicted. The complainant in this case was one Shivlal.

[4] Shivlal is alleged to have len a sum of RS. 150 under two promis ory notes—one of RS. 100 and the other of RS. 50. Shivlal wanted his money back from Susa, which Susa was not repaying

and, therefore, it is said that on 6-9-1949 Shivlal served a notice of demand on Susa. On 10th september in the evening it is said that Susa went to the shop of Shivlal and there was a quarrel between the two over this repayment of debt. Shivlal then lodged a report against Susa at the police station Rakabganj and he followed it up by filing a complaint against Susa in the Court of City Magistrate. This criminal case ended in a compromise, on Susa paying Rs. 50, being possibly the loan on one of the two promissory notes.

Shivlal then filed a suit in respect of the other promissory note of Rs. 100 which was decreed against Susa. Shivlal complainant's story then is that while the complaint against Susa was pending, the accused Mahfooz Ali sent for him (Shivlal) told him that he had received an application from Susa complaining that he (Shivlal) had not returned the promissory note, even though, he had received payment for the same. Shivlal then says that he told the accused that the allegation of Susa was absolutely false and saying so he came away from the accused. Shivlal goes on further to say that he was sent for by the accused 6 or 7 days later and was again told by the accused that he was going to lose his case and he was further going to be prosecuted under S. 420, Penal Code. Shivlal says that thereon he made entreaties to the accused to save him, whereupon the accused demanded a sum of Rs. 50 as illegal gratification for making a favourable report. Bargain was settled at Rs. 20 instead of Rs. 50.

[5] Shivlal, after his return from the accused, went and complained about this to one Babulal Lodh who was a member of the Ward Congress Committee. Babulal Lodh thereupon took Shivlal with him to Babulal Mittal, the President of the Town Congress Committee, and apprised him of the entire story. Babulal Mittal thereupon gave a letter to Shivlal addressed to the Additional District Magistrate. Shivlal went to the Additional District Magistrate with this letter of Babu Lal Mittal who, in his turn, gave him another letter for the City Magistrate, Sri R. C. Asthana. Shivlal then went to the City Magistrate with the letter of the Additional District Magistrate and there the statement of Shivlal was recorded by Sri Mathur and two ten rupee notes were taken from Shivlal, their numbers noted and the notes returned to Shivlal. These notes were meant, according to the plan, for being passed on to the accused.

[6] The usual trap was then laid, the notes were then passed on to the accused and on a search of the person of the accused these notes were recovered. The recovery list is Ex. p. 2 on the record and it records the following facts:

[7] That Sri J. S. Mathur along with Sri Asthana, City Magistrate, went to Idgah Outpost at about 7-10 p. m. on 11-10-1949, and found the accused sitting in the room with Babulal Lodh. The accused was asked if any money had been given to him in connection with any application for police enquiry, whereupon the accused is recorded to have answered in the affirmative saying that Rs. 20 had been given to him by Babulal Lodh who was then present with him and who told him that he was going shortly to bring an application for a police enquiry. The two currency notes of Rs. 10 each bearing Nos. C/21-878216 and C/45-773757 were recovered from the pocket of the accused. The recovery memorandum further indicates that Shivlal was also present at the recovery. It is further recorded in this memorandum that Shivlal had gone, after the notes had actually been passed to the accused, to inform the City Magistrate and Sri Mathur that the money had been passed, to a nearby place where these officers were lying in ambush.

[8] The accused was put up on his trial on the above facts and circumstances. The defence of the accused was that the two currency notes of Rs. 10 each had been given to him by Babulal Lodh as a repayment because the accused had advanced Rs. 20 to Babulal for the purpose of supplying him ghee which the accused required in connection with the circumcision ceremony in his family.

[9] From the prosecution and the defence version the following fact is beyond controversy:

"that the notes were passed to the accused and that the notes were recovered from his person in the presence of Shivlal, Babulal, the City Magistrate and Sri Mathur on 11-10-1949."

The controversy that arose in the case was whether these notes were given to the accused by Shivlal as a bribe for hushing up the alleged complaint made against him by Susa or these currency notes had been given to the accused through Babulal Lodh because Shivlal had received Rs. 20 from the accused earlier for supplying him ghee which Shivlal could not supply.

[10] The trial Judge accepted the prosecution version by believing the prosecution evidence and naturally rejecting the defence case. It was contended by Mr. P. C. Chaturvedi that there was no satisfactory proof of the fact that there was any complaint by Susa to the accused which he could utilise as a lever for extracting the alleged bribe. It was said that the original application was not produced. A copy that was produced was not properly proved. The absence of the original application was explained by the prosecution to have been due to the fact that this must have been with the accused and it was not possible for the prosecution to get hold of it. In my opinion, the absence of the original application did not, in any manner, detract from the prosecution case if once, it was found that the statement which Shivlal made was reliable.

Shivlal was told by the accused about an application having been made by Susa and, if the statement of Shivlal is believed, then it did not matter whether or not there was an application by Susa, for, in my view, even if the accused invented this story of an application for the purpose of

extracting a bribe, even then, his complicity in the crime was quite clear. Some contradictions have been referred to and some alleged improbabilities have been pointed out by learned counsel on which he submitted that this part of the prosecution case was not true. I do not think it necessary to notice those contradictions and alleged improbabilities inasmuch as, in my opinion, they are not of such a character as could persuade me, on the strength of those contradictions and alleged improbabilities, to disbelieve this part of the prosecution story. I am in agreement with the trial Judge that the accused did tell Shivlal about Susa's application, whether there was, in fact, such an application or not, and that the accused did use this assertion of his to make it the basis of his demand for illegal gratification from the complainant Shivlal.

[11] The story of the defence, namely, that this money came from Babulal as a repayment of the advance which the accused had made to Shivlal for the purpose of ghee, in my judgment, was not true. There is nothing on the record, except the bald statement of the accused himself that there was a 'circumcision' ceremony in the family of the accused and that, for the purpose of such a ceremony, ghee was required. There is further nothing on the record to indicate that Shivlal had anything to do with any ghee business and that ghee could be had through his mediation.

[12] Learned counsel for the defence raised certain questions of law and on the basis of such questions he argued that the conviction of the appellant under S. 5 (2) of Act 2 of 1947 was illegal.

[13] The first point which was raised was that the charge which was framed was defective inasmuch as it did not indicate the manner in which the accused had abused his position in order to have pecuniary advantage by illegal and corrupt means. It was further said that the illegal and corrupt means employed was also not indicated in the charge. In my opinion the inclusion of all these matters in the charge may have and possibly would have, made the charge better but their absence from the charge did not amount to anything more than a petty irregularity which could be cured, specially, when I find that by this no prejudice has been caused to the accused.

[14] The next submission made by learned counsel for the appellant was that on the facts found a conviction under S. 5 (2), Prevention of Corruption Act, could not be made. Section 5 (1) of the Act defines "criminal misconduct" in the following words :

(a) "A public servant is said to commit the offence of criminal misconduct if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in S. 161, Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

[15] Mr. Chaturvedi's contention was that what the appellant, at the worst, did was to obtain a bribe from Shivlal on a solitary occasion. There was, he said, no evidence and no finding which could indicate that the accused was a habitual offender. I agree with Mr. Chaturvedi's contention that there is no evidence nor is there a finding to the effect that the appellant was a habitual offender but I do not agree with Mr. Chaturvedi's contention that S. 5 applies only to the case of habitual offenders and cannot be made applicable to the case of a person who takes illegal gratification on a solitary occasion. In my judgment S. 5 (1) (d) makes provision for a case of the present type, namely, a case where the accused is charged with having taken illegal gratification on a solitary occasion.

[16] It was next contended by Mr. Chaturvedi that cl. (d) of S. 5 (1) does not strictly cover the case of a person who obtains money from another as illegal gratification. According to him this clause of sub-s. 5 (1) contemplates cases where the accused takes some object in species or gains some pecuniary advantage and not merely takes cash. I have given this argument my careful consideration and I am of opinion that the argument is not sound for, in my judgment, the words "pecuniary advantage" are wide enough to include cases of cash payment. A man when he gets some money in cash certainly makes a pecuniary gain and, therefore, has a pecuniary advantage.

[17] Mr. Chaturvedi's next contention was that the learned Judge has relied, for convicting the accused, on a presumption which the Act, namely, the Prevention of Corruption Act, allows the Courts to make under S. 4 of the Act. Section 4 of the Act reads as follows:

"Where in any trial of an offence punishable under S. 161 or S. 165, Penal Code, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said S. 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate:

Provided that the Court may decline to draw such presumption if the gratification or thing aforesaid is in its opinion so trivial that no inference of corruption may fairly be drawn."

[18] Mr. Chaturvedi's contention was that the presumption which was permissible under the provisions of the Act, quoted above, could not be invoked when the Court had charged the accused under s. 5 (1) of the Act; in his submission, the presumption permissible under s. 4, was only available when the charge against the accused was under s. 161, Penal Code. I do not think that this submission of Mr. Chaturvedi is right. In my judgment, the presumption available under s. 4 is not confined to those cases only where the accused is, in fact, charged under s. 161, Penal Code, but it is in my view also available in cases where the accused is charged under some other section where the gravamen of the charge is the same as that under s. 161, Penal Code. Section 4 which has been quoted earlier in this judgment in extenso says : "Where in any trial of any offence punishable under s. 161 . . . ." It does not say where in any trial the accused is charged for an offence under s. 161. Section 5 (1) provides for the same type of offence—the gravamen of the charge being the same—as in s. 161, Penal Code; in my judgment, the trial Court was fully justified in relying upon the presumption available under section 4.

[19] I may further state that the Court has not merely relied on this presumption. It has, in my judgment, mainly relied on the facts which proved the offence independently of the presumption.

[20] The next "legal" argument of Mr. Chaturvedi was that the Court had relied on the statement made by the accused at the time of the search, a statement recorded in the 'recovery memorandum.' Mr. Chaturvedi's contention was that this statement recorded in the "recovery memorandum" could either be a statement under s. 161, Criminal P. C. or under s. 364 of the same Code. If, it was a statement under s. 161, Criminal P. C., Mr. Chaturvedi submitted it was not admissible in evidence. According to him, it could not have been a statement under s. 364, Criminal P. C., for the simple reason that it was not an examination of the accused by a Magistrate. Mr. Chaturvedi further contended that, if anything, it amounted to a confession by the accused, and the same not having been recorded with the formalities required by the law, for the record of confessions, it could not be used against the accused. I must say that Mr. Chaturvedi is right in regard to this submission. I am of the view that the "admission" of the accused which finds place in the recovery memorandum could not be used by the Court against the accused at the trial. I may here mention that I am fortified in the view that I have taken by an unreported decision of a Bench of this Court, given in the case of *Shiva Balak Singh* v. *The State*, (Criminal Appeal No. 908 of 1949 decided on 2-4-1951).

[21] The next question that arises for consideration is whether the trial Court did, in fact, use this statement of the accused against him in order to arrive at its decision. I have carefully considered the judgment of the trial Court and am of the opinion that the Court has not relied on the statement of the accused for convicting him.

[22] Lastly, it was submitted by Mr. Chaturvedi that the accused has been prejudiced inasmuch as the trial Court never told the accused that he was, under the provisions of the Prevention of Corruption Act (Act 2 of 1947), entitled to appear as a witness on his own behalf. Section 7 gives the accused a right to appear as a witness in his own defence. Section 7 does not cast any obligation on the Court to invite the accused to offer himself as a witness for himself. The accused was represented by a counsel and a counsel certainly must be presumed to know the law and I must assume that he knew the law, and that knowing the law he did not consider it proper to advise his client in this case to offer himself as a witness in his own defence. Section 7 has to it some provisos and, in my judgment, these provisos clearly indicate that a Court cannot ask the accused to appear as a witness for himself, nor can the Court draw a presumption against the accused, if the accused has chosen not to appear as a witness for himself.

[23] It appears to me that s. 7 never contemplated Courts giving a kind of warning or offering a kind of a reminder, to the accused about the right or privilege conferred upon him by s. 7. Further, in my opinion, the accused has not, in any manner, been prejudiced by not appearing as a witness for himself. What he could say as a witness for himself he has already said in his statement as an accused. The Court has considered that statement and given it due weight.

[24] In my judgment, therefore, this appeal has no force and I accordingly dismiss it. The conviction and the sentence of the appellant is maintained. The appellant is on bail. He will immediately surrender to his bail and serve out his sentence.

B/K.S. *Appeal dismissed.*

A. I. R. 1953 Allahabad 113 *[Vol. 40, C. N. 47]*

DESAI J.

Chotey Lal—Defendant — Appellant v. *L. Chhakkilal alias Hari Shanker, Plaintiff and another, Pro forma-Defendant—Respondents.*

Second Appeal No. 1807 of 1952, D/- 8-10-1952.

(a) Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 (a)—Arrears of rent include also decreed arrears.

The words 'arrears of rent' in S. 3 (a) include not only undecreed arrears, but also decreed arrears, of rent. The words 'arrears of rent' have no technical meaning. Rent that is not paid on the date on which it falls due becomes an arrear of rent and it remains so even though a suit is brought for its recovery and decreed. The only effect of the passing of the decree is that the cause of

action is merged in the decree and that the landlord can realise the decreed amount in a certain manner; it has not the effect of changing the arrear of rent into something other than arrear of rent. [Paras 2, 4]

(b) Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 (a)—Wilful default—Meaning of.

If there is a default in payment of arrears of rent and that default is committed intentionally or deliberately and not caused by accident or any circumstances beyond one's control, it is a wilful default, regardless of the reason why the default was intended. [Para 8]

When in pursuance of a landlord's notice demanding arrears of rent including the decreed arrears within one month of the notice, the tenant only pays the arrears of rent which had accrued due after the decree within the prescribed time and subsequently deposits the decreed arrears in Court after expiry of one month, there is a wilful default in payment of decreed arrears of rent on the part of the tenant. The fact that the tenant had been paying the rent regularly in the past or that the landlord had refused to accept the arrears of rent prior to the decree sent to him by a money order, is absolutely irrelevant. 1951 A.W.R. 115, *Dist.*; *Case law Ref.* [Paras 6, 8, 9, 10]

B. L. Dikshit—for Appellant.

Judgment.—This is a defendant's appeal from a decree for ejectment passed against him. The dispute is about a shop which admittedly was let out to the appellant by the plaintiff-respondent.

[2] On 24th February 1948 a decree for arrears of rent was passed against the appellant. Previous to the institution of that suit the respondent had given a notice for payment of the arrears and appellant had sent the arrears by money order, but the money order had been refused by the respondent. Consequently the decree was passed without costs. Subsequently rent again fell into arrear and the respondent gave a notice to the appellant demanding the arrears that has fallen due since the passing of the decree on 24th February 1948, and also the arrears decreed on that date. The appellant sent only the arrears that had fallen due subsequent to the passing of the decree, within the period of one month. He did not send the decreed arrears but deposited them in Court after a month. The respondent thereupon sued the appellant for ejectment from the shop contending that he had wilfully defaulted in paying the arrears within a month of the receipt of the notice demanding the same. The suit was dismissed by the trial Court which held that there was no wilful default on the part of the appellant but has been decreed by the lower appellate Court on the ground that he committed wilful default in not paying the decreed arrears. The lower appellate Court took the view that the words 'arrears of rent' in s. 3 (a), Control of Rent Act, include not only undecreed arrears, but also decreed arrears of rent.

[3] Two questions arise: (1) Whether the words 'arrears of rent' include decreed arrears of rent and (2) Whether the appellant committed wilful default.

[4] The words 'arrears of rent' have no technical meaning. Rent that is not paid on the date on which it falls due becomes an arrear of rent and it remains so even though a suit is brought for its recovery and decreed. The only effect of the passing of the decree is that the cause of action is merged in the decree and that the landlord can realise the decreed amount in a certain manner; it has not the effect of changing the arrear of rent into something other than arrear of rent. So long as the rent has not been paid, whether a decree has been passed for the same or not, it is rent in arrear. It remains 'rent' even if a decree is passed, and so long as it is not paid it is in arrear. There is no reason for thinking that the words 'arrears of rent' in s. 3 (a) mean only undecreed arrears of rent.

[5] If a tenant can be ejected on the ground of his failure to pay undecreed arrears of rent within a month of the receipt of a notice of demand, there is all the greater reason for his being ejected on the ground of his failure to pay the arrears of rent within a month of the receipt of a notice of demand in spite of a decree for the same having been passed against him. A tenant who does not pay the arrears of rent in spite of a decree having been passed against him undoubtedly stands in a weaker position than one against whom no decree has been passed. Because the landlord can realize the decreed arrears by executing the decree, he gets no licence for not paying them at all, or unless a warrant of attachment or arrest is issued against him. The lower appellate Court rightly held that the appellant did not pay all the arrears of rent rightly demanded from him within a month of the receipt of the notice of demand.

[6] The default of the appellant was undoubtedly wilful. It was deliberate or intentional and not caused by any accident or any circumstance beyond his control. He intended not to pay the decreed arrears of rent, why he intended so is absolutely irrelevant. What is material is the existence of the intention not to pay the demanded arrears and not the reason or motive for that intention. Therefore there arises no question of *mala fides* or dishonest intention.

[7] In *Gould* v. *The Mount Oxide Mines Ltd.*, 22 C. L. R. 490, it was said by Issac J. that 'wilful default' is a term which must depend for its precise connotation on the subject-matter and the context, that it does not connote dishonesty, and that in that case it meant a course of conduct consciously pursued. In *U. S. A.* v. *Murdock*, 290 U. S. 389 : (78 L. E. 381) it was laid down by Roberts J. that the word 'wilfully' often denotes an act which is intentional or voluntary or knowingly as distinguished from accidental, though when used in a criminal statute, it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely. A provision in a statute punishing a person who 'wilfully and knowingly' used any passport obtained by making false statement was considered in *Browder* v. *U. S. A.*, 85 L. E. 862 : (312 U.

S. 935) and it was held that the words 'wilfully and knowingly' do not suggest that fraudulent use as an element of crime. Reid J. said :

"Wilfully and knowingly can be taken only as meaning deliberately and with knowledge and not something which is careless or negligent or inadvertent."

Another provision making it an offence for anyone to fail 'wilfully" to pay a tax or make a return came up for discussion in *Spies* v. *U. S. A.*, 317 U. S. 492 : (87 L. E. 418). It was observed in that case that 'mere voluntary and purposeful' as distinguished from accidental, omission to make a timely return might meet the test of wilfulness. "But in view of the traditional aversion to imprisonment for debt, the Supreme Court understood the word 'wilful' to include some element of evil motive and want of justification. We are not concerned in the present case with any criminal or penal statute. The provision that a landlord can file a suit for ejectment against a tenant who wilfully defaults in paying the arrears in spite of notice of demand is certainly not a penal provision. The Rent Control Act does not penalise anything which was not liable to punishment previously. On the contrary, before the enactment of the Rent Control Act a landlord had a right to sue for ejecting a tenant whose tenancy had been terminated without assigning any reason. That right has been curtailed by the Rent Control Act except when there is wilful default on the part of a tenant. Therefore, allowing a landlord to sue a tenant who is guilty of wilful default is not a penal clause and there arises no question of including in the meaning of wilfulness an element of evil motive. Even in respect of a provision in a criminal statute punishing one for wilfully submitting an untrue return it was held that the word 'wilfully' meant absence of inadvertence or mistake and not a wrong view of the law or ignorance of law and that no criminal intent to submit an untrue return was necessary ; see *In re Jayarama Chettiar*, A. I. R. 1949 Mad. 95.

In *Faulger* v. *Steadman*, (1872-73) L. R. 8 Q. B. 65, a man without paying the licence fee that was due from him to the railway, kept his carriage on the land belonging to the railway and refused to leave. He was held to be a wilful trespasser within the meaning of a statute punishing a person who "shall wilfully trespass upon a railway". His plea that he believed the land to be a public thoroughfare and that consequently he was not a wilful trespasser was rejected because he 'intentionally and purposely stayed on the railway land although fancying that he was entitled to remain there. "Wilful default" was discussed by the Court of Appeal in *Re Mayor of London and Tubb's Contract*, (1894) 2 ch. 524. There was default in that case but as it was not intentional but due to an oversight and that too an oversight easily accounted for, it was held to be a perversion of the word "wilful" to hold it wilful. Lopes L. J. said on p. 588 :

"If it were treated as wilful there would be no distinction between what was intentional and what was unintentional and accidental."

The learned Lord Justice approved of *Lewis* v. *Great Western Railway Co.*, (1877) 3 Q. B. D. 195 in which Bramwell L. J. defined "wilful" when used in connection with "misconduct" as something opposed to accident or negligence.

[8] My conclusion is that if there is a default, and that default is committed intentionally or deliberately, it is a wilful default, regardless of the reason why the default was intended. The appellant knew that he was committing default and deliberately committed it. It is not that he did not intend to commit the default or that he did not think that it was a default. He, therefore, cannot derive any benefit out of *Lala Raj Narain* v. *Ram Prasad Vaish*, 1951 A. W. R. 115, where the arrears had been deposited by the tenant in Court and in reply to the notice he informed the landlord that he could withdraw the money from the Court. Clearly the tenant there did not intend not to pay the arrears. When he asked the landlord to withdraw the money from the Court he *bona fide* thought that he was paying the arrears and complying with the notice. Therefore, even if there was a default (inasmuch as he actually did not pay the arrears to the landlord) it was not intentional or deliberate.

[9] That the appellant used to pay his rent regularly in the past is quite irrelevant. His default on this occasion does not cease to be a wilful default on account of his being regular in payment in the past.

[10] The argument that there was no default, or no wilful default, because the respondent had refused to accept the money orders for the arrears before the decree was passed is devoid of force. The refusal of the respondent to accept the money orders did not wipe off the appellant's liability. The appellant remained liable to pay the arrears though he might not be liable to pay the costs of the suit brought by the respondent to recover them. In spite of the previous refusal, the appellant was bound to pay the decreed arrears; that was the decree passed against him. Further when the respondent demanded the decreed arrears through notice, the appellant was bound to pay them. He could not refuse to pay them on the ground that the respondent had refused the previous tender.

[11] The decree passed by the lower appellate Court is affirmed and the appeal is dismissed.

B/K.S. *Appeal dismissed.*

A.I.R. 1953 Allahabad 116 *[Vol. 40, C. N. 48]*

MALIK C. J. AND V. BHARGAVA J.

Om Prakash Gupta, Applicant v. *The State of Uttar Pradesh—Respondent.*

Supreme Court Appeal No. 54 of 1951, D/- 25-10-1952.

Civil P. C. (1908), O. 33, R. 1; O. 45, R. 7—Scope—Supreme Court Appeal—Maintainability— (Supreme

Court Rules, O. 12, R. 1 and O. 14)—(High Court Rules and Orders (All.) chap. 23, R. 22.)

Order 44, Civil P. C., must be read as a whole and there are clear indications in that order that it applies only to appeals which are entertainable by the High Court against the decisions of Courts subordinate to it. A Bench of the High Court hearing the application for leave to appeal cannot be said to be appellate Court with reference to the Bench which had decided the appeal and had passed the decree. [Para 2]

Order 45, R. 7 gives the High Court only limited power of extending the period mentioned in the rule but does not provide anywhere that the High Court can direct that the security and amount needed for defraying the expenses need not be deposited by the applicant in case he is found to be a pauper. The rule makes it obligatory on the High Court to insist on the deposit. Reference to the rules found by the Supreme Court as well as High Court also supports the same conclusion. [Para 3]

Leave to appeal to the Supreme Court under Art. 133 of the Constitution in forma pauperis is therefore not maintainable. 4 M. I. A. 114, *Not considered*; 17 Cal. L. J. 381, 3 Pat. L. J. 179, 42 Mad. 32 and A. I. R. 1948 Lah. 1, *Ref.* [Para 6]

Anno. Civil P. C., O. 44, R. 1, N. 12; O. 45, R. 7, N. 2.

A. P. Dubey—for Applicant.

Order.—In an application filed under ART. 133 of the Constitution for leave to appeal to the Supreme Court the applicant filed an application under O. 44, R. 1, Civil P. C., for being allowed to appeal in *forma pauperis* and attached to the application the list of properties held by him to show that he was really a pauper. Notice of this application was issued by a Bench of this Court in MAY 1952. On the application coming up before us in SEPTEMBER 1952, a point was raised that the application was not maintainable.

[2] We have heard learned counsel in support of the application at some length and we are not satisfied that in a matter of this kind we can grant leave to appeal in *forma pauperis*. There are only two provisions of the Civil Procedure Code that need be considered in this connection. Learned counsel has strongly relied on the provisions of O. 44, Civil P. C., and has urged that the language of R. 1 of O. 44 is wide enough to include not only an appeal from a subordinate Court but an appeal from a decree of this Court to the Supreme Court. We do not think there is any substance in this argument. Order 44 must be read as a whole and there are clear indications in that Order that it applies only to appeals which are entertainable by this Court against the decisions of Courts subordinate to it. For example, the proviso to R. 1 is as follows:

"Provided that the Court shall reject the application unless, upon perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

In R. 2, it is provided that:

"The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the order of the Appellate Court by the Court from whose decision the appeal is preferred."

A Bench of this Court hearing an application for leave to appeal cannot be said to be an appellate Court with reference to the Bench which had decided the appeal and had passed the decree. O. 44 clearly provides for applications for leave to appeal to this Court against orders passed by lower Courts. This Order, we feel satisfied, does not apply.

[3] Order 45, Civil P. C., was made applicable under the Adaptation of Laws Order, 1950, to applications for leave to appeal to the Supreme Court. It is provided in that Order that in the heading for 'King in Council', 'Supreme Court' is to be substituted and throughout that Order for 'His Majesty in Council', 'Supreme Court' is to be substituted. Reading O. 45 and reading 'Supreme Court' in place of 'His Majesty in Council' O. 45, R. 7, provides that the applicant must, within the period of time fixed or within such extended period as may be granted, furnish security for the costs of the respondent and also deposit the amount required to defray the expense of translating, transcribing, indexing, printing and transmitting to the Supreme Court a correct copy of the whole record of the suit. So far as we can see the Rule gives this Court only limited power of extending the period mentioned in the Rule but it does not provide anywhere that this Court can direct that the security and amount needed for defraying the expenses mentioned above need not be deposited by the applicant in case he is found to be a pauper. The Rule makes it obligatory on this Court to insist on the deposit of the amounts mentioned in that Rule. Reference to the Rules framed by the Supreme Court as well as this Court also supports the same conclusion. Order 12, R. 1 of the Supreme Court Rules makes O. 45 of the Code applicable to applications for leave to appeal to the Supreme Court. There is no provision making O. 44 applicable to such cases. Order 14 of the Supreme Court Rules makes provision for special leave to appeal to the Supreme Court in *forma pauperis*, and O. 44, Civil P. C., has been made applicable to such applications for special leave by R. 4 of the said Order. Under chap. 23, R. 22 of the Rules framed by this Court applications for leave to appeal to the Supreme Court are governed by the provisions of O. 45 of the Code. We are, therefore, satisfied that this application does not lie and it must fail.

[4] Learned Counsel, Sri A. P. Dube, has, however, relied on a passage at p. 136 in *Munni Ram Awasty* v. *Sheo Churn Awasty and Mussamat Neeut Kooer*, (4 Moore's Indian Appeals, page 114). The passage, however, is not contained in the judgment of Lord Langdale, who decided the case, but was a suggestion made by Mr. Moore, which was for some reason, incorporated in the report. It is not necessary to consider how far the suggestion made by Mr. Moore was in accordance with the provisions of the Bengal Regulations 28 of 1814. The application must now be decided in accordance with the provisions of the Civil Procedure Code read with the various relevant rules that we have discussed above.

[5] The view taken by us is supported by decisions of other High Courts: *Jagadanmad Asram* v. *Rajendra Roy and others*, (1913) 18 I. C. 129: (17 Calcutta Law Journal, p. 381) ; *Ramkishen Lal* v. *Manna Kumari*, (3 Patna Law Journal, p. 179) ; *Amba alias Padmavati* v. *Srinivasa Kamathi*, (I. L. R. 42 Mad. p. 32) : A. I. R. 1918 Mad. 18 and *Sm. Attar Kaur* v. *Lala Gopal Das and others*, A. I. R. 1948 Lab 1.

[6] The application has no force and is dismissed with costs.

A/H.G.P. *Application dismissed.*

A. I. R. 1953 Allahabad 117 *[Vol. 40, C. N. 49]*

WALIULLAH AND CHATURVEDI JJ.

Ram Sahai and others — Applicants v. *The Custodian of Evacuee Property, U. P., Lucknow and others — Opposite Parties.*

Civil Misc. (Writ) No. 450 of 1952, D/- 17-9-1952.

Constitution of India, Art. 226 — Tribunals passing orders on footing urged — Orders not outside jurisdiction — Writ quashing these orders on new grounds cannot be issued — (Administration of Evacuee Property Act (31 of 1950), S. 24).

Where the case was urged before the Additional Custodian and the Custodian General that the applicants were holding the plots which formed the part of sir land of the evacuee landlord and the tribunals passed orders on that footing, it could not be said that the tribunals had travelled outside their jurisdiction or had failed to exercise jurisdiction vested in them and that there was any violation of principles of natural justice. [Para 4]

Hence, the petition under Art. 226, Constitution Act, for issuing writ of certiorari to quash those orders on the ground that applicants were holders of the plots as sajhidars and later on became hereditary tenants, the contention which was not specifically raised before the tribunals, could not be granted : A. I. R. 1952 S. C. 319 ; A. I. R. 1952 S. C. 179 and A. I. R. 1952 S. C. 192, *Rel. on.* [Para 4]

B. L. Gaur—for the Applicants ; Standing Counsel—for the Opposite Parties.

REFERENCES : Courtwar / Chronological / Paras

('52) A. I. R. 1952 S. C. 319 : (1952 S. C. R. 696). 1
('52) 1952 S. C. R. 519 : (A. I. R. 1952 S. C. 179). 2
('52) A. I. R. 1952 S. C. 192 : (1952 S. C. R. 583). 3

Waliullah J.—This is an application for issue of a writ of certiorari for quashing the order of the Additional Custodian dated 27-2-1952 as well as the order of the Custodian General dated 4-7-1952. There are some other reliefs claimed in the application but the argument of the learned counsel before us has been confined to the question whether or not this is a fit case for the issue of a writ of certiorari for quashing the orders mentioned above. There is an affidavit filed in support of the application. Mr. Gaur, the learned counsel for the applicants, has strenuously contended that it is a fit case in which this Court should issue a writ of certiorari for quashing the orders of the Additional Custodian as well as that of the Custodian General mentioned above. The learned counsel has pressed us hard to accept his contention that in this case his clients were not tenants of certain sir land at all, but were rather holding the plots actually in their possession as *sajhidars* and that later on they became hereditary tenants under the Tenancy Law. The contention of the learned counsel has been that the Additional Custodian, or the Custodian General, has not considered and decided the vital matter which would have affected his jurisdiction to decide this case. The vital matter referred to by the learned counsel is the question whether or not the plots held by the applicants were comprised in the sir land of the evacuees Abdul Alim and others which later, after July 1948, became vested in the Custodian of the Evacuee Property. We have carefully looked into the order given by the Additional Custodian and also the order of the Custodian General. It is clear from those orders that the question whether the plots held by the applicants form part of the sir land of the evacuees was never raised before either of the two officers, namely, the Additional Custodian or the Custodian General. These two orders proceed on the footing that the land in which the plots held by the applicants are situate was originally sir land of Abdul Alim and his relations who later migrated to Pakistan. In this connection it is important to remember what the Supreme Court of India has laid down with regard to the scope of the provisions embodied in Art. 226 of the Constitution. In the case of *Ebrahim Aboobaker* v. *Custodian-General of Evacuee Property, New Delhi*, A. I. R. 1952 S. C. 319, Mahajan J. delivering the judgment of the Court at p. 322 (para. 13) observed :

"It is plain that such a writ (writ of certiorari) cannot be granted to quash the decision of an inferior Court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Want of jurisdiction may arise from the nature of the subject-matter, so that the inferior Court might not have authority to enter on the inquiry or upon some part of it. It may also arise from the absence of some essential preliminary or upon the existence of some particular facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it. But once it is held that the Court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a Court has jurisdiction to decide rightly as well as wrongly."

Referring to the powers of the Custodian General conferred upon him by s. 24, Administration of Evacuee Property Act, 1950 (31 of 1950), the learned Judge observed at p. 322, column 2 :

"Like all Courts of appeal exercising general jurisdiction in civil cases, the respondent (the Custodian General) has been constituted an appellate Court in words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a Court of appeal has only jurisdiction to determine the soundness of the decision of the inferior Court as Court of error, but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of

preliminary issues by the parties. Such jurisdiction is inherent in its very constitution as a court of appeal."

(2) Again in — 'Parry & Co. Ltd. Dare House Madras v. Commercial Employees Association, Madras', 1952 S C R p. 519, it was held:

"The High Court cannot issue a writ of certiorari to quash a decision passed with jurisdiction by a Labour Commissioner under the Madras Shops and Establishments Act, 1947, on the mere ground that such decision is erroneous."

At page 524 Mukherjea J. delivering the decision of the court in this case is reported to have observed:

"The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus there was absolutely no grounds here which would justify a superior court in issuing a writ of certiorari for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions."

The learned Judge pointed out that in that particular case what the High Court had done really was to exercise the powers of an appellate court and correct what it considered to be an error in the decision of the Labour Commissioner. This, as the learned Judge pointed out, obviously it could not do.

(3) The third case which we may refer to here, in which the Supreme Court has considered and laid down the scope of the powers of the High Court under Article 226 of the Constitution, is — 'G. Veerappa Pillai v. Raman & Raman Ltd., Kumbakonam, Tanjore Dist.', AIR 1952 S C 192. In this case Chandrasekhara Aiyar, J. who delivered the judgment of the Court at page 195 (paragraph 20) observed thus:

"Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

(4) In view of the above authorities it seems to us clear that unless the applicants bring their case within one of the categories of cases indicated in the decisions of the Supreme Court, the application must be rejected. As mentioned already learned counsel's sole contention has been that the question of the applicants being the holders of the plots comprised in the sir land of the former zamindar i.e. the evacuee landlord, has not been correctly decided. As already stated, it seems clear to us that this question was not specifically raised before either of the Additional Custodian or the Custodian General. On the contrary the case seems to have been argued before these tribunals on the footing that the applicants were holding plots in question which formed part of the sir land of the evacuee landlord. In any view of the case we fail to discover anything in the order passed either by the Additional Custodian or the Custodian General which would indicate that either of these two officers have travelled outside his jurisdiction or has failed to exercise jurisdiction vested in him. There is nothing pointed out to us which would show that here there has been a violation of principles of natural justice, in the decisions given by any of these two officers.

(5) The result, therefore, is that we dismiss this application.

A/H.G.P. Application dismissed.

AIR 1953 ALLAHABAD 118 (Vol. 40, C. N. 50)

SAPRU AND AGARWALA JJ.

Musai Bhant & others, Applicants v. Ganga Charan & State U. P., Opposite Parties.

Criminal Misc. No. 1954 of 1951, D/- 7-12-1951.

(a) U. P. Panchayat Raj Act (XXVI (26) of 1947), S. 89 — Revision under — Duty of magistrate.

For the successful working of the Panchayat Raj Act and for guiding the Panchayati Adalats it is essential that Magistrates should take some pains over the judgments and orders that they pass in revisions against the orders of the Panchayati Adalats. (Para 1)

(b) U.P. Panchayat Raj Act (XXVI (26) of 1947), S. 49 — Contravention of — Effect — Issue of writ of certiorari — (Constitution of India, Art. 226).

The provision in S. 49 that some of the panchas should be residents of the area in which the complainant and the applicants resided had been deliberately inserted in order to give a domestic colour to the Panchayat court. In the case of its contravention, there is no power under the Act which would enable the Court to cure the irregularity which is one affecting the jurisdiction of the Panchayati Adalats, and a writ of certiorari can be issued under Art. 226 of the Constitution to quash the proceedings in the Adalat. (Para 3)

Suraj Nath Singh, for the Applicants; Satya Narain Pd., for the Opposite Parties.

SAPRU J.: This is an application under Article 226 of the Constitution praying that this Court may be pleased to issue a writ of certiorari or such other writ, direction, or order as it may please and quash the conviction and sentence passed against the applicants by a Panchayati Adalat. The applicants' allegation is that none of the five panchas who convicted him resided in the village of the accused or the area of the Gaon Sabha. This fact is not controverted by the opposite parties as they have not filed any counter-affidavit. We further find that this objection was taken, though not in very clear terms, before the learned Sub-Divisional Magistrate to whom the applicants went in revision. The learned Sub-Divisional Magistrate chose to pass an order which gave no reasons for rejecting the applicants' application. We think it was incumbent on him to pass a more well-considered order. For the successful working of the Panchayat Raj Act and for guiding the Panchayati Adalats it is, in our opinion, essential that Magistrates should take some pains over the judgments and orders that they pass in revisions against the orders of the Panchayati

Adalats. We regret to note that this consideration was not borne in mind by the learned Sub-Divisional Magistrate who dealt with this case.

(2) A reading of S. 49 of the U. P. Panchayat Raj Act, 1947, leaves no room for doubt in our mind that it was essential for the Panchayati Adalat which convicted the applicants to include one panch who resides in the area of the Gaon Sabha in which the complainant resided and one panch residing in the area of the Gaon Sabha in which the applicants were residing. It is quite clear that in this case none of the panchas resided in the village of the applicants or the area of their Gaon Sabha.

(3) The Panchayati Adalat is a new institution. It is based on ancient concepts of justice modified by modern conditions. The provision that some of the panchas should be residents of the area in which the complainant and the applicants resided had been deliberately inserted in order to give a domestic colour to this court. There is no power under the U. P. Panchayat Raj Act which would enable us to cure irregularities affecting the jurisdiction of the Panchayati Adalats. We think, therefore, that the applicants have made out a case for interference by this Court.

(4) We, therefore, direct that a writ shall issue quashing the proceedings of the Panchayati Adalat.

A/D.R.R. Order accordingly.

AIR 1953 ALLAHABAD 119 (Vol. 40, C. N. 51)

B. MALIK C. J. AND V. BHARGAVA J.

Jan Mohammed, Nainital, Applicant v. The Commr. of Income-Tax, Respondent.

Income Tax Misc. Case No. 50 of 1951, D/- 22-10-1952.

Income-tax Act (1922) S. 5A (7) — Point referred to third Member — He cannot formulate new point and decide appeal.

Where a point is referred to a third Member, he can decide only the point that has been referred to him and he cannot formulate a new point for himself on which he can base his decision. After the decision of the point or points referred to him by the third Member, the case with his opinion should go back to the original Tribunal because, the third Member has not been given any right to decide the appeal. The Tribunal, when finally disposing of the appeal, may, no doubt, allow other points to be raised before it, if they consider it proper. The third Member, however, can only answer the point or points that were referred to him for decision and on which there was a difference of opinion.

(Para 2)

Kalbe Abbas, for Applicant; S. C. Das, for Respondent.

ORDER: This is a reference under S. 66(1) of the Indian Income-tax Act and the question referred to us for opinion is as follows:

"Whether there was material to come to the conclusion that the money with which the bus was purchased was advanced to the wife by the husband so as to attract the operation of the section 16(3) (a) (iii) of the Income-tax Act?"

(2) The assessee carries on business in Haldwani and Naini Tal. There was, however, a bus no. 104 U. S. R. registered in the name of of the assessee's wife. The income from this bus amounting to Rs. 2520/- during the year in question was paid to the wife of the assessee by the Kumaon Motors Union who were running the bus. The Income-tax Officer claimed that the bus belonged to the assessee and his wife was merely a benamidar for him. He treated the income from the bus as the income of the assessee. The assessee, however, denied that the bus belonged to him and asserted that the bus belonged to his wife who had purchased it out of the money which she had received from her father at the time of his death in 1934.

The assessee, however, informed the Income-tax Officer that he could not produce any evidence to prove how and when that money came into the hands of his wife. When the case was heard by the Income-tax Appellate Tribunal, the two learned Members differed on the point whether it could be presumed that the bus belonged to the assessee, there being no evidence or circumstance to establish the same. The point, on which they differed, was formulated as follows:

"The question for decision is whether in the circumstances, the presumption about the Bus belonging to the appellant could be legally drawn or not."

In accordance with S. 5-A(7) of the Income-tax Act, the point was referred by the President of the Tribunal to the third Member, Shri B. N. Mukerjee, who agreed with S. Kalbe Abbas that the presumption could not be drawn. The finding recorded is in the following terms:

"My decision, therefore, as regards the first question is that, in the circumstances, the presumption about the bus belonging to the appellant could not be legally drawn."

On this finding, therefore, the majority opinion was that the Income-tax Officer was wrong in presuming that the bus belonged to the assessee and that the presumption could not legally be drawn on the materials on the record. After having recorded that finding, however, the third Member formulated a new point for himself and held that the bus must have been purchased from the assets transferred directly or indirectly to the wife by the husband. He relied on section 16(3)(a)(iii) of the Income-tax Act. This point, however, had not been referred to the third Member and, under section 5-A (7) of the Act, he was competent to decide only the point referred to him. The relevant portion of section 5-A(7) of the Indian Income-tax Act runs as follows:

"If the members of a Bench differ in opinion on any point.....if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal....."

The third Member could, therefore, decide only the point that had been referred to him and he could not formulate a new point for himself on which he could base his decision. It appears to us to be further clear from a reading of the sub-section quoted above that after the decision of the point or points referred to him by the third Member, the case should go back to the original Tribunal because so far as we can see, the third Member has not been given any right to decide the appeal. According to S. 5-A (6) of the Income-tax Act, the appeal must be

decided by the Tribunal which must consist of a Bench of not less than two Members.

As we have already said, the point referred to the third Member was whether there could be a presumption legally drawn from the materials on the record that the bus belonged to the 'appellant' and, on that point, the third Member having agreed with Shri Kalbe Abbas that no such presumption could be legally drawn, the majority view was in favour of the assessee. The last part of S. 5-A(7) of the Act provides that the point or points have to be decided according to the opinion of the majority of the Members of the Tribunal who had heard the case including those who had first heard it.

After the opinion of the third Member had been obtained the case should have gone back to the Tribunal for its final orders. We do not know what is the practice followed by the Tribunal. The rules framed by the Tribunal, which have been placed before us by the learned counsel, & which are relevant on this point, throw no light on the point. The rules are as follows:

"Rule 33 (1) — The order of the Bench shall be signed and dated by the members constituting it.

"Rule 33 (2) — Where a case is referred under sub-section (7) of section 5-A, the order of the member or members to whom it is referred shall be signed and dated by him or them as the case may be."

"Rule 34 — The Tribunal shall, after the order is signed, cause it to be communicated to the assessee and to the Commissioner."

These rules do not, however, show that it was intended that the third Member should finally dispose of the appeal when only some point or points had been referred to him for decision. In our view, the case with the opinion of the third Member should go back to the Tribunal for final decision. The Tribunal, when finally disposing of the appeal, may, no doubt, allow other points to be raised before it, if they consider it proper. The third Member, however, can only answer the point or points that were referred to him for decision and on which there was a difference of opinion.

The reason is obvious. On the new point based on S. 16(3) (a) (iii) of the Income-tax Act there is only the opinion of the third Member. The two other members of the Tribunal had no opportunity of going into that question and, if the point had been raised before them, they might not have taken the same view as the third Member took. The jurisdiction of the third Member, it appears to us, is clearly defined in S. 5-A(7) of the Income-tax Act and he cannot, therefore, take it upon himself to decide the appeal by either dismissing or by allowing the same.

(3) The result, therefore, is that, in our view, the case has never been properly disposed of by the Tribunal and there is no order of the Tribunal from which the reference under S. 66 of the Income-tax Act could arise. The case must, therefore, go back to the Tribunal for decision according to law. In view of the peculiar circumstances of the case, parties should bear their own costs of this case.

A/V.R.B Case sent back.

AIR 1953 ALLAHABAD 120 (Vol. 40, C. N. 52)

MOOTHAM AND SAPRU JJ.

L. Lahori Ram Sahgal, J. D. Appellant v. L. Prabhu Dayal, D. H. Respondent.

Execution First Appeal No. 115 of 1948 D/- 2-11-1951.

Civil P. C. (1908), S. 148 — Decree for specific performance — Extension of time — Limitation Act (1908), Art. 182.

On the 11th October 1940 certain property was sold by B to L with the condition that, if within four years and a half B would pay the price, namely, Rs. 6000/-, purchaser would execute a deed in his favour reconveying the property in question. On the 18th of November 1944 B brought, on the basis of the above contract, a suit for the specific performance of that contract of sale. The plaintiff's suit for specific performance was decreed and the defendant was ordered to execute a deed in favour of the plaintiff reconveying the property in question to the plaintiff after receiving Rs. 6000/- from the latter within two months of the decree. If the defendant did not execute the deed within the time allowed, the plaintiff was entitled to have the sale deed executed through Court in execution department. B gave a notice to L, demanding execution of the decree and intimating that he would be present on the 27th of September 1945 with the requisite sum of Rs. 6000/- and that L should be ready to execute the sale-deed before the Sub-Registrar on that date. On the 27th of September 1945, L remained at the Sub-Registrar's office till 4 P. M. but B did not turn up. L did not execute any deed as the condition precedent to its execution was not fulfilled by B. On the 7th July 1947 B deposited the sum of Rs. 6000/- in Court and on the 10th July 1947, B filed the application for its execution.

Held that the right of the decree-holder to invoke the assistance of the Court in executing the decree would have come into existence only if within a period of two months of the decree the decree-holder had moved in the matter by tendering to the judgment-debtor the sum of Rs. 6,000/- and on such a tender having been made the judgment-debtor had failed to execute the sale-deed within that period of two months. The decree could not be construed to mean that an obligation had been cast by it upon the judgment-debtor to execute the sale-deed within a period of two months, no matter whether the decree-holder had or had not paid the sum of Rs. 6,000/- within that period. No doubt under Art. 182 of the Lim. Act the decree-holder can execute a decree within 3 years of an executable decree. There was however no decree capable of execution until Rs. 6,000 has been paid. Even assuming that time could be extended by Court this was not a fit case in which time should have been extended, for B disqualified himself by his conduct from claiming an extension of time and no explanation for the delay was forthcoming from his side. AIR 1933 Cal 496 Dissent: AIR 1923 Mad 184, AIR 1943 Nag 111 Rel. on. (Paras 5, 6, & 13)

Anno: C. P. C. S. 148 N. 2; Lim. Act Art. 182 N. 26.

Gopi Nath Kunzru and G. Kumar, for Appellant; B. R. Avasthi, for Respondent.

SAPRU, J.: This is an Execution First Appeal which has been filed by the judgment-debtor and the circumstances in which it arises are stated below:

(2) On the 11th October 1940, the property in respect of which execution of a decree for the specific performance of a contract of sale is claimed was sold by Swami Badalgiri to Lala Lahori Ram Sahgal with the condition that, if within four years and a half Badalgiri would pay the price, namely, Rs. 6000/-, the purchaser would execute a deed in his favour reconveying the property in question. On the 18th of November, 1944, Badalgiri brought, on the basis of the above contract, a suit for the specific performance of that contract of sale. It was decreed on the 28th of July 1945 and in order to facilitate an understanding of the case we are quoting below the operative portion of this decree as translated by the learned second civil Judge of Saharanpur:

"The plaintiff's suit for specific performance is decreed and the defendant is ordered to execute a deed in favour of the plaintiff reconveying the properties in question to the plaintiff after receiving Rs. 6000/- from the latter within two months of this date. If the defendant does not execute this deed within the time allowed, the plaintiff will be entitled to have the sale deed executed through Court in execution department....."

Thereafter on the 17th of September 1945, a notice was given by the decree-holder, Badalgiri, demanding execution of the decree and intimating that he would be present in Hardwar on the 27th of September 1945 with the requisite sum of Rs. 6000/- and that Lahori Ram should be ready to execute the sale-deed before the Sub-Registrar on that date. On the 26th of September 1945, Lahori Ram replied that he would be present on the 27th and meet him at Hardwar. On the 27th of September, 1945. Lahori Ram went, as required, to Hardwar and remained at the Sub-Registrar's office till 4 p.m. but Badalgiri did not turn up.

Lahori Ram did not execute any deed as the condition precedent to its execution was not fulfilled by Badalgiri who, as has been said before, was absent on that date. Badalgiri's case is that he did attend the Sub-Registrar's office but this is not borne out by any evidence in this case and has not been believed by the learned Judge. On the 26th of October 1945, Badalgiri transferred the decree to the respondent in the suit viz. Prabhu Dayal and the latter's name was thereafter entered as the transferee of the decree. On the 7th July 1947, Prabhu Dayal deposited the sum of Rs. 6000/- in court which had been agreed upon by the parties for the reconveyance of the property and on the 10th July 1947, Prabhu Dayal filed the application out of which this appeal arises for its execution.

(3) The defence of Lahori Ram was that, according to the decree of the 11th October 1940, money should have been paid within two months and that it was on the fulfilment of that condition that he was bound to execute the decree for specific performance. He, therefore, pleaded that there had been no failure on his part to execute it, he having been present at the Sub-Registrar's office. The decree-holder having failed to pay the sum of Rs. 6,000/- to get the sale deed executed in his favour within a period of two months provided by the decree when he was ready and willing to execute it, had no right left to obtain the sale-deed by putting the decree in execution.

(4) The defence of the judgment-debtor did not find favour with the lower Court. The learned Judge rejected the objections raised by the judgment-debtor and held that the application for execution was in order. He thought that the terms of the decree clearly showed that its execution was to be governed by Article 182 of the Indian Limitation Act and that it was for the defendant i.e. the appellants before us to execute the deed within two months. He further held that the failure of the defendants i.e., the appellants before us to execute the deed within the time allowed and his continuance in enjoyment of the usufruct could not bar the present application. In other words, he was of the opinion that on a correct interpretation of the terms of the decree Badalgiri or his transferee could execute it even after the lapse of two months allowed by it. Dissatisfied with the decision, the judgment-debtor Lahori Ram has come up in appeal to this Court and the question before us is whether the order of the learned Judge is correct.

(5) From a perusal of the operative portion of the decree which has been quoted by us in the opening part of our judgment, it is quite clear that the right of the decree-holder to invoke the assistance of the court in executing the decree would have come into existence only if within a period of two months of the decree the decree-holder had moved in the matter by tendering to the judgment-debtor the sum of Rs. 6,000/- and on such a tender having been made the judgment-debtor had failed to execute the sale-deed within that period of two months. We are not prepared to construe the decree to mean that an obligation had been cast by it upon the judgment-debtor to execute the sale-deed within a period of two months, no matter whether the decree-holder had or had not paid the sum of Rs. 6,000/- within that period. The broad facts that stand out in this case are that within the two months allotted by the decree, the sum of Rs. 6,000/- which was to be paid, before the reconveyance was to be executed by the judgment-debtor, was not paid up and has indeed not been paid up even upto this date, for payment in court cannot be regarded as a tender of the purchase money to the judgment-debtor. We are not prepared to agree with the view that the decree had put the judgment-debtor under an obligation to obtain a sum of Rs. 6,000/- from the decree-holder within the aforesaid period of two months. It is difficult to understand how such an obligation could have been imposed upon the judgment-debtor without means being afforded of carrying it out and obviously in this case no such means had been afforded to the judgment-debtor.

(6) It has been argued that the limit of two months prescribed in the decree was intended solely for the judgment-debtor and that so far as the decree-holder is concerned, he could, under Art. 182 at any time within three years, deposit the money and get the sale-deed executed through the court. It is further urged that the court could extend the time for payment and that, in effect, it must be deemed to have done so. No doubt under Art. 182 of the Limitation Act the decree-holder can execute a

decree within three years of an executable decree. This is, however, begging the question. For the fact is that in the present case, however, there is, in our opinion, no executable decree. The decree would not be executable unless a sum of Rs. 6,000/- was paid by the decree-holder. The judgment-debtor appellant was under no obligation to execute the sale-deed unless he had been paid up Rs. 6,000/-. In other words, there was no decree capable of execution until Rs. 6000/- had been paid. The decree was to become executable only on compliance of its terms. Failure to comply with the terms would make the decree inexecutable. The decree-holder not having fulfilled the terms of the contract had no right to get the decree executed.

(7) It was urged that the court could extend the time for payment and it must be deemed to have done so in this case by implication. Even assuming that the court could extend the time the position has to be faced in this case that there is no application in writing supported by an affidavit explaining the delay in the payment of Rs. 6000/- on the part of the decree-holder. No facts were placed before the court to justify any extension of time under section 148 or any other section of the Code of Civil Procedure or the Limitation Act.

(8) We were referred to the case of — 'Khorshedi Ali Bepari v. Prabhat Chandra Das', reported in AIR 1933 Calcutta 496. In that case, in a decree for specific performance of a contract of sale the defendant was directed to execute a 'kobala' in favour of the plaintiff for the sale of the properties by accepting the balance of the price from the plaintiffs within a month. On failure to deposit that price the court was empowered to execute and register a kobala of the sale of the properties on behalf of the defendant. The decree-holder did not pay the amount due nor was the kobala executed within the time specified in the decree.

On those facts, the view which found favour with the Calcutta Court was that upon the terms of the decree as it stood, the plaintiff decree-holders had the right to deposit the balance of the purchase money and requisite stamp and registration fee and get a conveyance executed and registered through the agency of the court. It was held that the only limitation imposed by the decree-holder in that behalf was the one under the law prescribing the time within which the decree must be put into execution. No reasons are given for this conclusion. We may with respect say that we dissent from this case and are unable to agree with its reasoning which we have found it difficult to follow.

(9) In the case of 'Abdul Shakur Sahib v. Abdul Rahman Sahib', reported in AIR 1923, Madras 284, the Bench deciding it took the view that where the plaintiff is given a decree for specific performance of a contract of sale with a condition of paying a certain amount to the defendant within a specified time, the decree is in the nature of a preliminary decree, the original court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases extension of time. The learned Judges who decided the case further held that it was open to the vendor to file a fresh suit for rescission of the contract or in the same suit apply to rescind the contract—the contract not being determined by mere failure of the plaintiff to pay the amount within the specified time. Reference may be made to the observations in that case of Schwabe, C. J.

> "that it is a well-established principle that persons who desire assistance of the Court for equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the court ought not to exercise its powers".

In the case before them they held on the facts brought out that the delay should be excused, for on the evidence, the plaintiffs had been put off for some time by the first defendant.

(10) In the case of — 'Shri Murti Parasnathji v. Gulab Chand', AIR 1943 Nag 111 the decree which was sought to be enforced was in the following terms:

> "It is ordered and decreed that the plaintiffs shall deposit in Court a sum of Rs. 3500/- plus Rs. 82/8/- less the costs incurred by them in the suit, within a period of one month from today. Thereafter, within fifteen days the defendant, through the Sarbarkars shall execute a proper reconveyance deed in favour of the plaintiffs, shall get the same registered and shall deliver the same to the plaintiffs. The defendant shall also at the same time place the plaintiffs in possession of the house. Should the defendant fail to do so within the time specified, the plaintiffs may apply to this Court to get a reconveyance deed duly executed on behalf of the defendant....."

The plaintiff decree-holder having found himself unable to pay within the period stated in the decree and the plaintiff decree-holder having shown that the delay was due to unavoidable circumstances and having produced money within a few days of the time fixed in the decree, the court came to the conclusion that the court had power to extend the time.

(11) Dealing with the above state of things Stone C. J. and Vivian Bose, J. observed as follows:

> "Where a decree for specific performance does not state what is to happen if payment is not made by the successful plaintiff within the time fixed, the result of the plaintiffs being out of time will not be to cause the sanction automatically to fall".

The conclusion that they came to was that—

> "Once the plaintiffs were out of time in producing the purchase money the opponents could have moved the Court to rescind the decree, and the court, in considering that motion would rescind if it thought that the facts were such as to justify the taking away from the plaintiffs the relief that they got, because of their default. On the facts here present of course the court would have no such thing. Indeed normally on such a motion the court would not, for any default, there and then dismiss the suit, in other words, rescind the decree but would give further time".

From the cases referred to above even on the assumption that section 35 of the Specific Relief Act has no application to the facts of the present case and that it was open to the court to extend the time, the question whether time should have been extended was one to be decided in the light of the facts brought out in the case. It was not as if the court was bound to extend time. For the proper exercise of its discretion proper material should have

been placed before the court. We proceed, therefore, to consider whether such materials had been placed before the court in this case.

(12) I have pointed out that on the 17th of September 1945 notice was sent by Badalgiri to Lahori Ram asking him to attend the office of the Sub-Registrar at Hardwar on September 27, 1945, and to execute the sale-deed in accordance with the terms of the decree. The position established in this case is that Lahori Ram did attend the Sub-Registrar's office on that date but Badalgiri did not. The period for payment of the amount fixed in the decree was two months and Lahori Ram would be justified on receiving this information that Badalgiri would be attending the Sub-Registrar's office with the money. In these circumstances, having been informed by Badalgiri that he was coming with the money there was no point in Lahori Ram requiring Badalgiri to pay the money and have the sale-deed executed within two months.

(13) There can be no doubt that Lahori Ram's version is correct. Apparently Badalgiri could not get the sale deed executed within two months because he did not have the money to pay for the reconveyance of the property. The learned counsel has cited a number of cases on the point that it is open to the court to extend time. Even accepting the argument that time could be extended, the question is whether this is a fit case in which time should have been extended. I think not, for Badalgiri, disqualified himself by his conduct from claiming an extension of time and no explanation for the delay is forthcoming from the side of the respondents.

(14) In these circumstances I think that the judgment of the learned judge is erroneous. I would allow the appeal, set aside the judgment and decree of the lower court and dismiss the plaintiff's suit with costs.

(15) MOOTHAM, J.: I agree that this appeal must be allowed.

(16) The respondent's contention is that he is entitled to execute the decree which he obtained on the 28th July 1945, at any time within the period allowed by the law of limitation; in other words he says that provided he within that period, pays to the appellant a sum of Rs. 6,000/- he can compel the latter to convey to him the property specified in the decree. The contract in respect of which the appellant has obtained a decree for specific performance was entered into on the 11th October 1940. It provided, 'inter alia', that if within four and a half years from that date the vendor should pay the sum of Rs. 6,000/- to the purchaser the latter would execute a reconveyance of certain property in the vendor's favour.

The suit for specific performance was instituted on the 18th November 1944, and the decree, as I have said, was made on the 28th July 1945. The vendor's right of repurchase would, under the agreement, have expired in April 1945, and what in effect, therefore the respondent is contending is that by virtue of the decree the period within which the property may be repurchased has been extended by three years—indeed, if appropriate steps in aid of execution are taken the period for repurchase can presumably be extended by twelve years. I do not think this is the legal position.

(17) It appears to me that the plain meaning of the decree is not merely that the appellant shall reconvey the property if within two months the respondent pays to him the sum of Rs. 6,000/-, but also that the respondent must pay that sum within that period if he wishes to have the property reconveyed to him. If the respondent failed to pay the sum of Rs. 6,000/- within the prescribed period the decree did not (in the absence of a clear proviso to that effect) automatically become null and void, but it was open to the appellant to apply to have the decree rescinded or to the respondent to apply to the court for an extension of the time for payment: — 'Abdul Shakur Sahib v. Abdul Rahman Sahib', (1); — 'Moorti Parasnathji v. Gulab Chand', (2). No question of treating the decree as one which could be executed at any time within three years appears to me to arise, for the decree was not capable of being executed unless the respondent paid to the appellant the sum of Rs. 6,000/- within the prescribed period as the court might allow on an application being made for that purpose. In this case, the money was in fact paid into court by the respondent on the 7th July 1947, exactly two years after the decree. No application was made to the court for an extension of the time for payment, and I may add that there appears to be no ground whatever in this case for extending the time for payment for so long a period.

(18) On the question of fact whether the failure to execute a reconveyance was due to default on the part of the appellant I entirely agree with the conclusion reached by my brother.

(19) The appeal must therefore be allowed, with costs.

A/D.H. Appeal allowed.

(1) ILR 46 Mad. 148.
(2) AIR 1943 Nag. 111.

***AIR 1953 ALLAHABAD 123 (Vol. 40, C. N. 53)**

WALI ULLAH ACTING C. J. AND CHATURVEDI J.

Dal Chand and another, Convicts-Appellants v. The State, Respondent.

Cri. Appeal No. 1268 of 1950, D/- 9-10-1952.

(a) Evidence Act (1872), S. 9 — Identifying parade — Proportion of outsiders to be mixed with suspects.

As a safe rule of prudence, a fair proportion of outsiders mixed with the suspects, considering the circumstances of the case, should always be insisted upon by every Magistrate who is charged with the duty of conducting identification proceedings. If too large a number of persons is mixed with suspects or accused persons, in a particular case, there might be a danger of putting too much strain on a witness's ability to pick out a suspect. He might get easily bewildered. (Para 11)

(Note.— In this case, it was held that the test afforded by identification proceedings was quite a fair and proper one even though the proportion of suspects to undertrials bore the ratio of 5 : 1 i.e. though undertrials, or outsiders five times the number of suspects, were mixed with them at the identification parade.) : (1952) All LJ 568 Rel. on. (Para 10)

Anno: Evidence Act, S. 9 N. 5.

*** (b) Criminal P. C. (1898), S. 269 — Notification under — Trial by jury in some districts and for certain offences — Discrimination — Validity of notification — (Constitution of India, Art. 14).**

By a notification issued by the State Government, in exercise of the powers conferred by S. 269, Criminal P. C. it was provided that (i) only in six districts comprised in the State and (ii) certain specific offences including the offence of dacoity shall be tried by jury. Bareilly was one of the six districts; and the accused was tried by jury at Bareilly for committing an offence of dacoity. It was contended for the accused that his right to "equality before the law" guaranteed by the Constitution had been violated inasmuch as in other districts similar conduct on the part of other persons could not be tried by jury and that discrimination or want of equality before the law which is prohibited by the Constitution had been introduced by the notification in question.

Held that the classifications made by the notification were based on reasonable considerations and therefore, the provisions of the notification issued for the trial of the offence of dacoity by jury in the district of Bareilly, where the trial of the accused was held, were perfectly valid and could not be impugned on the ground that they introduced discrimination — such discrimination as is prohibited by Article 14 of the Constitution: Case law Ref. (Para 27)

Anno: Cr. P. C., S. 269 N. 3.

S. P. Kumar, for the Appellants; Shri Rama, Deputy Govt. Advocate, for the Respondent.

JUDGMENT: This is an appeal by Dal Chand and Pitam against their conviction of an offence under S. 395, I. P. C. and the sentence of seven years' rigorous imprisonment passed upon each of them by the learned Additional Sessions Judge of Bareilly.

(2) It appears that eight persons in all were put upon their trial. Six of them were acquitted and the two appellants were convicted and sentenced.

(3) On the night of the 27th of February, 1950 — it was a moonlit night — about midnight an armed dacoity appears to have been committed at the house of one Lala Ram in village Angadpur Khamaria. It is the prosecution case that some twenty persons participated in this dacoity. The family of Lala Ram is a well-to-do family of Chamars, the head of which is Lala Ram. He has three other brothers viz. Jhamman, Hori and Birbal, prosecution witnesses, and a son named Ram Lal P. W. 1. On the night when the dacoity was committed, Lala Ram was not at his house but was at his Kolhu, while his three brothers and the son Ram Lal as also the ladies of his family were sleeping inside the house. The dacoits are said to have been armed with guns and lathis. Inside the house a lantern is said to have been burning at the time and the dacoits are alleged to have used electric torches and also burnt 'Phoos' at some places inside the house. The dacoity is said to have been committed for about an hour and a half. Villagers on hearing the outcries and the sound of gun fire appear to have collected in front of Lala Ram's house. They are said to have burnt three heaps of 'Phoos' on different sides outside the house of Lala Ram. It is the prosecution case that there was an exchange of lathi fight between the villagers on one side and the dacoits on the other. When the dacoits retreated, they were given a chase by the villagers. About a furlong away from the dacoited house, near the fields of two persons, viz. Mansukh Dhobi and Kesri Teli, there was a regular lathi fight as the result of which some of the dacoits received injuries and one dacoit named Ram Lal Sonar of village Bhowa, who was seriously injured, was captured by the villagers. This man soon became unconscious and remained in that condition till he died in the District Hospital on the 1st of March 1950. He was left in charge of the Mukhia and other villagers while Ram Lal P. W. 1, son of Lala Ram, proceeded to the police station Bhuta and made the first information report at 7 A.M. The police station is some four miles away from village Khamaria. In this report, three persons including the injured dacoit who had been caught by the villagers and the appellant Dal Chand (Dalla) were named as the culprits who committed this dacoity along with fifteen or twenty other unknown persons.

(4) Police investigation followed. The station officer appears to have been out of station. The Head Moharrir, Jit Lal, therefore proceeded to the village and started investigation. A list of stolen property was given to the Head Moharrir on his arrival at the village. Some fired cartridges and Tiklis (Ext. 2) were found on the spot. A lathi, Ext. 1, belonging to the injured dacoit who had been caught, was also handed over to the Head Moharrir. Meanwhile, the station officer arrived on the scene and took over investigation. Arrest of a number of suspects was effected and in due course identification proceedings were held before a Magistrate of the first class. As the result of the investigation, eight persons in all, as mentioned above, were eventually put upon their trial before the learned Sessions Judge with the result indicated above.

(5) The trial before the learned Sessions Judge was by jury which consisted of five persons. As the result of the trial the jury unanimously returned a verdict of guilty so far as the two appellants viz., Dal Chand and Pitam, were concerned, while they unanimously acquitted the remaining six persons, namely Ganga Ram, Tara Chand, Tondi Dhobi, Baboo, Chotte, and Bhoop Ram. The learned Sessions Judge accepted the verdict of the jury. He convicted the two appellants and sentenced them each to seven years' rigorous imprisonment while he acquitted the remaining accused persons.

(6) Learned counsel for the appellants has, in the first instance, contended strenuously that the charge to the jury was not a fair charge inasmuch as many essential and material points of the case were not brought to the notice of the jury. Learned counsel has therefore contended that there was a serious omission on the part of the learned Judge in his charge to the jury. In short, learned counsel contended that the verdict of the jury was vitiated owing to a misdirection by the learned Judge.

(7) Next, it was contended by the learned counsel that the provisions of law directing the trial of a case of dacoity, like the present one, by jury were against the fundamental rights guaranteed to the citizens of India by Article 14 of the Constitution. The argument of the learned counsel was that the provisions of Article 14 which guarantee "equality before the law" or "the equal protection of the laws" within the territory of India were violated by the provisions of law relating to jury trial.

(8) We now proceed to examine the arguments of learned counsel.

(9) Section 423(2), Criminal P. C., makes it clear that this Court, as the Court hearing the appeal, cannot alter or reverse the verdict of the jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. The main question, therefore, is whether there has been, in the present case, as is the contention of learned counsel, a misdirection or non-direction by the learned Judge which has brought about an erroneous verdict by the jury. Learned counsel has, in this connection, placed before us the charge to the jury and has submitted his criticisms in regard to the same.

(10) One of the criticisms of learned counsel was that the proportion of undertrials mixed with the suspects in the present case was seriously defective and therefore the identification proceedings were not legally and properly carried out. In the present case, it was pointed out to us by learned counsel, forty undertrials were mixed with eight suspects. This, according to the learned counsel, was not a proper and fair proportion of undertrials to be mixed with the suspects. Learned counsel contended that this defect in the proceedings for identification was not pointed out to the jury by the learned Judge. Learned counsel was not able to point out to us any authority in support of the proposition that the proportion of 5 : 1 between the number of undertrials mixed and the number of suspects was defective in law. We are not aware of any such law, nor has the learned counsel been able to point out to us any such law. On the contrary, we are clearly of the opinion that the test afforded by identification proceedings is quite a fair and proper one even if the proportion of suspects to undertrials bears the ratio of 5 : 1 i.e. that if undertrials, or outsiders five times the number of suspects, are mixed with them at the identification parade. We may also observe that it is not a matter where a hard and fast rule has ever been laid down either by this Court or by any other Court. Obviously, a lot may depend upon the circumstances of a particular case.

(11) In this connection, learned counsel for the State has invited our attention to the case of the — 'State v. Wahid Bux and others', (1952) ALJR, 568 decided by a Division Bench of this Court. In that case, it was contended by learned counsel for the accused that the number of persons mixed with the accused at the identification parade should have been ten times. With reference to this argument the learned Judges at page 570 observed thus :

> "We do not think that there is any such general rule. Of course, it is always better to have as large a number of persons mixed up with the accused as possible. But no hard and fast rule can be laid down and we are of opinion that if five times the number of the accused persons are mixed with them, it cannot be said that there is any flaw in the identification proceedings."

Our own view on this matter receives strong support from this decision of a Division Bench of the Court. We would, however, like to add, in passing, that if too large a number of persons is mixed with suspects or accused persons, in a particular case, there might be a danger of putting too much strain on a witness's ability to pick out a suspect. He might get easily bewildered. In our opinion, therefore, all that need be laid down as a safe rule of prudence is that a fair proportion of outsiders mixed with the suspects, considering the circumstances of the case, should always be insisted upon by every Magistrate who is charged with the duty of conducting identification proceedings.

(12) Next, learned counsel contended that the learned Judge had misdirected the jury in that part of the charge where he dealt with the question of the factum of dacoity. We have given careful consideration to this contention of the learned counsel. We are, however, not at all satisfied that what the learned Judge has said in that part of the charge amounts to a misdirection.

(13) On giving a careful consideration to the charge to the jury as a whole, we are satisfied that there has been no misdirection committed by the learned Judge. There is no contention in this case that there was "a misunderstanding on the part of the jury of the law as laid down by him." The unanimous verdict of the jury in the present case, therefore, cannot be considered to be erroneous in any way. It is accordingly binding upon this Court. The conviction of the appellants cannot in this view of the matter, be challenged.

(14) The next contention of the learned counsel, as already indicated, is to the effect that the provisions of law under which the trial by jury was held are void inasmuch as they violate the provisions of Article 14 of the Constitution which guarantee "equality before the law" or "equal protection of the laws" to every citizen. Section 269, Criminal P. C., authorises the Provincial Government (the State Government) to direct by an order notified in the official gazette that the trial of all offences or of any particular class of offences before any court of Session shall be by jury in any district. By reason of this statutory provision, the Provincial Government (now the State Government) of Uttar Pradesh issued a notification No. 2749-VI-1122-1924 dated 26th August 1924 by reason of which inter alia the offence of dacoity in the district of Bareilly was made triable by jury. By reason of this notification the present trial of the appellants by jury was held at Bareilly.

(15) The crucial question for decision in the present case is whether in providing for a jury trial for the offence of dacoity the State can be said to have denied to the appellants either "equality before the law" or "the equal protection of the laws" within the meaning of these expressions as contained in Article 14 of the Constitution. The effect of the notification by the State Government is undoubtedly this: Only in the six districts of the State specified in the notification can a jury trial be held. Further, in these districts only the trial of the offences in the notification can be held by jury. It is significant that the notification nowhere directs that a particular person, or class of persons, charged with the same offence shall be treated differently.

(16) The contention of the learned counsel is that the appellants' right to "equality before the law" guaranteed by the Constitution has been violated inasmuch as in other districts similar conduct on the part of other persons could not be tried by jury. Learned counsel has contended strenuously that discrimination or want of equality before the law which is prohibited by the Constitution has been introduced by the notification in question.

(17) The provisions of Article 14 of the Constitution have been considered and interpreted in quite a large number of cases decided by various High Courts in India including this Court as well as the Supreme Court.

(18) In — 'Deodat Rai and others v. The State', AIR (1951) ALL 718, a Bench of two learned Judges of this Court had to consider the provisions of the U. P. Prevention of Crimes (Special Powers) (Temporary) Act (V of 1949). With reference to the clause "equal protection of the laws" in Article 14, it was held:

"What the equal protection clause means is simply this that the same law should govern those similarly circumstanced; it cannot and does not prohibit different laws for those differently circumstanced. The Legislature has full freedom to classify people according to circumstances and enact different laws for different classes; but it must treat equally all similarly circumstanced or falling in one class and the difference in treatment must have some intelligible or rational connection with the difference in circumstances and not be arbitrary. Discrimination among persons in one class or similarly circumstanced, whether apparent on the face of the statute, or resulting in practice, is all that is prohibited under the clause. It is competent for the Legislature to leave it to the discretion of an authority to apply different laws to people in different circumstances but always provided that it lays down a rational standard to guide its discretion or such a standard can be presumed to exist; it cannot leave it to its arbitrary or naked discretion."

(19) Again in the case of — 'Raja Suryapal Singh & others v. The U. P. Government', AIR (1951) All 674, decided by a Full Bench of five learned Judges of this Court, the main question was whether the Zamindari Abolition and Land Reforms Act, 1950 (I of 1951) contravened any provision of the Constitution & was thus invalid on that account. It was held that it did not contravene any provision of the Constitution & was not invalid on that account. One of the contentions raised in that case was that the provisions of Article 14 of the Constitution were infringed by S. 4 (2) of the impugned Act. In that connection, the Full Bench had to consider the scope of Article 14. It was held:

"Equality before the law" has not the same meaning as "the equal protection of the laws". The former may be defined as the equal subjection of all persons to the ordinary law of the land and the latter as the protection of equal laws. The protection of equal laws does not mean that all laws must be uniform, but it does require equality of treatment 'under like circumstances and conditions'.

"The equal protection of the laws" does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate."

In dealing with this matter, the learned Judges referred to a passage from Willis's Constitutional Law, p. 579, where, with reference to the corresponding words in the Fourteenth Amendment (of the American Constitution) it is stated:

"The inhibition of the amendment.....was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".

(20) Next, in the case of — 'Asiatic Engineering Company v. Achhru Ram and others', AIR 1951 All 746, decided by a Full Bench of three learned Judges of this Court, the validity of the Administration of Evacuee Property Act, 1950 was challenged on the ground that it was discriminatory. Dealing with the provisions of Article 14 of the Constitution, it was laid down by the Full Bench:

"The expression 'equality before the law' does not imply that the same laws should apply to all persons in the same State. It does not refuse to take note of differentiations in economic and social functions, nor of the need for special types of quasi-judicial tribunals due to the growing tendency towards the enlargement of state intervention in the economic and social life of the country. The Administration of Evacuee Property Act has laid down a special procedure and constituted special Courts for declaring any property as evacuee property and that that procedure is of a summary nature is not sufficient to justify the conclusion that there has been any violence of the letter and spirit of Art. 14."

Again, it was laid down:

"The guarantee of equal protection is not to be understood as requiring that every person in the land shall possess precisely the same rights and privileges as every other person. The classification must be based upon reasonable ground. It cannot be mere arbitrary selection. What the Article contemplates is that both in the matter of the laws applicable and the mode in which they are administered, all persons, in like circumstances and conditions should possess the same privileges and be subject to the same liabilities."

(21) Next, in the case of — 'Matrumal Sharma and others v. The Chief Inspector of Shops and Commercial Establishments', AIR 1952 All 773, decided by two learned Judges of this Court sitting on the Lucknow Bench, a question arose about the constitutional validity of the U. P. Shops and Commercial Establishments Act (Act XXII of 1947). It was held that the impugned Act did not infringe the principle of "equality before the law" as laid down in Article 14. It was held:

"Article 14 of the Constitution aims against the conferment of special privileges at law on account of birth, religion, caste or creed and enjoins equal subjection of all persons and classes of persons to the laws of the land without distinction of race, wealth, social status or political affiliations."

(22) Coming to the decisions of the Supreme Court, the first case cited before us is that of — 'Charanjit Lal Chowdhury v. The Union of India and others', AIR 1951 SC 41. In that case, the Supreme Court was concerned with the question of the validity of Sholapur Spinning and Weaving Company (Emergency Provisions) Act (XXVIII of 1950). With refer-

ence to the provisions of Article 14, it was laid down:

"A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it. Any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed.

"The presumption is always in favour of the Constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles."

At page 47 (para. 18) Fazl Ali. J. observed thus:

"Article 14 of the Constitution, as already stated, lays down an important fundamental right, which should be closely and vigilantly guarded, but, in construing it, we should not adopt a doctrinaire approach which might choke all beneficial legislation."

The majority decision in that case was that the Act did not run counter to Art. 14 of the Constitution.

(23) The next case is that of — 'The State of Bombay and another v. F. N. Balsara', AIR 1951 SC 318. In this case, 'inter alia' the validity of S. 39, Bombay Prohibition Act, (Act XXV of 1949) was challenged on the ground that it contravened the provisions of Art. 14 of the Constitution. Section 39 provided for special treatment of persons belonging to the armed forces, military and naval messes and canteens as well as warships and troop-ships. Fazl Ali J. delivering the judgment of the Court at page 327 is reported to have observed thus:

"I think that there is an understandable basis for the exemptions granted to the military canteens, etc., by the Act. The armed forces have their own traditions and mode of life, conditioned and regulated by rules and regulations which are the product of long experience and which aim at maintaining at a high level their morale and those qualities which enable them to face dangers and perform unusual tasks of endurance and hardship when called upon to do so — qualities such as dash and courage, unbreakable tenacity and energy ready for any sacrifice which should be unfaltering for long days together. By these rules and regulations, drinking among the forces is not prohibited, but it is properly and carefully regulated. It is easy to understand that the legislature chose not to interfere with the mode of life to which the forces have been accustomed, lest such interference should affect their morale and lead to subterfuges which may prove unwholesome for their discipline and good behaviour.....I find therefore nothing wrong 'prima facie' in the legislature according special treatment to persons who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions. In my opinion, therefore, S. 39, in so far as it affects the military and naval messes and canteens, warships and troopships, cannot be held to be invalid."

(24) The next case is that of — 'The State of West Bengal v. Anwar Ali Sarkar and another', AIR 1952 SC 75. In this case, the Supreme Court was concerned with the question of the validity of S. 5 (1), West Bengal Special Courts Act, (Act X of 1950). The validity of S. 5 (1) was challenged on the score of its being discriminatory and thus violating the provisions of Article 14 of the Constitution. It was held:

"The impugned Act has completely ignored the principle of classification followed in the Criminal Procedure Code and it proceeds to lay down a new procedure without making any attempt to particularize or classify the offences or cases to which it is to apply."

The impugned statute, in that case, provided for discrimination in criminal trials and it made provisions for speedier trial of certain offences. It was held:

"Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a classification of offences or cases. The necessity of a speedy trial is too vague, uncertain and elusive criterion to form the basis of a valid and reasonable classification.

"It is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of Article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

"A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

(25) Next, we may refer to the case of — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123. In this case, the court was concerned with the question of constitutional validity of the Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949). It was held by the majority of the Court that S. 11 of the Ordinance in so far as it authorises the State Government to direct offences or classes of offences or classes of cases to be tried by the Special Court did not offend against the equal protection clause of the Constitution of India and the notification which has been issued by the Saurashtra Government under that part of the section cannot be held to be invalid or 'ultra vires'. The decision of the Supreme Court in the case of — 'The State of West Bengal v. Anwar Ali Sarkar and another', was distinguished. At page 125 (paragraph 7), Patanjali Sastri, C. J. is reported to have observed thus:

"All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15 (1) and Article 16 (2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is

based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies. The power of the State to regulate criminal trials by constituting different Courts with different procedures according to the needs of different parts of its territory is an essential part of its police power (cf. — 'Bowman v. Lewis', (1880) 101 US 22: (25 Law Ed 989). Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient, in my opinion, to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands as, for instance, when it amounts to a denial of a fair and impartial trial. It is, therefore, not correct to say that Article 14 provides no further constitutional protection to personal liberty than what is afforded by Art. 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, Article 14 remains an important bulwark against discriminatory procedural laws.

Again, "The impugned Ordinance having thus been passed to combat the increasing tempo of certain types of regional crime, the twofold classification on the lines of type and territory adopted in the impugned Ordinance, read with the notification issued thereunder, is, in my view, reasonable and valid, and the degree of disparity of treatment involved is in no way in excess of what the situation demanded."

Again, at page 131, Mukherjea J., observed thus:

"The nature and scope of the guarantee that is implied in the equal protection clause of our Constitution have been explained and discussed in more than one decision of this Court and do not require repetition. It is well settled that a legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the regulation, that necessity of judicial interference arises."

Similarly, at page 136, Das J. observed:

"It is now well established that while Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

(26) Lastly, we may refer to the case of — 'Lachmandas Kewalram and another', AIR 1952 SC 235. In this case, the Supreme Court was concerned with the question of the validity of S. 12, Bombay Public Security Measures Act, (6 of 1947). The majority of the Court held:

"Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should be avoided.

It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

(27) In the light of the authorities referred to above we have to see if, in the present case, the trial of the appellants has been held under the provisions of a law which is discriminatory in character so as to attract the application of Art. 14 of the Constitution. By the notification issued by the State Government, in exercise of the powers conferred by S. 269, Criminal P. C., it is provided, as already mentioned, that (i) only in six districts comprised in the State and (ii) certain specific offences including the offence of dacoity shall be tried by jury. The legislature in conferring this power on the State Government under Section 269, Criminal Procedure Code, clearly intended that the State Government should have full discretion in selecting a district or districts where jury trial might be held and also in particularising the offences or classes of offences which might be so tried. It follows, therefore, that it was intended by the legislature that the State Government shall have full discretion in introducing the system of trial by jury both as regards the territorial limits as well as the offences, or classes of offences, in which such trial was to be held. The State Government in issuing the notification apparently acted with a good deal of caution. This was so in view of the peculiar conditions which existed in different parts of the State. Trial by jury was more or less in the nature of an innovation.

People of the State had to be initiated into the new procedure of trial by jury. The classification made by Government with regard to the districts as also with regard to the specific offences which could be tried by jury was obviously upon the circumstances which existed in different districts and also upon the prevalence or non-prevalence of a certain type of crimes in one part of the State or the other. Introduction of the system both as regards the territory as well as the nature of offences had necessarily to be effected slowly and cautiously. It seems to us, therefore, that the classifications made by the notification in question were based on reasonable considerations. In our view, therefore, the provisions of the notification issued for the trial of the offence of dacoity by jury in the district of Bareilly, where the trial of the appellants was held, were perfectly valid and cannot be impugned on the ground that they introduced discrimination — such discrimination as is prohibited by Art. 14 of the Constitution.

(28) In the end a subsidiary point was also urged by the learned counsel. Learned counsel drew our attention to the notifications: (i) No: 2038/VII-B-1583-50 dated the 7th of March, 1952, and (ii) No: 6268/VII-B/F-1583-50 by the State of Uttar Pradesh issued on the 18th of July 1951. In substance, what was provided by these notifications was that no jury trial was to be held so far as cases of dacoity were concerned. Learned counsel contended that the effect of these notifications would be that the trial of the appellants already held and completed before the date of these notifications would become vitiated in law. We are clearly of opinion that this contention is devoid of all substance. When the trial of the appellants was held, notification No: 2749/VI-1122-24 dated August 26 1924 was in full force. The mere fact that after the conclusion of the trial of the appellants, the State Government found it necessary to alter its previous notification and provided, that dacoity cases were not to be tried by jury, can have no effect on the trial of the appellants. The new notifications would obviously govern cases which would arise in future after the date of the issue of the notifications. They cannot affect the validity of the trials already held and completed.

(29) For the reasons given above, in our judgment, there is no force in this appeal. We accordingly dismiss the appeal and confirm the conviction and sentence of both the appellants.

A/V.S.B. Appeal dismissed.

A.I.R. 1953 ALL. 129 (Vol. 40, C. N. 54)
(LUCKNOW BENCH)

CHANDIRAMANI AND C. B. AGARWALA JJ.

Mahant Har Kishan Das, Plff.-Appellant v. Satgur Prasad, Deft-Respondent.

Supreme Court Appeal No. 15 of 1950, D/- 14-9-51.

Civil P. C. (1908), Ss. 109(c), 110 — Substantial question of law — Certificate of fitness — Inference as to legal nature of property — (Constitution of India, Art. 133).

The inference as to the legal nature of a particular property, whether it is secular or debottar, is an inference of law. A substantial question of law need only be of importance between the parties and need not necessarily be of public importance. No doubt, it must be substantial, that is to say, of substance and not a question which, on the face of it, is of no force or is immaterial for the decision of the appeal.

Where the basis of the plaintiff's claim was that there was a public religious endowment by the name Sangat Bagh Baba Hazara and that the properties in dispute were endowed properties appertaining to the Sangat, the question whether Sangat Bagh Baba Hazara was a public religious charitable trust or was a private trust or was no trust at all had to be decided upon the basis of inference to be drawn from the proved facts of the case.

Held that the question of law involved was a substantial question, as the dispute related to a property in which not only the parties to the suit but a section of the public belonging to the Nihang Udasi Sect and also other members of the public who worshipped at the Sangat were interested. The case was not only of private importance but of public importance also. The case involved substantial question of law and was otherwise a fit one for appeal under S. 109(c): 54 CWN 538: 54 IA 126 Rel. on. (Paras 9, 10)

Anno: C.P.C., S. 109 N. 10; S. 110 N. 17.

Niamat Ullah and G. D. Khare, for Appellant; B. P. Misra, for Respondent.

AGARWALA J.: These are two applications for leave to appeal to the Supreme Court. They arise from a decision of a Bench of this Court in two appeals disposed of by one judgment. These two appeals were brought against a decision of the Civil Judge of Lucknow in one suit. The suit related to properties alleged to belong to a Sangat by the name of Bagh Baba Hazara. These properties mainly consisted of Bagh Baba Hazara, Bagh Suraj Kund, certain muafi villages, certain non-muafi villages and certain movable properties of the total valuation of over Rs. 5500000/-.

(2) The plaintiff's case was that the Sangat was founded by Baba Hazara, a Faqir of the Nihang Udasi Sect, that the Sangat was a public religious endowment managed by Mahants, that the first Mahant was Baba Hazara, who was succeeded by his disciple, Amriti Das, who again was succeeded by Mahant Gur Narain Das, that a bulk of the property was acquired in the name of Gur Narain Das, that the property thus acquired was either given to Gur Narain Das for the purpose of the Sangat or was acquired by him out of the profits of the previously endowed property in his possession or was dedicated by him for the purposes of the Sangat, and that Gur Narain Das was succeeded by his disciple, Har Charan Das, who was succeeded by Sant Rain Das, who, in his turn, was succeeded by Mahant Har Narain Das, who died in 1933. The plaintiff claimed that he was a disciple of Mahant Har Narain Das and was installed as the Mahant by the community of Nihang Udasi Sect and was entitled to possession over the properties as a Mahant.

(3) The defence, inter alia, was that there was no Sangat, that Bagh Baba Hazara was not a public religious endowment, that two properties Bagh Baba Hazara and Bagh Suraj Kund were acquired by Baba Hazara as his personal property and remained so up to his death and were inherited by his disciple Amriti Das, that Gur Narain Das acquired valuable personal properties which were never de-

dicated by him for a public trust, that the properties were confiscated by the British Government after the mutiny and were regranted to him as a Taluqdar in his own right with full power of alienation and that they were secular properties to which the defendant was entitled to both as the sister's son of Sant Rain Das, the last owner, and as his disciple and also on account of a family settlement arrived at between Mahant Har Narain Das and himself by which Mahant Har Narain Das reserved to himself a life interest only in the properties and acknowledged the defendant's title to reversion after Har Narain Das's death.

(4) The trial court held that there was a Sangat of Nihang Udasi Sadhus founded by Baba Hazara, situated in Bagh Baba Hazara with certain endowed properties, that it was a public religious endowment and that the properties appertaining to the Sangat were Bagh Baba Hazara and thirteen muafi villages. It further found that the plaintiff was the lawful Mahant of the Sangat and was entitled to the possession of the properties appertaining to it and that he was also entitled as heir and successor of the late Mahant Har Narain Das to his secular properties. The properties acquired by Gur Narain Das, other than the muafi villages were held to be secular properties which belonged to Gur Narain Das and after him were inherited by his heirs and successors and not by the plaintiff. The trial court, therefore, decreed the suit with regard to properties which it declared to be endowed properties and in regard to the personal properties of Mahant Har Narain Das and dismissed the suit with regard to the rest of the properties. Against that judgment there were two appeals to this Court, one by the plaintiff and the other by the defendant. These two appeals as already stated, were disposed of by one judgment by a Bench of this court.

(5) The Bench held that although there was a Sangat in existence it was not proved that it was a public religious trust and that it was not established that any property was endowed by Baba Hazara or his successors or that any property was acquired by them as endowed property. It held that Mahant Har Narain Das having, under the family settlement, obtained a life interest in the properties and the remainder having vested in the defendant, the plaintiff had no title to the properties and was merely entitled to certain movable properties personally belonging to Har Narain Das. One of the Judges constituting the Bench expressed the opinion that the Sangat might be a private religious endowment. In the result the plaintiff's appeal was dismissed and the defendant's appeal was allowed with the exception of certain properties in respect of which the parties had entered into a compromise, and with the exception of certain secular properties of Mahant Har Narain Das. The defendant's appeal having been allowed in part, the decree of the court below was varied and since the valuation of the subject-matter of the suit both in the court of first instance and in the proposed appeal was over Rs. 20,000/-, it was conceded that the case fulfilled the requirements of S. 110, Civil P. C., and Art. 133 of the Constitution and the application for leave to appeal arising out of that appeal must be granted.

(6) The other application for leave to appeal arising out of the dismissal of the plaintiff's appeal, however, stands on a different footing. There was, no doubt, a small variation even in the plaintiff's appeal inasmuch as certain properties were decreed to the plaintiff on the basis of a compromise, but it is agreed that this variation is not a variation within the meaning of S. 110, Civil P. C., and that it must be assumed that the decree is of affirmance. The property involved in this appeal is the bulk of the property and is valued at over Rs. 33,00,000/-. The question therefore, is whether in the proposed appeal to the Supreme Court arising out of the dismissal of the plaintiff's appeal a substantial question of law is involved or whether it is otherwise a case which should be certified as a fit one for appeal under Article 133(1)(c) of the Constitution. We are of opinion that a substantial question of law does arise in the proposed appeal and it should also be certified as a fit one for appeal under Art. 133 (1) (c) of the Constitution.

(7) The basis of the plaintiff's claim was that there is a public religious endowment by the name Sangat Bagh Baba Hazara and that the properties in dispute are endowed properties appertaining to the Sangat. The existence of the Sangat was found as established both by the court below as well as by the Bench of this Court. This Court, however, did not agree with the court below that the Sangat was a public religious trust.

(8) The question whether Sangat Bagh Baba Hazara is a public religious charitable trust or is a private trust or is no trust at all had to be decided upon the basis of inference to be drawn from the proved facts of the case. It was found that the enclosure known as Bagh Baba Hazara was gifted to Baba Hazara who was a Nihang Udasi Faqir about 200 years ago, that he did not execute any deed endowing this property or the property which had been acquired by him subsequently, namely Bagh Suraj Kund, but that he founded a Thakurdwara in Bagh Baba Hazara, in which Granth Sahib was placed, idols were installed and Samadhs constructed which were worshipped by the members of the public, that Sadhus came and stayed in the Bagh and held religious discourses, that they were fed free of cost and that festivals were observed and were attended by the members of the public. The learned Chief Justice observed that

> "it may be that the defendant has now no right to stop the people visiting the temple or the Thakurdwara to perform religious rites and it also may be that the defendant is bound to carry on various festivals which had been carried on in the past."

But it was held that the circumstances did not establish that it was a public religious trust. The muafi villages had been acquired by Gur Narain Das in the Nawabi rule. In respect of three of these villages, Asakhera, Dhanpur and Daulatpur, Sanads were produced. The Sanad in respect of Asakhera was by the Queen of Oudh for the purpose of expenses of Faqirs, the poor and destitutes. The Sanad in respect of Dhanpur and Daulatpur was for meeting the expenses of the Sangat and of the Sadhus who came to the Sangat and the poor. The donee was described as "Mahant" Gur Narain Das. The question was whether these grants were made personally to Gur Narain Das 'sub conditione' or whether they were made to him in his capacity as the Mahant of the Sangat for the purposes of the Sangat and, therefore, belonged to the Sangat. Gur Narain Das used to receive cash grants from the time of the Nawabs of Oudh. The object of the grants

was that the amount may be spent on the expenses of the Sadhus coming to the Sangat of Baba Hazara. The question was whether these cash grants were made to Gur Narain Das in his personal capacity or were made to him as Mahant of the Sangat and, therefore, were the property of the Sangat. Later, Gur Narain Das acquired large number of properties in three ways by means of 'supurdigi' by purchases and by mortgages. The question was whether these acquisitions were made by Gur Narain Das as Mahant of the Sangat on behalf of the Sangat or on his own personal behalf, and further the question was what the presumption would be as to the source of the consideration paid for some of these acquisitions — whether the consideration came from the trust funds or from the personal fund of the Mahant, when the Mahant mixed up the trust funds with his personal income and there was no positive evidence to prove the source from which the consideration was paid. The income of all the properties thus acquired was lumped together and out of it the expenses of the Sangat were met and no distinction was made between the income from the muafi villages and the rest of the property. Gur Narain Das and subsequent Mahants made various declarations that the income of these properties was utilised for the purposes of feeding the Sadhus who came to the Sangat and on other religious observance. At the same time there was evidence that Gur Narain Das and some of his successors lived in great pomp and show and not like ascetics and kept mistresses by whom they had children and they made alienations of the property for their personal benefit. The question was whether by the declarations and user of the property and its profits Gur Narain Das and the subsequent Mahant could be said to have made an implied endowment of the properties. To our minds all these questions are mixed questions of law and fact. They are all involved in the plaintiff's appeal. The plaintiff cannot succeed in his appeal without displacing the findings of the Bench of this Court even with regard to those matters which were decided in his favour by the Civil Judge and which mainly arose in the defendant's appeal. Without upsetting those findings he cannot possibly uphold his claim to the properties which were the subject-matter of his own appeal. In this respect common questions of law are involved in both the appeals. The question which is exclusively involved in the proposed appeal arising out of the dismissal of the plaintiff's appeal is also a mixed question of law and fact.

(9) It was held in — 'Kumar Purnendu Nath Tagore v. Sree Sree Radhakanta Jew', (54 CWN 538) that the inference as to the legal nature of a particular property, whether it is secular or debottar, is an inference of law, and leave to appeal to the Federal Court was granted. That the question of law involved is a substantial question, can admit of no doubt. A substantial question of law need only be of importance between the parties and need not necessarily be of public importance: — 'Raghunath Prasad Singh v. Deputy Commissioner of Pratabgarh', (54 IA 126). No doubt, it must be substantial, that is to say, of substance and not a question which, on the face of it, is of no force or is immaterial for the decision of the appeal. In this sense the questions involved in the proposed appeal are undoubtedly substantial. The dispute relates to a property in which not only the parties to the suit but a section of the public belonging to the Nihang Udasi Sect and also other members of the public who worship at the Sangat are interested. It can be said that the case is not only of private importance but of public importance also. On the whole, therefore, we think that this application should also be granted.

(10) We, therefore, certify that the proposed appeal which arises out of the decree allowing the defendant's appeal fulfils the requirements of S. 110, Civil P. C., and Article 133 of the Constitution and is a fit one for appeal. We further certify that the proposed appeal which arises out of the decree dismissing the plaintiff's appeal also satisfies the requirements of S. 110, Civil P. C., and Article 133 of the Constitution and involves substantial questions of law and the case is otherwise a fit one for appeal under S. 109(c), Civil P. C., and Article 133(1)(c) of the Constitution. We make no order as to costs of these applications.

A/D.H. Applications allowed.

A.I.R. 1953 ALL. 131 (Vol. 40, C. N. 55)

MALIK C. J.

Shiam Lal, Appellant v. Rex, Respondent.

Criminal Appeal No. 1180 of 1949, D/- 26-9-1951.

(a) Evidence Act (1872), S. 9 — Evidence of identification witnesses — Evidentiary value — Reduction to arithmetical formula according to percentage of mistakes is not convincing — Appreciation of such evidence — Principles.

Practice of reducing the evidentiary value of identifying witnesses to an arithmetical formula based on the result of the identification parade, is not convincing. At the identification parade in jail the accused are mixed up with several others and a witness is required to pick out the man whom he claims to have seen committing the crime. The result of the identification parade is not substantive evidence in the case but can be used to corroborate or contradict the statement made by the witness in Court. It, however, provides a useful test as it can be found out whether from the impressions that the witness had made of an accused person at the place of occurrence he can pick out those, who, it is alleged, had committed the crime. The evidence against the accused must be the evidence given by a witness in the witness-box. The identification parade in jail is useful as corroborative evidence as the mere fact that a person is in the dock as an accused person is likely to influence the mind of a witness and make him think that the person in the dock was the person he had seen committing the crime and thus reduce the evidentiary value of the evidence given in Court. If a witness knows an accused person from before and claims to have seen him committing the crime, the question merely is of accepting or rejecting the testimony. But where a witness did not know an accused person from before and has identified the accused as the person he had seen committing the crime, the question arises how far such evidence can be relied upon. There is a possibility of even an honest witness making a mistake. The mistake may be due to defective observation or some misleading likeness or the witness may have

seen the accused elsewhere but the impressions in his mind may have got mixed up. Where, therefore, the only evidence against the accused is identification evidence such evidence has to be taken with a certain amount of caution. If a witness has made a number of mistakes that establishes that his power of observation is either defective or the likelihood of his making a mistake is greater, but the margin of error becomes less and less as the number of witnesses identifying an accused person increases. It has, therefore, been held that it is not safe to rely on the identification evidence of a solitary witness and the larger the number of such witnesses the chances of a wrong person being identified gets minimised. Also that mistakes made by a witness in identification detracts from the value of his testimony: AIR 1942 All 339 Not approved.
(Para 4)

Anno: Evidence Act, S. 9 N. 5.

(b) Penal Code (1860), S. 395 — Sentence — Dacoity on increase in State — Deterrent punishment is called for — 7 years sentence held not excessive. **(Para 11)**

Anno: Penal Code, S. 395 N. 5.

B. S. Darbari and Krishna Shanker, for Appellant; Shri Ram, Deputy Government Advocate, for Respondent.

JUDGMENT: The appellants have been convicted under s. 395, I.P.C., and sentenced to seven years' rigorous imprisonment. A dacoity was committed on the night between the 11th and 12th February 1949, at the house of Zahari. A report of the incident was lodged at the Police Station, Zafrinagar at 9'clock in the morning of 12th February 1949. The report was made by Zahari through Prasadi Chaukidar of the village. In the report it was mentioned that there were fifteen or sixteen dacoits who were armed with guns, spears, lances and lathis etc. A list of the property that was looted, the valuation of which came to about Rs. 2,000/-, was given to the police. Investigation was started and some days after the occurrence the appellants were arrested and were committed to stand their trial in the court of session under s. 395, I.P.C.

(2) After the conviction by the learned Sessions Judge the appellants have come up to this Court in appeal and it is urged on their behalf that on the evidence their guilt was not made out. The first two appellants Aidal and Babu are represented by Sri Bhagwan Swarup Darbari. No looted property was recovered from the houses of these two appellants. The evidence against them consists entirely of identification by witnesses. Aidal was identified by five witnesses and Babu by three. On 11th March 1949, these two accused along with Azimullah, appellant No. 4, were put up for identification in the District Jail at Budaun. At the time that the identification was held Aidal said that Bhim Singh was his sister's husband and knew him from before and the Station Officer had shown him to the other witnesses. Azim Ullah accused said that he was by profession a barber and he had several times visited the houses of the witnesses in marriages and on other occasions. Azim Ullah is a resident of village Raj Thal, Babu of village Dinaura while Aidal is a resident of village Bazpur. The dacoity was committed in village Budhaiti. So none of these three accused were residents of the village where the dacoity had been committed. The village of Budhaiti is in the circle of Police Station Zafrinagar while Raj Thal is in the circle of Police Station Islamnagar. Dniaura is in the circle of Police Station Gunnaur and Bazpur is in the circle of the same Police Station.

(3) Seven witnesses were asked to identify these accused and the accused were mixed up with thirty others. The result of the identification was as follows:

The accused Aidal was identified by Zahiri, Srimati Rewati, Lakhpat, Chetram and Bhim Sen.

Babu accused was identified by Srimati Rewati, Lakhpat and Bhim Sen.

Azim Ullah accused was identified by Zahiri, Chetram, Jamal Chaukidar and Parshadi.

At the time of identification of the accused Zahiri made one mistake. Srimati Rewati made one mistake, Chetram made two mistakes, Bhim Sen made one mistake and the other witnesses made no mistakes.

(4) The learned Judge worked out the percentage and he gave to the witnesses who had made no mistakes, for example, Lakhpat 100 per cent marks and he similarly worked out percentages for other witnesses. Learned counsel has relied on a decision of this Court in —'Emperor v. Debi Charan', AIR 1942 All 339, that unless the percentage thus worked out comes to more than 80 per cent it cannot be said that a witness is a reliable witness. This practice of reducing the evidentiary value of witnesses to an arithmetical formula based on the result of the identification parade, I must say with great respect, does not appeal to me. At the identification parade in jail the accused are mixed up with several others and a witness is required to pick out the man whom he claims to have seen committing the crime. The result of the identification parade is not substantive evidence in the case but can be used to corroborate or contradict the statement made by the witness in court. It, however, provides a useful test as it can be found out whether from the impressions that the witness had made of an accused person at the place of occurrence he can pick out those, who, it is alleged, had committed the crime.

The evidence against the accused must be the evidence given by a witness in the witness-box. The identification parade in jail is useful as corroborative evidence as the mere fact that a person is in the dock as an accused person is likely to influence the mind of a witness and make him think that the person in the dock was the person he had seen committing the crime and thus reduce the evidentiary value of the evidence given in court. If a witness knows an accused person from before and claims to have seen him committing the crime, the question merely is of accepting or rejecting the testimony. But where a witness did not know an accused person from before and has identified the accused as the person he had seen committing the crime, the question arises how far such evidence can be relied upon. There is a possibility of even an honest witness making a mistake. The mistake may be due to defective observation or some misleading likeness or the witness may have seen the accused elsewhere but the impressions in his mind may have got mixed up.

Where, therefore, the only evidence against the accused is identification evidence such evidence has to be taken with a certain amount of caution. If a witness has made a number of mistakes that establishes that his power of observation is either defective or the likelihood of his making a mistake is greater, but the margin of error becomes less & less as the number of witnesses identifying an accused person increases. It has, therefore, been held that it is not safe to rely on the identification evidence of a solitary witness and the larger the number of such witnesses the chances of a wrong person being identified gets minimised. Also that mistakes

made by a witness in identification detracts from the value of his testimony.

(5-10) His Lordship considered the evidence against accused and agreed with the trial court in this appreciation, and then concluded.

(11) It has lastly been urged on behalf of the appellants that the sentence of seven years should be reduced to five years. Unfortunately dacoity is a crime that is on the increase in the State and the time has come when if a case is established against a dacoit he should get a deterrent sentence. The sentence of seven years is not too excessive.

(12) I see no force in this appeal and dismiss it.

A/R.G.D. Appeal dismissed.

A.I.R. 1953 ALL. 133 (Vol. 40, C. N. 56)

MALIK C. J. AND MUSHTAQ AHMAD J.

Raja Ram and others, Applicants v. State, Respondent.

Criminal Misc. Case No. 2558 of 1950, D/- 11-12-1950.

(a) Constitution of India, Art. 134(1)(c) — Question as to appreciation of evidence on record.

A question as to the weight to be attached to the evidence of witnesses on the record in a criminal case cannot be deemed to be sufficient ground for allowing leave under Art. 134(1)(c). (Para 3)

(b) Criminal P. C. (1898), Ss. 297 and 367 — Charge to jury and judgment — Comparison.

In a charge to the jury the Judge's duty is to sum up the entire material on the record and he is not called upon to give his own conclusions. A judgment, however, is not the same thing as a charge to the jury. There the Judge is required to give his findings on the points at issue and his reasons therefor. (Para 5)

Anno: Cr. P. C., S. 297 N. 2; S. 367 N. 4.

Suresh Narain Mulla, for Applicants; Government Advocate, for State.

MALIK C. J.: This is an application under Article 134(1)(c) of the Constitution for leave to appeal to the Supreme Court. The applicants were convicted under S. 302, I. P. C., and each of them was sentenced to death by the learned Sessions Judge of Faizabad on the 18th April 1950. The charge against the applicants was that on the 10th October 1949 they had murdered one Chhutkun at about sunset. The evidence against the applicants consisted of the statements of eight persons who claimed that they were eye-witnesses to the murder. There was also the dying declaration of the deceased made before the village Sarpanch Dubri Sharma and Asharam Panch. The learned Sessions Judge believed the evidence, and was satisfied that the guilt had been fully brought home to the accused. On appeal, a Bench of this Court considered the evidence and agreed with the learned Sessions Judge that the evidence of the prosecution witnesses was reliable and the accused had been satisfactorily proved to have been guilty of the offence with which they had been charged.

(2) The learned counsel for the applicants has laid great stress on two points, and his submissions are that the dying declaration and the evidence of the eye-witnesses should not have been accepted. The reason suggested why the evidence of the eye-witnesses should not have been accepted is that these eye-witnesses did not mention the names of the assailants to any one till Chhutkun had made his statement to Dubri Sharma, the Sarpanch. The suggestion is that this is most unnatural conduct on the part of the eye-witnesses and it was made more unnatural by the admission of Ram Raj who said that the witnesses, when they mentioned to him that Chhutkun had been murdered, did not give him the names of his assailants. Ram Raj was the maternal grand-father of a boy Kamla and it was said that in connection with the management of the property of the minor Kamla, a dispute arose and Chhutkun deceased was the Pairokar of Ram Raj, and, as a result of this enmity, Chhutkan was murdered. The learned Judges have noticed this argument, and the objection raised by learned counsel is that, when the witnesses did not suggest any reason why they did not mention the names of the assailants earlier than the time given by them, it was not open to the learned Judges to speculate and to suggest reasons for this unnatural conduct on the part of the witnesses. Learned counsel has suggested that, if necessary, the witnesses might have been recalled under S. 540, Criminal P. C. If the learned Judges hearing the appeal had thought that this conduct of the witnesses was such that it would 'per se' make their evidence unworthy of credit, they would have probably investigated the matter further. As regards the argument advanced by learned counsel that the evidence of the witnesses should have been rejected on the ground that they had not mentioned the names of the assailants earlier, the learned Judges had merely suggested some reasons why they might not have given the names at an earlier stage; the learned Judges could not have intended to lay down that, in the absence of the explanation as suggested by them, they would have rejected the testimony of the eye-witnesses.

(3) As regards the dying declaration, the question of the weight to be attached to it was raised. It has been said that the deceased made the dying declaration one and a half hours after having received the injuries, and immediately after he gave the five names to the Sarpanch and the Panch, he became unconscious. It is suggested that the man must have been on the point of losing his senses and in such circumstances his dying declaration could not be relied upon. This also is a question of the weight to be attached to the dying declaration. Both the questions raised by learned counsel really amount to the weight to be attached to the evidence on the record, which, to our minds, cannot be deemed to be a sufficient ground for allowing leave under Art. 134(1)(c).

(4) The learned counsel for the appellant has suggested that the words 'fit case' in Article 134(1)(c) should be given the same meaning as in S. 3, Criminal Appeal Act of 1907, 7 Edw. 7. The words 'fit case' in that section of the Act are followed by certain other words which clearly define the meaning intended to be attached to the words 'fit case'. The circumstances in England are entirely different from the circumstances in this country. In England it is the trial Judge who gives leave at the time of pronouncing the sentence, and it is only when he has refused to give leave or the Attorney-General has not certified the case to be a fit one that the Court of Criminal Appeal can be moved for leave. In India, the High Courts were final Courts of Appeal in

all criminal matters before the 26th January 1950. Though the Judicial Committee had in some exceptional cases granted special leave, it had remarked more than once that it was not a Court of Criminal Appeal against convictions recorded by the High Courts in India. No appeal would have lain to the Supreme Court if there was no provision in the Constitution for an appeal to that Court. As the Supreme Court could not claim the right to entertain appeals on the ground that it was exercising the prerogative right of the King, it was necessary to make special provision in the Constitution for appeals to the Supreme Court in criminal matters. There was an exception made in those cases where the High Courts had reversed an order of acquittal and sentenced the accused to death or had withdrawn the case from the subordinate court to the High Court and had convicted the accused and sentenced him to death in those cases an appeal lay as a matter of right. In all other cases the High Court has to certify the case as a 'fit' one for appeal. We do not think that the intention was to alter the old established practice and to make the Supreme Court a court of Criminal Appeal so that it may exercise jurisdiction materially different from the jurisdiction exercised by the Judicial Committee of the Privy Council. The Judicial Committee entertained Criminal Appeals only where there was some contravention of the rules of natural justice and they were satisfied that it had led to miscarriage of justice. On the question of mere weight to be attached to the evidence of witnesses, no appeal used to be entertained by the Privy Council, and we do not think that an appeal on that ground would be entertained by the Supreme Court either.

(5) The learned counsel has urged that in all cases where a judgment contains matters, which, if included in a charge to the jury, would amount to a misdirection and vitiate their verdict, leave to appeal to the Supreme Court should be granted. We do not think there is any substance in this argument. In a charge to the jury, the Judge's duty is to sum up the entire material on the record and he is not called upon to give his own conclusions. A judgment, however, is not the same thing as a charge to the jury. There the Judge is required to give his findings on the points at issue and his reasons therefor.

(6) There is, therefore, no force in this application and it is dismissed.

A/V.B.B. Application dismissed.

A.I.R. 1953 ALL. 134 (Vol. 40, C. N. 57)

(LUCKNOW BENCH)

KIDWAI J.

Mst. Thakur Dei, Plaintiff-Appellant v. Dharam Raj & others, Defendants-Respondents.

Second Appeal No. 476 of 1946, D/- 28-3-1952.

(a) Contract Act (1872), S. 11 — Contract by minor — Subsequent avoidance at the option of minor — Minor cannot enforce promise therein in his favour.

A, a Hindu widow relinquished the property inherited by her in favour of her reversioners in consideration of certain amount and a promise to receive certain amount every month for maintenance. She sued for declaration that the relinquishment was void as she was minor on the date of its execution. The deed was avoided on condition that A returned the consideration received by her which she did not do. Subsequently A sued for maintenance under the deed;

Held, that as the deed was adjudged to be void in a previous suit at the instance of the minor widow, no claim could be made under it either by the minor or by the adult contracting party: 30 Cal 539 (PC), Relied on; AIR 1927 Lah 24, AIR 1934 Lah 480, 30 All 63, AIR 1917 Mad 630 FB and 19 IC 610 (All), Disting. (Para 7)

Anno: Cont. Act, S. 11 N. 2.

(b) Equity — Principles — Person claiming equity must do equity.

An equitable claim can only have effect given to it if it is shown that there is no default by the person claiming equity. If the person claiming equity has not fulfilled the obligation imposed upon him, he cannot claim that he is being inequitably dealt with, if the law is enforced and no equitable consideration is shown.

A, a Hindu widow, relinquished her interest in favour of her reversioners on condition that they gave her certain amount every month for maintenance. She avoided the transaction on the ground of her minority and the property was decreed to her provided she paid back certain amount received by her. She failed to pay the amount with the result that the property remained with the reversioners. A claimed maintenance on grounds of equity:

Held that the claim could not be allowed as the state of affairs continued only because of her own default. (Para 8)

(c) Hindu Law — Widow — Maintenance — Right dependent on contract — Effect of her remarriage.

A widow who inherits her husband's property is not entitled to maintenance. If she makes a transfer of that property or if she relinquishes that property, then it depends upon the contract whether she gets maintenance or not from the transferee or the reversioner in whose favour the relinquishment has been made. If she is entitled to maintenance under the contract, it is immaterial that she had remarried or had become unchaste. She would still be entitled to continue to receive that maintenance. (Para 9)

Suresh Chandra, for Appellant; H. W. Misra holding brief of Hyder Hussain, for Respondents, 1 to 4.

REFERENCES: Courtwise/Chronological/ Paras

('03) 30 Ind App 114: (30 Cal 539 PC)	7
('08) 30 All 63: (5 All LJ 14)	6
('13) 19 Ind Cas 610: (35 All 370)	6
('27) 99 Ind Cas 318: (AIR 1927 Lah 24)	6
('35) 16 Lah 1: (AIR 1934 Lah 480)	6
('17) 40 Mad 308: (AIR 1917 Mad 630 FB)	6, 7

JUDGMENT: Aditya Prasad died possessed of some immoveable property. He left no issue but he left a widow Thakur Dei who succeeded to his property in May 1921. She obtained mutation of names in her favour. Thereafter on the 22nd of May, 1925, Thakur Dei in consideration of a sum of Rs. 2,000/- paid in cash and in lieu of a promise to pay a monthly maintenance of Rs. 5/- contained in the document, executed a deed of relinquishment in favour of Dharam Raj, defendant No. 1, Jitau, father of

respondents Nos. 2 to 4, Khelan, father of respondents Nos. 5 to 9 and Ram Lal. It is agreed that these four persons were at the time nearest reversioners of Aditya Prasad. Ram Lal died and his rights were inherited by Dharam Raj and Jitau.

(2) In 1933 Thakur Dei instituted a suit for possession of the property which she had relinquished on the allegation that she was then a minor and that therefore the deed of relinquishment was void. Khelan did not contest the suit. The other persons did contest. Eventually it was found that Thakur Dei was a minor at the date when she executed the deed of relinquishment which was, therefore, void. The Court however, ordered that Thakur Dei should refund a sum of Rs. 1,500/- to Dharam Raj and Jitau before she could be entitled to possession of three-quarters of the property covered by the deed of relinquishment. With regard to one-quarter, which fell to the share of Khelan a decree for immediate possession was passed in favour of Thakur Dei. Thakur Dei never paid the sum of Rs. 1,500 and consequently she did not obtain possession of three-quarters of the property.

(3) On the 30th of May, 1945, Thakur Dei instituted the suit out of which this appeal arises claiming a sum of Rs. 135/- as maintenance allowance for three years from Dharam Raj and the sons of Jitau. She also impleaded the sons of Khelan but stated in the plaint that they were impleaded as 'pro forma' defendants and no claim was made against them. The maintenance was claimed at the rate of Rs. 3/12/- per month, Re. 1/4/- per month being the share of Khelan's branch, which was not claimed.

(4) The Munsif Utraula, District Gonda, framed five issues. He found that the plaintiff was not entitled to any maintenance under Ex. 1 or under the Hindu Law. He further found that the agreement (Ex. 1) had been superseded by the decree in the case instituted by Thakur Dei for possession of the property. He gave findings on other issues also but as will appear presently, it is not necessary to enter into them. The suit was accordingly dismissed.

(5) Thakur Dei appealed. The learned Additional Civil Judge of Gonda upheld the findings of the trial Court on the two points mentioned and dismissed the appeal. She has come up to this Court in second appeal. Several points have been raised in it namely,

" (1) that the provision of Ex. 1, the deed of relinquishment, which is for the benefit of the minor is enforceable at her instance;

(2) that at any rate since Thakur Dei never got back possession of the property she is in equity entitled to the maintenance made payable out of it in consideration for the deed of relinquishment; and

(3) that the lower appellate Court has erred in not giving its decision on other points raised in the case."

(6) For the first proposition, reliance is placed upon — 'The Firm Bhola Ram v. Bhagat Ram', 99 Ind Cas 318 (Lah); — 'Abdul Ghaffar v. Piare Lal Salig Ram', 16 Lah 1; — 'Meghan Dube v. Pran Singh', 30 All 63; — 'Raghava Chariar v. Srinivasa Raghava Chariar', 40 Mad 308 FB and — 'Walidad Khan v. Janak Singh', 19 Ind Cas 610. In all these cases it has been laid down that a promise may be made to a minor who may, therefore, enforce that promise even though the contract which he entered into and in which the promise is contained is void.

(7) Whatever may be said of these decisions, in view of the decision of their Lordships of the Judicial Committee in — 'Mohori Bibee v. Dharmodas Ghose', 30 Ind App 114 (PC), which is differentiated in these cases, it must be held that none of these cases applies to the present appeal. In all these cases, the contract itself was sought to be enforced by the minor for his benefit and it appears that the Courts were occupied more by equitable considerations than by the principle laid down in the Contract Act and the Transfer of Property Act. But the principal thing to notice is that the whole contract was upheld and enforced and in none of these cases was the contract avoided in so far as the adult contracting party was concerned and enforced in so far as the minor was concerned. In the present case, in a previous suit at the instance of the minor the contract has been adjudged to be void. That being so, no claim could be made under it either by the minor or by the adult contracting party. It is to be noticed in this connection that what would happen in such an eventuality was left undecided in the Full Bench case of — 'Raghava Charier v. Srinivasa Raghava Chariar', 40 Mad 308, in which Ayyangar, J. says at page 327:

"I am therefore inclined to hold that a payment of money for the purchase of goods or an advance of money as a loan, by a minor, passes the property in the money; whether it passes absolutely or whether the minor can avoid the transaction at his option is a question which it is unnecessary to consider."

In the present case, that question has been considered in the previous litigation and the contract has been avoided at the option of the minor. It cannot, therefore, be enforced at the instance of that very person who had avoided it.

(8) Coming now to the plea based on equity, that can only have effect given to it if it is shown that there is no default by the person claiming equity. If the person claiming equity has not fulfilled the obligation imposed upon him, he cannot claim that he is being inequitably dealt with, if the law is enforced and no equitable consideration is shown. In the present case the decree passed in the previous suit set aside the contract but directed that Thakur Dei should pay the consideration which she had already received before she could get back the property. She failed to make the payment as directed by the decree and it is for this reason that the property has not been returned to her. The property is held by the respondents Nos. 1 to 4 not under the contract (Ex. 1) which is void but because of the default of Thakur Dei in making payment. Thus she is the owner but not entitled to actual possession because she has not refunded the consideration which she received for the void transfer and though Court judged the transfer to be void it directed her to repay. She cannot claim to be entitled to any allowance because the property still continues in the possession of respondents 1 to 4 and this state of affairs exists by reason of her own default.

(9) With regard to the issues that were not disposed of by the lower appellate Court, no grievance can be made by Thakur Dei. What the Court has found is that Thakur Dei is not entitled to pay maintenance under the Hindu Law because she succeeded to the property left by her deceased husband. A widow who inherits her husband's property is not entitled to maintenance. If she makes a transfer of that property or if she relinquishes that property, then it depends upon the contract whether she gets maintenance or not from the transferee or the reversioner in whose favour the relinquish-

ment has been made. There can be no doubt that the view of the lower Court on this aspect of the matter is perfectly in accordance with law. Thakur Dei was thus entitled in the present case to maintenance not as a Hindu widow but because she had a claim under Ex. 1. It was, therefore, wholly unnecessary to decide whether she has remarried or she had become unchaste and the Court below was quite right in saying that if she was entitled to maintenance under Ex. 1 it was immaterial that she had remarried or had become unchaste. She would still be entitled to continue to receive that maintenance. It is only because the lower appellate Court has agreed with the trial Court that Thakur Dei is not entitled to maintenance under Ex. 1 that the suit has been dismissed. As I have already stated she can base no claim under it on equitable considerations.

(10) This appeal, therefore, fails and is dismissed with costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 ALL. 136 (Vol. 40, C. N. 58)

P. L. BHARGAVA J.

Sapattar Singh, Applicant v. State.

Criminal Revn. No. 903 of 1951, D/- 28-2-1952.

Evidence Act (1872), S. 114, Illus. (a) — Presumption under — Explanation of accused.

The presumption under S. 114, illustration (a) can be raised only if the person found in possession is unable to account for his possession. Three she-buffaloes belonging to the complainant were stolen. One M saw one of the three she-buffaloes tied in the accused's 'gher' and informed the police about it; and the Sub-Inspector of police recovered the she-buffalo from inside the accused's gher. The accused admitted that the she-buffalo was recovered from inside the 'gher'; but he alleged that he had not kept her there, that she might have been tied there by somebody and that he had no knowledge about it. According to the evidence available on the record, the 'gher' was open and accessible to everyone. It had not been established beyond doubt that the accused alone was in possession of this 'gher' and as such of the she-buffalo kept therein.

Held that in the circumstances the possibility of some person other than the accused putting the she-buffalo inside the gher unnoticed was not wholly ruled out. Even if the explanation offered by the accused was not proved by any convincing evidence, it could have been considered as probable and reasonably true, and sufficient to raise a doubt in the mind of the Court as to the guilt of the accused. It was for the prosecution to establish all the circumstances upon which a presumption could be raised under S. 114, illustration (a), and there was no question of burden being shifted on to the accused at any stage. He was only bound to account for his possession and offer an explanation which might reasonably be true. The presumption under S. 114, illustration (a) could and should not have been raised in the circumstances of the case. (Paras 8, 9)

Anno: Evid. Act, S. 114 N. 7.

S. S. Dhawan, for Applicant; S. K. Dongre, for the State.

ORDER: This is an application in revision by Sapattar Singh, son of Sanmukh Singh, a resident of village Tabar, P. S. Nakur, in the district of Saharanpur. The applicant was convicted by a Magistrate of the first class of Saharanpur for an offence punishable under S. 411, Penal Code and he was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 100/- or, in default of payment of fine, to undergo two weeks' further rigorous imprisonment. Against his conviction and sentence the applicant filed an appeal in the court of the Sessions Judge of Saharanpur, who upheld the conviction as well as the sentence. Now, the applicant has filed this revision.

(2) It has been found by the courts below that three she-buffaloes belonging to the complainant, Kundan, were stolen in the night between the 29th and the 30th September 1949; that on the 12th October 1949, Malkhan Singh, P. W., saw one of the three she-buffaloes tied in the applicant's 'gher' and informed the police about it; and that the Sub-Inspector of Police recovered the she-buffalo from inside the applicant's 'gher'.

(3) After the theft was discovered an alarm was raised the same night and a search for the she-buffaloes was started but they could not be traced. No report of the theft was, however, lodged with the police until the 11th October 1949. As a result of the investigation which followed the recovery, the applicant was prosecuted under Ss. 380 and 411, I.P.C. The Magistrate acquitted him of the charge under S. 380 and convicted him under S. 411, I.P.C.

(4) The applicant admitted that the she-buffalo was recovered from inside the 'gher'; but he alleged that he had not kept her there, that she might have been tied there by somebody and that he had no knowledge about it.

(5) There is nothing on the record to show that the applicant had kept the she-buffalo there, and, from the fact that the she-buffalo was recovered from inside the 'gher' of the applicant, the courts below have raised a presumption, under S. 114, illustration (a), Evidence Act, that the applicant was in possession of the she-buffalo and had received the same knowing it to be stolen property. Evidently, the courts below did not consider the explanation offered by the applicant sufficient.

(6) Learned counsel for the applicant has, in this revision, contended that having regard to the circumstances of the case no presumption under S. 114, illustration (a), Evidence Act, could or should have been raised. He has pointed out that, according to the evidence available on the record, the 'gher' was open and accessible to everyone; and in support of this contention reliance has been placed upon the facts found by the courts below that Malkhan Singh, while passing by the 'gher', had noticed the she-buffalo tied inside it and that the Sub-Inspector was able to recover the same. He has also pointed out that the 'gher' was practically abandoned; that it was not alleged that the Sub-Inspector had, before recovering the she-buffalo, to make any effort to have the 'gher' opened; and that a bad character occupied the 'gher' adjoining the gher from which the she-buffalo was recovered.

Reference has already been made to the findings of fact recorded by the courts below. It appears from the evidence that the 'gher' from where the she-buffalo was recovered, was at a distance of about two furlongs from the house of the applicant, and that it was not being used

by the applicant or anybody else. The fact that Malkhan Singh was able to see the she-buffalo tied inside the 'gher' goes to show that it was open. In the recovery list, the 'gher' has been described as a thatched 'kotha'; consequently, unless it was open, what was there inside could not be seen by a person passing by the 'gher'. Further, if the 'gher' was not being used, it was hardly necessary to close it.

It also appears from the evidence that adjoining the 'gher' from where the she-buffalo was recovered there is the 'gher' of one Sona, who is said to be a bad character. The omission on the part of the investigating officer to prepare a site plan is significant and the applicant can take advantage of it. In the circumstances, stated above, the possibility of some person other than the applicant putting the she-buffalo inside the 'gher' unnoticed is not wholly ruled out.

(7) Learned counsel holding the brief of the Government Advocate has pointed out an observation in the judgment of the court below to the effect that the accused's relations were nearby in the plots and argued that if any stranger had taken the she-buffalo inside the 'gher' the relations of the applicant must have seen him and protested. There is nothing on the record to show who these relations were. The evidence on the record only shows that some relations of the applicant were cutting grass in the fields. How far away those fields were and whether the persons in the fields were seated in a position so as to be able to notice the entrance door of the 'gher' and the persons entering through it, is not at all clear from the evidence.

(8) The presumption under S. 114, illustration (a), Evidence Act, can be raised only if the person found in possession is unable to account for his possession. In this case, it has not been established beyond doubt that the applicant alone was in possession of this 'gher' and as such of the she-buffalo kept therein. It appears from the evidence on the record that the applicant has got a father and two brothers and that all of them live together and have joint cultivation. In view of the evidence just referred to, it is difficult to hold that the applicant alone is the owner in possession of the 'gher', from where the she-buffalo was recovered. Even if we assume that the applicant alone was in possession of the gher, his explanation that the she-buffalo might have been put in the 'gher' by somebody unnoticed under the circumstances mentioned above, cannot be ruled out as wholly unreasonable or untrue or impossible.

(9) Even if the explanation offered by the applicant were not proved by any convincing evidence, it could have been considered as probable and reasonably true, and sufficient to raise a doubt in the mind of the Court as to the guilt of the applicant. It was for the prosecution to establish all the circumstances upon which a presumption could be raised under S. 114, illustration (a), Evidence Act, and there was no question of burden being shifted on to the applicant at any stage. He was only bound to account for his possession and offer an explanation which might reasonably be true. The contention put forward on behalf of the applicant that the presumption under S. 114, illustration (a), Evidence Act, could and should not have been raised in the circumstances of this case must, therefore, be upheld.

(10) If the presumption under S. 114, illustration (a), Evidence Act, cannot be raised in the circumstances of this case, there is no other evidence on the record on which the conviction of the applicant under S. 411, Penal Code, can be rested. In this view of the matter, this revision is allowed, the conviction of, and the sentence imposed upon the applicant are set aside. The applicant, who is on bail, need not surrender. The bail bonds executed by him are cancelled. The fine, if paid, will be refunded.

B/D.H. Revision allowed.

A.I.R. 1953 ALL. 137 (Vol. 40, C. N. 59)

P. L. BHARGAVA J.

Jai Ram and another, Convicts-Applicants v. State.

Criminal Revn. No. 551 of 1951, D/- 26-2-1952.

Criminal P. C. (1898), S. 350A — Proceedings — Meaning of — Non-compliance with section — Effect — (Words and Phrases — Proceedings).

In order to save the order or the judgment of the Bench from being invalid under S. 350A, the Magistrates constituting the Bench ought to have been present on the Bench throughout the proceedings. The expression 'proceedings' with reference to a case, would imply taking of steps in connection with the further progress of the case. When a case is listed for hearing and the case is taken up by the court and an order is made in the case, it would be proceedings in the case. It is not possible to confine the word 'proceedings' to the recording of evidence only. (Para 12)

Where the Magistrates constituting the Bench who pass the judgment have not been present throughout the proceedings, the judgment is not protected by S. 350A and must be held invalid. (Paras 14, 15)

Anno: Cri. P. C., S. 350A N. 4.

B. C. Saxena, for Applicants; S. K. Dongre, Brief Holder for the Asst. Govt. Advocate, for the State.

ORDER: This is an application in revision filed on behalf of Jairam and Satyaram, who are own brothers and were convicted by the Bench Magistrates of Bhogaon, in the district of Mainpuri, for offences punishable under ss. 147, 452 and 323, I.P.C., and each of them was sentenced to different terms of imprisonment and fine. On appeal, the Assistant Sessions Judge of Mainpuri set aside the conviction of the applicants under s. 147, I.P.C. but upheld their conviction under ss. 452 and 323 I.P.C. The applicants have now come up to this Court in revision.

(2) On behalf of the applicants, the first point urged in this revision is that the Bench Magistrates, who delivered the judgment, were not present on the Bench throughout the proceedings. A reference to the order sheets bears out this contention of the applicants' learned counsel. The case was transferred to the Bench Magistrates on the 21st January 1950. When this case was taken up by the Bench Magistrates on the 15th March 1950 the Magistrates present on that date were Dr. Janki Prasad Misra and Chaudhri Sheoraj Singh. On that date, the statement of certain witnesses were recorded and the other witnesses being absent the case was adjourned to the 5th April 1950. On the last mentioned date, only the Magistrate Dr. Janki Prasad Misra was present and Chaudhri Sheoraj Singh, Magistrate was absent. The order-sheet of this date goes to show that as the

quorum was not complete, the case was adjourned. The order-sheet also goes to show that the quorum prescribed for this Bench was of two magistrates. The case was then adjourned to April 20, 1950 and the case had to be adjourned to the 25th of April 1950 for want of a quorum. On the 25th April 1950, all the three magistrates who constituted the Bench namely Dr. Janki Prasad Misra, Chaudhri Sheoraj Singh and Chaudhri Bijai Singh were present. Certain witnesses were produced and cross-examined and the case was adjourned for the recording of further evidence to the 10th May 1950. On the order-sheet, against the date 25th April 1950, there is a note showing that the accused persons did not claim a de novo trial, apparently in view of the fact that the constitution of the Bench had been changed.

(3) On the 10th May 1950, the case had to be adjourned for want of quorum to the 17th May 1950. On the last mentioned date again the case had to be adjourned for want of quorum. But it is to be noted that on this date Satyaram accused was absent and his absence was excused by an order made by Dr. Janki Prasad Misra who was present on the bench.

(4) When the case was taken up on the next date of hearing, namely, the 1st June 1950, it appears from the order-sheet that the constitution of the bench was again changed and the bench so constituted was described as "Jadid Bench". The bench magistrates present on that date were Dr. Janki Prasad Misra and Chaudhri Bijai Singh. On this date also, a note has been made on the order-sheet on behalf of the accused persons stating that they did not want to claim a 'de novo' trial. On the 14th June 1950, again the quorum was not complete and only Dr. Janki Prasad Misra was present and an order adjourning the case awaiting the receipt of the report regarding an examination of the medical witness was passed. On the next date of hearing i.e. on the 29th June 1950, the Bench Magistrates present were Dr. Janki Prasad Misra and Chaudhri Bijai Singh and the case had to be adjourned again as the report about the examination of the medical witness was not received. On the same date, an order was made by the Bench directing the summoning of the injury register from the hospital under s. 540, Criminal P. C.

(5) When the case was taken up next on the 13th July 1950 it appears that all the three Bench Magistrates were present. On this date again, a note was made on the order sheet on behalf of the accused persons that they did not want to claim a de novo trial. The case had to be adjourned as the report about the examination of the medical witness had not been received. On the 19th July 1950, which was the next date of hearing the bench magistrates present were Dr. Janki Prasad Misra and Chaudhri Sheoraj Singh. On this date, the case was adjourned for the recording of the defence evidence to the next date of hearing viz. the 27th July 1950. On the last mentioned date, the Bench magistrates were Dr. Janki Prasad Misra and Chaudhri Sheoraj Singh. After the hearing, the case was adjourned to the next date viz. the 31st July 1950 for delivery of judgment. Judgment was not delivered on the 31st July as the quorum was not complete. The judgment was delivered on the 17th August 1950 by Dr. Janki Prasad Misra and Chaudhri Sheoraj Singh.

(6) Learned counsel for the appellant has contended that as Chaudhri Sheoraj Singh who had delivered the judgment along with Dr. Janki Prasad Misra was not present on the Bench throughout the proceedings the judgment is invalid, and as such it should be set aside.

(7) Learned counsel holding the brief of the Government Advocate has urged that Ch. Sheoraj Singh was present on the material dates on which the evidence in the case was recorded.

(8) Learned counsel for the applicants has relied upon the provisions contained in s. 350A, Criminal P. C. which is in these terms:

> "No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which such order or judgment is passed is duly constituted and the Magistrates constituting the same have been present on the Bench throughout the proceedings."

The section deals with the effect of the change in the constitution of a Bench of Magistrates upon the order or judgment of the Bench and lays down when the change shall not invalidate the order or judgment.

(9) Section 15, Criminal P. C. empowers the Provincial Government to constitute Benches of two or more Magistrates. The notification of the Provincial Government constituting the Bench at Bhogaon is not before me; but it appears from the record that the said Bench consisted of three Magistrates, viz., Dr. Janki Prasad Misra, Chaudhry Sheoraj Singh and Chaudhry Bija Singh; and under the rules framed under s. 16 of the Code two Magistrates could constitute a Bench for trial of cases transferred to the Bench. In other words, two Magistrates could form a quorum.

(10) It is not contended that there was any change in the constitution of the Bhogaon Bench, although it has been pointed out that there were frequent changes in the constitution of the Bench, before which the trial of this case had commenced. That Bench consisted of two Magistrates, viz., Dr. Janki Prasad Misra and Chaudhry Sheoraj Singh; and the said Bench recorded part of the evidence in the case. On two subsequent dates at different intervals the Bench which took up this case was constituted of all the three Magistrates. These changes invited on each occasion a statement from the accused persons that they did not want to claim a 'de novo' trial. The Bench which consisted of Dr. Janki Prasad Misra, Chaudhry Sheoraj Singh and Chaudhry Bijai Singh, recorded further evidence in the case. The constitution of the Bench was again changed and the Bench so constituted is described as 'Jadid' or new Bench, This Bench consisted of Dr. Janki Prasad Misra and Chaudhry Bijai Singh. When this Bench was constituted it was again stated on behalf of the accused persons that they did not want to claim a 'de novo' trial.

(11) In view of the provisions of S. 350A, Criminal P. C. these changes in the constitution of the Bench would not have been material if the Magistrates constituting the Bench, which started the trial of the case, had been present on the Bench throughout the proceedings. If we take the first Bench, that is the Bench before which the evidence was first recorded, Dr. Janki Prasad Misra and Chaudhry Sheoraj Singh should have been present on the Bench throughout the proceedings; if we take the second Bench, all the three Magistrates should have been present throughout the proceedings; and if we take the third Bench, or Jadid Bench, Dr. Janki Prasad Misra and Chaudhry Bijai Singh should have been present throughout the proceeding. But, we find from the record that only

one Magistrate, namely, Dr. Janki Prasad Misra was present throughout the proceedings and the other two Magistrates, or even Chaudhry Sheoraj Singh, who joined Dr. Janki Prasad Misra in delivering the judgment in the case, were not present throughout the proceedings.

(12) The argument of the learned counsel holding the brief of the Government Advocate that Dr. Janki Prasad Misra and Chaudhry Seoraj Singh were present on all the material dates on which evidence was recorded, has, in my opinion, got no force. In order to save the order or the judgment of the Bench from being invalid the Magistrates constituting the Bench ought to have been present on the Bench throughout the proceedings. The dictionary meaning of the word 'proceedings' is the course of procedure in an action at law; and an act, measure or step in a course of business or conduct. Hence, the expression 'proceedings' with reference to a case, would imply taking of steps in connection with the further progress of the case. When a case is listed for hearing and the case is taken up by the court and an order is made in the case, it would be proceedings in the case. It is not possible to confine the word 'proceedings' to the recording of evidence only. On a particular date of hearing, on which evidence has to be recorded, a witness may be absent in spite of sufficient service and an order may be made directing the issue of a proclamation or warrant against the witness or witnesses who are absent. That would be a proceeding in the suit, even though no evidence is recorded on that date. Similarly, on any particular date the accused might be absent owing to illness or otherwise and an order may be made either dispensing with the presence of the accused or for the issue of a warrant for securing their presence. In either case, proceedings will have to be recorded in the case.

(13) In the present case, we find that part of the evidence was recorded on the first date of hearing and some part was recorded on a subsequent date of hearing. During the interval, on some days the case had to be adjourned awaiting the return of the report of the commission which had been issued to Sitapur for the recording of the statement of the medical witness; on one date, the court dispensed with the presence of one of the accused person who was absent; on another date the Bench directed the summoning of a document under S. 540, Criminal P. C.; and on another date time was allowed for the production of defence witnesses. On all these dates, although no evidence was recorded, some proceedings were taken in the case. On all the dates on which the proceedings were taken in the case the Magistrates constituting the Bench, which started the trial of the case and which delivered the judgment in the case, should have been present. Chaudhry Sheoraj Singh who was one of the members of the Bench, which started the trial of the case and of the Bench which delivered judgment in the case, was not present on some of the dates on which proceedings were recorded in this case. It appears from the record that whoever was present on a particular date of hearing proceeded to hear the case; and the only precaution taken was that at least two Magistrates were present and there was quorum.

(14) According to the general rule of law the Bench which recorded proceedings in the case and recorded evidence should have pronounced judgment in the case and if this general rule was not observed, the judgment delivered by a Bench could have been saved from being declared invalid if the provisions of S. 350A, Criminal P. C., were complied with. In the present case, the general rule was violated and the case does not fall within the exception mentioned in S. 350A of the Code, inasmuch as the Magistrates constituting the Bench which delivered the judgment, were not present throughout the proceedings.

(15) The judgment which is being challenged in this revision, as already stated, was delivered by Dr. Janki Prasad Misra and Chaudhri Sheoraj Singh. It is true that a Bench so constituted had commenced the trial of this case, but as pointed out above there were frequent changes in the personnel of the Bench and that Chaudhry Sheoraj Singh was not present on the Bench throughout the proceedings. The judgment delivered is, therefore, not protected by S. 350A, Cr. P. C. and must be held to be invalid. The judgment being invalid the applicant's conviction must be set aside.

(16) The revision is, therefore, allowed; and the conviction of and the sentences imposed upon the applicants are set aside. Having regard to the petty nature of the offence and the time which has elapsed since the incident took place on the 20th September 1949, I do not order a retrial in this case. The applicants are acquitted. Fine, if paid by them, will be refunded. The bail bonds executed by them are cancelled.

B/V.B.B. Revision allowed.

A.I.R. 1953 ALL. 139 (Vol. 40, C. N. 60)

SANKAR SARAN AND MUSHTAQ AHMAD JJ.

Ram Adhar, Appellant v. Nem Kumar, Respondent.

Ex. Second Appeal No. 391 of 1948, D/- 30-1-1952.

Civil P. C. (1908), S. 11 — Execution proceedings — Execution application becoming fructuous — No objection on ground of limitation raised — Subsequent application — Objection that previous execution was time barred cannot be raised.

Where an application for execution had proved fructuous in part or in whole, for instance, where a certain property had been sold in execution of the decree and the sale confirmed as if the application was not open to any objection on the score of limitation, then, even though the judgment-debtor had not raised any objection on that ground, it must be deemed that the Court at least by implication decided that the application was within time and therefore, a subsequent objection that the application for execution had been made beyond time would be barred by the rule of constructive res judicata : AIR 1936 All 21 (FB) Foll. AIR 1938 All 89 Distinguished. (Paras 7, 12)

Anno: C. P. C., S. 11 N. 23.

Ambika Prasad, for Appellant; B. S. Darbari, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('36) AIR 1936 All 21: (58 All 313 FB) 7

('38) AIR 1938 All 89: (173 Ind Cas 428) 7

MUSHTAQ AHMAD J. : This is a judgment-debtor's appeal, and the only question to be decided is one of limitation.

(2) The decree in question was one on a simple mortgage dated the 12th August 1926,

and was passed on a compromise fixing instalments on the 4th November 1931. No instalments having been paid, the decree-holder applied for the preparation of a final decree on the 5th November 1934, the previous day being a Sunday. This application, it is conceded, was thus made on the last day of limitation and was, therefore, within time.

(3) On the 5th December 1934, the court ordered that a final decree be prepared, and such a decree was prepared on the 19th February 1935.

(4) On the 19th October 1938, the first application for execution was made. This was obviously after the expiry of three years from the date of the final decree and had, therefore, been made beyond time. The application having been dismissed for default, a second application, also dismissed for default, and then a third, likewise dismissed for default, were made. Finally, the fourth and last application for execution was made on the 15th February 1943. These applications for execution, barring the first, were all within time in the sense that they had been made within three years of the previous order.

(5) After the said fourth application for execution had been made, the execution was transferred to the Collector under S. 65, C. P. C. A portion of the property mortgaged was then sold in execution on the 21st February 1944, the sale being confirmed on the 21st March 1944 and a sale-certificate granted on the 29th May 1944. On the 6th July 1944, an application was made by the auction-purchaser to the civil court for possession being delivered to him, and the court directed the Amin to do so by the 31st August 1944. On the 12th August 1944, objections were filed by the judgment-debtor-appellant :

(1) that the application dated the 5th November 1934 for the preparation of a final decree was beyond time and

(2) that the first application for execution dated the 19th October 1938, being time-barred, the subsequent applications including the proceedings on the 4th application for execution were all contrary to law.

On this latter objection it was pleaded that the fourth application for execution was itself time-barred.

(6) It is now conceded that the day previous to the date of the application of the 5th November 1934, for the preparation of a final decree being a Sunday, that application could be taken as within time, and the only question now to be decided is whether the fourth application for execution dated the 15th February 1943 was or was not within time in view of the grounds alleged by the judgment-debtor, as already stated.

(7) Both the courts below rejected the objection of the appellant in this behalf on the authority of the Full Bench case in — 'Genda Lal v. Hazarilal', AIR 1936 All 21 (FB). The judgment-debtor relied on a later decision of a Bench of this Court in the — 'Collector of Benares v. Jai Narain Rai', AIR 1938 All 89, but those Courts were of the opinion that this ruling had in no way modified the legal position established by the earlier Full Bench case. The rule laid down in the Full Bench case was that where an application for execution had proved fructuous in part or in whole, for instance, where a certain property had been sold in execution of the decree and the sale confirmed as if the application was not open to any objection on the score of limitation, then, even though the judgment-debtor had not raised any objection on that ground, it must be deemed that the Court at least by implication decided that the application was within time and that, therefore, a subsequent objection that the application for execution had been made beyond time was barred by the rule of constructive res judicata. Sulaiman C. J. when delivering the main judgment of the Full Bench, laid down the law thus :

"Where no objection to the execution is taken but the application becomes partly or wholly fructuous and such fructification necessarily involves the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of 'res judicata' from raising the question that that application was not within limitation."

(8) Niamat Ullah J., one of the Judges of the Bench, put the same position in a somewhat more elaborate form. His Lordship said :

"As to whether it was finally decided depends upon the manner in which the proceeding terminated. If the ultimate result of the proceeding was such as to be accountable only on the hypothesis that the question of limitation was decided in a certain manner, it may be deemed not only to have been directly and substantially in issue, but also to have been finally decided. For instance, if the question of limitation be deemed to have been a matter directly and substantially in issue, because the judgment-debtor might and ought to have raised the plea, and the application for execution results in a certain property being sold in execution of decree and the sale proceeds applied in part satisfaction of the decree, the question of limitation should be deemed not only to have been directly and substantially in issue, but should also be deemed to have been heard and finally decided, because the final order of the Court terminating the execution proceedings is reconcilable only with one hypothesis, namely that the application for execution was treated by the Court as one not barred by limitation."

(9) We have quoted the above passage as Niamat Ullah J. was a member of the Bench deciding the later case already referred to, on which reliance was placed by the learned counsel for the appellant before us also. It will be seen from the two passages quoted above, one from the judgment of the Chief Justice and the other from that of this learned Judge that there was absolutely no divergence of opinion between them on this particular point.

(10) The facts of the later case in which the learned Judges decided that the application for execution in that case was time-barred were quite different. There the sale in execution of the decree had not been confirmed, so that it could not be said that the application for execution had proved fructuous at all. Indeed the following observation of Allsop J., who delivered the judgment of the Bench, leaves no doubt that the rule laid down in the earlier Full Bench case was, of course it had to be, wholly followed in the later case. The learned Judge remarked :

"Thus, if an application for execution is made and the final result is that the decree becomes in some measure fructuous, it must be assumed that the point of limitation has been decided, because otherwise the result would not have been reached."

(11) It is thus manifest that the later ruling is not only distinguishable from the facts of the present case, but that, so far as the point now raised is concerned, there was complete unanimity between the two cases.

(12) Applying the rule to the present case, we find that a portion of the property was actually sold in execution of the mortgage decree in pursuance of the fourth application for execution dated the 15th February 1943, the same being confirmed and a sale-certificate being granted therefor. No doubt, if an objection on the score of the bar of limitation had been raised by the judgment-debtor, either before the sale or at any rate before its confirmation, the objection would have been entertainable by the Court. No such objection at either of these two stages was raised, and it was only after the Amin had been directed to deliver possession to the decree-holder auction-purchaser over the property purchased by him in execution of the decree that an objection was filed by the judgment-debtor that the fourth application for execution dated the 15th February 1943 was beyond time, as the first application for execution dated the 19th October 1938 had itself been made after the expiry of the period of limitation. Under the authority of the decision of the Full Bench cited above, the courts below found themselves unable to entertain the objection, and in our opinion they were perfectly right.

(13) Accordingly there is no force in this appeal which is dismissed with costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 ALL. 141 (Vol. 40, C. N. 61)

MALIK C. J. AND V. BHARGAVA J.

Madan Gopal Bagla, Applicant v. Commr. of Income-tax, U. P. and Ajmer-Merwara, Respondent.

Misc. Case No. 289 of 1947 and Misc. Case No. 66 of 1948 D/-27-8-1952.

Income-tax Act (1922), S. 10 — Bad debt — Loss in partnership business.

In a partnership business, which has ended in a loss, the partner, who had invested money in that business, cannot claim the loss suffered as a bad debt, made by the assessee in the course of his money-lending and still less can it be considered as having become bad in the year of accounts: AIR 1936 P. C. 133 Rel. on. (Para 9)

Anno: I. T. Act S. 10 N. 12.

G. S. Pathak for Applicant; J. Swarup for Respondent.

REFERENCE: ..... /Para

('36) 1936-4 ITR 173: (AIR 1936 P. C. 133) 9

MALIK C. J.: The point raised in this reference under s. 66(1) of the Income-tax Act is:

"Whether under the circumstances of the case Income-tax Appellate Tribunal was right in disallowing the bad debt of Rs. 26,251/- and the proportionate costs under question?"

(2) The assessee is Seth Madan Gopal Bagla, an individual. He was a partner in two firms, Harnandrai Phoolchand at Calcutta and Phoolchand Mohanlal at Kanpur. There were two other partners in these firms, Raj Bahadur Chiranji Lal and Seth Pearey Lal. There was a dissolution of partnership and a sum of Rs. 48,510/- was found due to the assessee as his share of the partnership assets of the Calcutta firm and a sum of Rs. 14,541/- was found due to him as his share of the partnership assets of the Kanpur firm. Besides these two items there was a third item of Rs. 29,463/-. Raj Bahadur Chiranji Lal was the guardian of the assessee's father, L. Kashi Nath, who was a lunatic. He mis-spent or had failed to account for the money which had come to his hands as the guardian of the lunatic and had been held liable to the extent of Rs. 29,463/-. We are not concerned with this third item.

(3) The claim against R. B. Chiranji Lal together with interest and costs amounted to over a lac but the claim was settled by transfer of certain properties valued at Rs. 54,000/-. The balance was written off as bad debt and the assessee claimed that he was entitled to reduction in respect of that amount. The Appellate Tribunal worked out the proportion in which the sum of rupees fifty-four thousand was to be divided between the three items mentioned above and, while allowing a set off with respect to the last item, disallowed a set off with regard to the first two.

(4) The assessee made an application that three questions of law may be referred to this Court but the Tribunal referred only one question which we have quoted above. The other two questions were disallowed. An application was made to this Court that the other two questions be also referred and some additional questions were also framed. That case is numbered and registered as Miscellaneous Case No. 66 of 1948. The two cases have been put up before us together for orders.

(5) We have heard learned counsel for the parties. Mr. Pathak, learned counsel for the assessee, has urged that the facts have not been correctly set out in the statement of the case or in the appellate order of the Tribunal and that, as a matter of fact, the first two items arise out of a debt due from R. B. Chiranji Lal to the assessee and, therefore, the assessee was entitled to set off the balance after giving credit for the amount received.

(6) As the facts were not very clearly stated in the statement of the case learned counsel for the parties, with the permission of the Court, read out to us the orders of the Income-tax officer, the Assistant Commissioner and the appellate order of the Tribunal. The Income-tax officer in his assessment order said as follows:

"On going through the accounts produced before me it appears that the debt relates to the loss suffered not by the assessee but by the unregistered firm styled as Harnandrai Phoolchand in which the partners were R. B. Seth Chiranji Lal and Seth Pearey Lal besides the assessee. The loss was suffered by the Calcutta firm principally, because a debt amounting to Rs. 1,02,000/- due to the Calcutta firm by one Ram Narain, sister's son of R. B. Seth Chiranji Lal, could not be realised by it. At the time of the settlement of the accounts amongst the partners, it was claimed by the assessee that the above loss should be borne by R. B. Seth Chiranji Lal and Seth Pearey Lal and not by the assessee, because the debtor was related to these two partners. A sum of more than Rs. 50,000/- was, therefore, debited to the account of each of these two partners in favour of the assessee."

(7) The Appellate Assistant Commissioner in dealing with this matter said:

"It is common ground that a loss was incurred in the Kanpur and the Calcutta firms and that the amount due against Seth Chiranji

Lal viz. a sum of Rs. 48,510/- and Rs. 14,541 arose on the dissolution of the partnership. The very manner in which these two bad debts arose against Seth Chiranji Lal clearly establishes that it was of the nature of a capital loss".

(8) The Tribunal in its appellate order says: "It may be noticed, at this stage that R. B. Chiranji Lal became a debtor in Calcutta firm mainly as a result of one of his nephews, Ram Narain, failing to pay that firm a sum of Rs. 1,02,000/- owed by him. This debt of Ram Narain was transferred in equal shares to the accounts of both R. B. Chiranji Lal and Seth Pearey Lal, as Ram Narain is said to be related to both of them".

(9) In the statement of the case though the facts were not so clearly stated but with reference to what we have already quoted the thing becomes clear. The Tribunal in its appellate order apportioned the entire sum of Rs. 54,000/- between all the three debts, excluding the amount of costs awarded to the assessee & held that out of the sum of Rs. 54,000 recovered, Rs. 17,200/- alone was in respect of the debt of Rs. 29,463/-, and the balance of Rs. 36,800/- was received on account of the other two items due from R. B. Chiranji Lal on the dissolution of the firms at Calcutta and Kanpur. The statement of the case in para 6 of the appellate order of the Tribunal is quoted in extenso and from this it appears that the loss in the business at Calcutta and at Kanpur, which was to be recovered from R. B. Chiranji Lal, after the dissolution of partnership, was Rs. 48,510/- and Rs. 14,541/-. Part of this loss was written off by transfer of property worth Rs. 54,000/-, the balance still remained due & must be deemed to be the loss in the business. That it cannot be said that there was any debt advanced by the assessee to R. B. Chiranji Lal and Pearey Lal, part of which was recovered and the rest became a bad debt. The Tribunal rightly relied upon the decision of the Privy Council in — 'RM AR BN Arunachalam Chettiar v. Commr. of Income-tax, Madras', (1936) 4 ITR 173 (PC), where dealing with the question, whether in a partnership business, which has ended in a loss, the partner, who had invested money in that business, could claim the loss suffered as a bad debt, their Lordships held that such a loss cannot be "considered as a bad debt made by the assessee in the course of his money lending and still less could it be considered as having become bad in the year of accounts."

(10) We, therefore, answer the question referred to us by the Tribunal in the positive. The Department is entitled to its costs which we assess at Rs. 400/-.

B./D.H. Answer in the affirmative.

A.I.R. 1953 ALL. 142 (Vol. 40, C. N. 62)
(LUCKNOW BENCH)

MALIK C. J. AND BEG J.

Anwarul Hasan, Appellant v. The State.

Criminal Appeal No. 230 of 1951, D/- 14-7-1952.

(a) Evidence Act (1872), S. 24 — Essential element necessary to constitute confession — Explanatory statement not admitting guilty intention or offence is not a confession.

A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. So even a statement which merely suggests an inference that the accused is guilty is not a confession. (Para 4)

A person who had been acting as a honorary secretary of a co-operative society was found to have deposited amounts lesser than what he received from members in respect of share money. Upon being threatened by the President of the society with criminal proceedings if he did not make a clean breast of the matter, he wrote a letter stating that owing to inexperience he had committed mistake in totalling and that a sum of Rs. 17 was due from him which he deposited:

Held that the letter contained only an explanation and not any admission of guilty intention or any confession that he had misappropriated the money. (Para 4)

Anno: Evi. Act, S. 24 N. 2.

(b) Criminal P. C. (1898), S. 297 — Misdirection — Conflict of testimony on important point — Duty of Judge.

Where the prosecution in a case must fail or succeed on the point whether a paper on record of Court is genuine or otherwise and the testimony on that point is conflicting, the Judge should impartially and fairly place the facts before the jurors. Where instead, he makes the suggestion, that the paper might have been changed in the Court of the Magistrate, by pointing out to the jury the evidence of a certain witness, without at the same time pointing out the evidence of some other witness which would go against the case of substitution and therefore in favour of the accused's innocence, there is a serious defect in the charge which is enough to vitiate the trial. (Para 5)

Anno: Cri. P. C., S. 297 N. 6, 11, 12.

(c) Criminal P. C. (1898), S. 297 — Language of charge — Duty to avoid pedanticism.

Though S. 297 of the Code does not mention in what language the charge should be, it is intended to explain the case to the jury, and hence the Sessions Judges are expected to use a language which they can easily follow. The charge must therefore be in the plainest and simplest language and all attempt at pedanticism should be discouraged. (Para 6)

Anno: Cri. P. C., S. 297 N. 6 Pt. 15.

(d) Criminal P. C. (1898), S. 423 — Acquittal of accused — Trial and conviction of accused under S. 408, Penal Code vitiated by defective charge to jury — Amount in respect of which offence was held to have been proved trivial and refunded at earliest opportunity — Case pending against accused for several years — Held accused was to be acquitted and case was not fit for ordering retrial. (Paras 7, 8)

Anno: Cri. P. C., S. 423 N. 22, 23.

Hakimuddin and R. K. Rai, for Appellant; S. L. Suri for Addl. Govt. Advocate, for the State.

REFERENCE ..... /Para

('39) AIR 1939 PC 47: (40 Cri LJ 364) 4

MALIK C. J.: The appellant Anwarul Hasan has been convicted under S. 408, Penal Code under two out of three counts and has been sentenced to two years' rigorous imprisonment and a fine of Rs. 100/- under each count, the sentences of imprisonment to run concurrently. He has been acquitted on the third count. The

case was tried with the aid of a jury and the jury returned a verdict of guilty on the two counts mentioned above. In this appeal learned counsel has raised the point that the jury was not properly charged and that the verdict was, therefore, vitiated by the irregularity in the charge.

(2) There was a Consumers' Co-operative Stores started in Rifah-i-am, Lucknow, of which Mr. B. L. Kaul, Advocate was the President. The accused Anwarul Hasan was the Honorary Secretary. The shares of this Co-operative Stores were valued at Rs. 10/- each and the amount was payable in a lump sum or in instalments. The charge against the accused was that on 22nd October 1948, he realised the share money from Mr. T. N. Varma and deposited the amount which was short by Rs. 4/-. On 13th October 1948, he realised another sum from Mr. Darbar Chand, but the deposit was Rs. 5/- short and on 20th November 1948, it was said that he had realised Rs. 50/- from Mr. Radhey Lal but had deposited Rs. 10/- and misappropriated Rs. 40/-. As he has been acquitted on the third count, it will no longer be necessary to mention the same.

The accused worked as Honorary Secretary up to 4th March 1949, when he resigned. After he had left the President Mr. Kaul sent certain allotment cards to the share-holders and Mr. T. N. Varma and Mr. Darbar Chand, when they received their cards, mentioned that the amounts entered in their credit was less than the amount paid by them. The President thereupon sent for the accused and threatened to hand him over to the police unless he made a clean breast of the whole thing. The accused thereupon wrote a letter (Ex. 10) on 12th September 1949, in which he admitted that due to inexperience he had made mistakes in totalling and a sum of Rs. 17/- was due from him, which amount he deposited. On a further enquiry, however, the President found other similar items and on 28th January 1950, he wrote a letter to one Mr. Furkan Ahmad, an uncle of the accused, that unless he deposited a sum of Rs. 300/- to be adjusted against any short deposits, the case would be handed over to the police. Mr. Furkan Ahmad deposited the sum of Rs. 300/-, a part of which has been adjusted and the balance kept in suspense account. On 14th December 1949, however the District Co-operative Officer wrote a letter (Ex. 14) to the District Magistrate, who sent the case to the police and the accused was thereupon prosecuted.

(3) Three points have been prominently brought forward by the Counsel :

Firstly, that the charge was such that it was not likely to have been understood by the jujors who had been empanelled;

Secondly, that the charge with reference to the document (Ex. 23) was not proper and amounted to a misdirection to the Jury; and

Thirdly, that the document (Ex. 10) being a confession by the accused and obtained from him by threat, it was not admissible in evidence and the learned Sessions Judge should not have referred to it in the charge to the Jury.

(4) Taking up the last point first, we have looked into Ex. 10 and though Mr. Kaul in his letter Ex. B wrote to Furkan Ahmad, the uncle of the accused, that the accused had owned up and given in writing the paper (Ex. 10) on his holding out a threat that he would be handed over to the police, the document in question is not a confession within the meaning of that term in S. 24 of the Evidence Act and it could not, therefore, be said that it was not admissible in evidence under that section. What is confession has been defined by their Lordships of the Judicial Committee in — 'Narayana Swami v. Emperor', AIR 1939 PC 47, where their Lordships pointed out that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. In Ex. 10 there is no such admission. All that the accused has said is that due to inexperience he has made mistakes in accounting. He has not admitted that there was any guilty intention nor is there any confession that he had misappropriated the money. Explaining the cause for the confusion in the interpretation of S. 24 and the definition of the word 'confession' their Lordships pointed out that the reason for the divergence of Judicial opinion was based on Article 22 of Stephen's Digest of Law of Evidence and in dealing with that commentary their Lordships said that the definition is not contained in the Indian Evidence Act, 1872, and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused suggesting the inference that he committed the crime. So, even a statement which merely suggests an inference that the accused must be guilty is not enough according to their Lordships' view. Ex. 10 cannot, therefore, amount to a confession and was not inadmissible under S. 24 of the Evidence Act.

(5) Coming to the second point, before the Magistrate a document (Ex. 23), which was supposed to be a summary of the accounts of realisations made by the accused in his own handwriting, was filed and proved. Before the Sessions Judge, however, the document was not produced and the accused summoned it from the Court of the Magistrate and had it exhibited as Ex. E. The learned Sessions Judge was of the opinion that if Ex. E was the genuine document, it completely exonerated the accused. To prove that Ex. E could not be genuine, the prosecution produced Exs. 6 and 12, Ex. 6 being the original and Ex. 12 being the carbon copy of the account's slip prepared by the appellant. Ex. 6 had certain corrections and additions and the question arose whether these had been made after the paper was filed by the prosecution in the Court of the learned Sessions Judge or it had these corrections from before. It was to prove that the corrections were not there that Ex. 12 the carbon copy was filed and Mr. Kaul President gave evidence to the effect that he had carefully examined Ex. 6 before it was filed and it did not bear the corrections that it bore at the time when the matter came up for consideration. Ex. 12 and Ex. 6 without the corrections help the prosecution while Ex. 23 helps the accused. This, of course, is the view of the learned Sessions Judge. We have not examined the papers ourselves from that point of view. When the accused produced Ex. 23 they summoned the Magistrate to prove his signature on the document. The Magistrate stated that the document bore his signature but the word "Exhibit" and the figures "23" were not in his handwriting; they were either in the handwriting of the Special Prosecuting Officer or of the clerk of his Court, as he generally initialled the exhibits and the exhibit number was written by the Special Prosecuting Officer or by the clerk of the Court. The auditor Mr. Jit Bahadur Nigam however, denied that the paper bore his initials. The document has in its corner written "Seen J. B." Mr. Jit Bahadur said that these words were not in his handwriting. On the

other hand, Mr. Kaul, the President, said that the paper which had been marked Ex. 23 by the learned Magistrate had been discovered in the papers of the accused and he had handed over that paper to the auditor. There was, therefore, conflict of testimony on the point, and as the paper was so important that, according to the learned Sessions Judge himself, if that paper was genuine, it disproved the prosecution case, the learned Sessions Judge should have taken great care to place the facts fairly and impartially before the jurors. On the other hand, we find that the learned Sessions Judge suggested to the jury that the paper might have been changed in the Court of the Magistrate, though no such suggestion was made to the Magistrate and no evidence to that effect was led on behalf of the prosecution. The translation of the charge is in these words :

"In connection with this paper on behalf of the accused, the trying Magistrate Sri Kanhaiya Lal has been made to give his statement who has identified his signature on Ex. E and said that it was certainly filed on 27-4-51 but it was neither possible for him to say with certainty nor has he said in so many words that it was certainly the same paper as was filed on behalf of the accused."

Dealing with evidence of Jit Bahadur, the learned Sessions Judge's charge to the jury was as follows :

"There are signatures of Sri Jit Bahadur on other papers also before you. Probably they may be helpful to you in deciding whether the signatures of Sri Jit Bahadur on Ex. E tally with those in other papers. I think it would be better if you compare them."

The learned Sessions Judge did not point out to the jury with what particular signatures the initials were to be compared. We have looked through the record and we do not find any single other document bearing the initials of the auditor. They either have his full signatures or they have been signed as J. B. Nigam. More important is the omission of the learned Sessions Judge to point out to the jurors that the President Mr. Kaul had stated that this particular paper Ex. 23 had been discovered in the papers of the accused and had been handed over by him to the auditor. Learned Counsel appearing for the State has said that Mr. Kaul could not have said anything else as he had no reason to believe that the paper was changed and even if it had been changed, he was not likely to know. Be that as it may, no suggestion was made to Mr. Kaul that the paper was different and that it had been changed and his statement on the point appears to us to be clear that it was the same paper which had been handed over to the auditor. In any case, if the learned Sessions Judge was suggesting to the jurors that it was possible for the Magistrate's signature to have been forged or the Magistrate to have been duped and was pointing out to them the denial of the auditor, in all fairness he should also have brought to their notice the statement made by Mr. Kaul and left to them to their own conclusion. The learned Sessions Judge has himself said that Ex. E or Ex. 23 of the Court of the Magistrate goes to the root of the case and if once believed it exonerates the accused completely. The defect in the charge, therefore, is serious enough to vitiate the conviction.

(6) The last submission is that the charge is in such a high flown literary style that it was not possible for the jurors to have followed the learned Sessions Judge. The members of the jury were the following :

1. Sri Murli Manohar,
2. „ Jaduraj Bakhsh Singh,
3. „ Akhtar Husain,
4. „ Kedar Nath and
5. „ Rameshwar Bakhsh.

The office of this Court had to translate the document for the use of the Court and they found it very difficult to translate it and at the last hearing of the case it was discovered that certain serious mistakes had been made in the translation. We asked the learned counsel for the State to read out the charge and it is not in simple Hindi which could commonly be followed by men in the position of the jurors to whom it was addressed. There were several words of which they were not likely to know the meaning. No doubt, in the beginning of the charge the learned Sessions Judge mentioned it to the members of the jury that if there were any portions in the charge which they were not able to follow, they should ask him to explain. Mr. R. K. Rai, who appeared in the lower Court has stated before us that neither he nor the members of jury stopped the learned Judge to ask him any question. An affidavit, however, has been filed and that has been supported by Mr. Rai's statement at the Bar that the learned Sessions Judge read through the charge without giving any verbal explanation. At places after having used difficult words the learned Sessions Judge has tried to give their meaning in simpler language, but he has not nor could he follow it throughout the whole charge. No doubt, in S. 297 of the Criminal P. C. it is not mentioned in what language the charge should be, but as the charge is intended to explain the case to the jury, the Sessions Judges are expected to use a language which they can easily follow. The charge must therefore be in the plainest and simplest language and all attempt at pedanticism should be discouraged and we hope that in future the learned Sessions Judge would bear in mind that the charge is to explain the case to the jury and avoid the use of language which is not easily understood by them.

(7) We have seriously considered whether this is a case in which we should order a retrial. The two items with respect to which the charge was held to be proved amounted to Rs. 9/- in all which the accused refunded in 1949. The offence was said to have been committed in 1948 and the case has now been pending for several years. We do not think, therefore, that it is a fit case where a retrial should be ordered.

(8) We accordingly allow the appeal and set aside the conviction and sentences passed on the appellant. The appellant, who is on bail, need not surrender to his bail. The fine, if realised, shall be refunded to him.

B/M.K.S. Appeal allowed.

A.I.R. 1953 ALL. 144 (Vol. 40, C. N. 63)

MALIK C. J. AND SAPRU J.

Pati and others, Applicants v. Dubari and another, Opposite Party.

Misc. Case No. 574 of 1952, D/- 14-8-1952.

U. P. Panchayat Raj Act (26 of 1947), S. 110 — Rules under — R. 93(3) — Administering oath to accused and cross-examining him — Contravenes rule of natural justice — Trial is vitiated.

There is no provision in the Panchayat Raj Act which gives the Panches the right to put an accused person on oath or allow him to be cross-examined. As a matter of fact, Rule 95(3) of the Rules framed under the Act does not entitle the Panchayati Adalat to administer oath to an accused person. In the absence of any legislation to the contrary, the rule of natural justice is well settled that an accused is not liable to prove that he is innocent. He cannot, therefore, be administered oath, nor can he be cross-examined. Where therefore an accused is administered oath and cross-examined either by the prosecution or by the Panchayat such a procedure violates the rules of natural justice and as it is not possible to say what effect such cross-examination might have had on the minds of the Panches, the entire proceedings are vitiated. AIR 1952 All 785, Disting.

(Paras 3, 5)

C. B. Misra, for Applicants; G. P. Bhargava and N. D. Ojha, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('51) 1951 All LJ 719: (AIR 1952 All 785: 1952 Cri LJ 1273) 4

('52) 1952 All LJ 18: (AIR 1952 All 668: 1952 Cri LJ 1185) 2

MALIK C. J.: The applicants, who are four in number, were convicted by the Panchayati Adalat Kaundhiara in Pargana Arail, District Allahabad, under Ss. 426, 447, 504 and 506, Penal Code and a fine under each section in the amounts of Rs. 25/-, Rs. 20/-, Rs. 15/- and Rs. 15/- respectively was imposed on each of the applicants. Pati, applicant, was further convicted under S. 323, Penal Code and sentenced to pay a fine of Rs. 10/-. The case for the prosecution was that the four accused had cut and removed the crop belonging to the complainant and when he protested against their illegal action they assaulted him. The accused, on the other hand, claimed that the field belonged to them and that they had sown the crop and were not guilty of any illegal act in reaping the same. On a revision in the Court of the Sub-Divisional Magistrate, Karchana, the Magistrate was of the opinion that the accused were wrongly convicted under Ss. 447, 504 and 506 I.P.C. and he set aside their convictions and sentences under those sections. The learned Magistrate was, however, of the opinion that all the four accused should have been convicted under S. 323, I.P.C. He, therefore, maintained the conviction of Pati under S. 323 but reduced the fine to Rs. 5/- and convicted Khelawan, Gopali and Ram Autar under S. 323, I.P.C. and imposed a fine of Rs. 5/- each under that section. The learned Magistrate was also of the opinion that the accused should not have been convicted under S. 426 and altered their conviction to one under S. 379, I.P.C. and imposed a fine of Rs. 5/- each under the latter section.

(2) Learned counsel for the applicants has referred us to S. 85 of the Panchayat Raj Act (No. 26 of 1947) and to a single Judge decision of this Court in the case of — 'Raghunandan Singh v. State', 1952 All LJ 18 and has urged that the Sub-Divisional Magistrate could not vary or modify the convictions and sentences passed by the Panchayati Adalat and that he could either quash the proceedings in their entirety or maintain the convictions as they stood. It is not necessary for us in this case to express any opinion on the point as the case must succeed on another ground.

(3) It appears from the Sub-Divisional Magistrate's order that the accused were allowed to be cross-examined by the complainant. There is no provision in the Panchayat Raj Act enabling the Panches to administer oath to an accused person or allow him to be cross-examined by the complainant or the prosecution. Learned counsel has relied on S. 85 of the Act and has urged that, as the Panchayat Raj Act provides that the Evidence Act shall not apply to any suit, case or proceeding, in a Panchayati Adalat, except as provided in the Act or as prescribed under the rules, the Panches were entitled to allow the accused to be cross-examined. It is admitted that there is nothing in the Panchayat Raj Act which gives the Panches the right to put an accused person on oath or allow him to be cross-examined. As a matter of fact, Rule 95(3) of the Rules framed under the Act does not entitle the Panchayati Adalat to administer oath to an accused person. It is true that in England there has been recent legislation which entitles an accused person to give evidence on oath and then render himself liable to be cross-examined. In the absence, however, of any legislation to that effect, the rule of natural justice is well settled that an accused is not liable to prove that he is innocent. He cannot, therefore, be administered oath, nor can he be cross-examined. The learned Sub-Divisional Magistrate has no doubt said that this did not prove harmful to the accused. It is, however, not possible to say what effect the answers, given by the accused to the questions put to them in cross-examination, had on the minds of the Panches.

(4) Our attention has been drawn to a case decided by a learned single Judge of this Court, — 'Sant Prasad v. State', 1951 All LJ 719. In that case the accused had been put on his oath. This, it was said, vitiated the proceedings. The learned single Judge, however, observed as follows:

"That rule (Rule 95(3) framed under the U.P. Panchayat Raj Act, 1947) makes it incumbent upon the Panchayati Adalat to examine all persons other than the accused after administering to them the prescribed oath. It does not lay down that if oath is administered to an accused person before his statement is recorded, that would vitiate the entire proceeding in which the statement is recorded. I, therefore, see no force in this objection."

It does not appear from the facts stated in the judgment whether the accused was examined like any other witness or the Panchayati Adalat while examining the accused under S. 342, Criminal P. C. had by mistake administered oath to him. If the examination was in accordance with the provisions of S. 342 and by an oversight oath had been administered to the accused, it might be possible to take the view that the proceedings were not vitiated, but if, on the other hand, the accused was cross-examined either by the prosecution or by the Panchayati Adalat it is difficult to hold that such a trial should be held to be a proper trial.

(5) We have already expressed our opinion that such a procedure violates the rules of natural justice and it is not possible to say what effect such cross-examination might have had on the minds of the Panches. The procedure adopted by the Panchayati Adalat being contrary to rules of natural justice in our view the entire proceedings are vitiated. We consider it, therefore, just and proper to set aside not only the order passed by the Sub-Divisional Magistrate but to cancel the jurisdiction of the Pan-

chayati Adalat in accordance with the provisions of S. 85(1)(a) of the Panchayat Raj Act. We order accordingly.

B/D.R.R. Order accordingly.

A.I.R. 1953 ALL. 146 (Vol. 40, C. N. 64)

MUSHTAQ AHMAD J.

Chouthi Raj, Appellant v. Mst. Sumitra Devi, Respondent.

Civil Revn. Nos. 86 and 87 of 1949, D/- 4-2-1952.

(a) Debt Laws — U. P. Agriculturists' Relief Act (XXVII (27) of 1934), S. 12 — Proceedings under — Applicability of S. 288, U. P. Tenancy Act, 1939 — (Tenancy Laws — U. P. Tenancy Act (XVII (17) of 1939), S. 288).

Section 288 of the U.P. Tenancy Act applies to such proceedings under S. 12 of the U. P. Agriculturists' Relief Act as have been filed in the Civil Court, that is, in cases where the principal money secured exceeds Rs. 500/- and not to those filed before the Collector, as provided by Section 10 of the latter Act. AIR 1949 All 318 and AIR 1949 All 100 Expl. (Para 9)

(b) Debt Laws — U. P. Agriculturists' Relief Act (XXVII (27) of 1934), S. 12 — Applicability — Redemption of mortgage of occupancy plots — Application filed before Full Bench decision in AIR 1950 All 604 (FB) — Application held strictly in compliance with the law — Retrospective effect not given to the Full Bench decision. (Para 10)

B. L. Dixit and Shambhu Nath Agarwal, for Appellant; S. C. Khare, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('48) 1948 All LJ 296: (AIR 1949 All 100) 8
('49) 1949 All LJ 122: (AIR 1949 All 318) 8
('50) 1950 All LJ 713: (AIR 1950 All 604 FB) 10

MUSHTAQ AHMAD J.: Both these are applications in revision by persons seeking redemption of two mortgages, each being the subject of a separate application under S. 12 of the U. P. Agriculturists' Relief Act 26 of 1934.

(2) The mortgages were each dated July 16, 1883, executed by Bhairo, grand-uncle of the plaintiffs 1 and 3 and Mst. Rukia, widow of a deceased brother of Bhairo. The mortgage to which the revision first mentioned relates covered certain fixed-rate plots, some bamboo clumps and a 'nim' tree, whereas the mortgage to which the other revision relates consisted only of occupancy plots.

(3) Redemption was sought on the usual allegation that the entire mortgage money in each case had been paid off from the usufruct of the property.

(4) In defence the applicant's allegation that they were heirs of the mortgagors and as such entitled to claim redemption of the mortgages was denied, and it was further denied that the mortgage money had been paid off in the manner stated by the applicants.

(5) The trial Court allowed redemption of the mortgages, holding that the plaintiffs were the heirs of the mortgagors and that the entire money had been paid off from the usufruct of the property. This decree was reversed by the lower appellate Court which held that the applicants had not proved themselves to be the heirs of the mortgagors.

(6) Only two questions have been argued before me by Mr. B. L. Dikshit, learned counsel for the applicants:

1. that the present applicants having claimed a tenancy right as heirs to the mortgagors and the same not having been admitted by the opposite parties, the trial court should have framed an issue on that question and submitted the record to the appropriate Court for the decision of the same, and

2. that S. 12 of the U. P. Agriculturists' Relief Act was inapplicable to a claim for redemption of occupancy plots.

(7) It will be seen at once that, while the first question is common to both the revisions, the second is peculiar only to Civil Revision No. 87 of 1949 relating to occupancy plots. I propose to deal with them seriatim.

(8) As regards the first point, learned counsel has referred me to a single Judge decision in — 'Ram Kirpal v. Bhagwati Saran', 1949 All LJ 122 and a Bench ruling in — 'Balram Singh v. Dudh Nath', 1948 All LJ 296. In the former it was held that a proceeding under section 12 of the Agriculturists' Relief Act could be treated as a suit and a reference under section 288 of the U. P. Tenancy Act could be made in such a proceeding. In the latter also it was laid down that proceedings under S. 12 of the Agriculturists' Relief Act were proceedings in a suit before a civil Court to which the Arbitration Act was applicable.

(9) So far as the point of a proceeding under the said section being a suit is concerned, there is no dispute. The question, however, whether a revenue Court seized of a proceeding under S. 12 of the U. P. Agriculturists' Relief Act is a civil Court for all purposes is not so simple. Of course, learned counsel for the applicants contends on the basis of the rulings just mentioned that such a Court is, for all purposes, a civil Court, so that, even where an application under S. 12 of the Act is made to a Collector, he would be a civil Court also within the meaning of S. 288(1) of the U. P. Tenancy Act. I find it difficult to endorse this contention. This section 'inter alia' provides:

> "If in any suit relating to agricultural land instituted in a civil Court, any question regarding tenant right arises and such question has not previously been determined by a Court of competent jurisdiction, the civil Court shall frame an issue on the plea of tenancy and submit the record to the appropriate revenue Court for the decision of that issue only."

If the argument of the learned counsel is accepted it would be apparent that under this provision a revenue Court seized of an application under S. 12 of the U. P. Agriculturists' Relief Act will have to refer an issue of tenancy to itself. On the other hand, if the section was applied only to those Courts which are, for all purposes, civil Courts, there would be no such anomaly in applying the same. With this position in view, the only reasonable interpretation which I can put on the observations relied upon by the learned counsel in the two cases referred to above is that S. 288 of the Tenancy Act would apply to such proceedings under S. 12 of the U. P. Agriculturists' Relief Act as have been filed in the civil Court, that is, in cases where the principal money secured exceeds Rs. 500/-, as provided by S. 10 of the latter Act. I am, therefore, unable to accept this contention of the learned counsel.

(10) As regards the second point urged by the learned counsel with particular reference to Civil Revision No. 87 of 1949, he relied on the Full Bench decision of this Court (Lucknow Bench) in — 'Mahabal Singh v. Ram Raj',

1950 All LJ 713 and argued that the property mortgaged in this case being occupancy plots, no application under S. 12 of the Agriculturists' Relief Act could be filed at all. It is conceded that the applicants had quite rightly applied under that section for the redemption of the particular mortgage in view of the law then existing under the rulings of this Court and that it was only later that a change was introduced and such an application was put beyond the purview of the said section. The applicants themselves having sought redemption of this mortgage under S. 12 of the U. P. Agriculturists' Relief Act and they having done so in strict accordance with the law then in force, I am not prepared to give a retrospective effect to the position that may now be deemed established under the Full Bench ruling above mentioned. The present case is after all a revision, and it is entirely discretionary with me to interfere or not. In every view of the case it is fully settled that, even in the case of an occupancy holding mortgaged with possession, the mortgagor is not entitled to recover the same without paying to the mortgagee what he has received from the latter. This would, of course, not be in a decree for redemption strictly so called, but would take the form of a condition of payment imposed on the mortgagor seeking to be restored to possession of the holding. This is a circumstance which has naturally influenced me in refusing to exercise my discretion in the applicants' favour by interfering with the judgment of the lower appellate Court purely on a preliminary ground. I am, therefore, not inclined to entertain this argument either.

(11) In the result, both the applications are dismissed with costs.

B/D.R.R. Applications dismissed.

A.I.R. 1953 ALL. 147 (Vol. 40, C. N. 65)
(LUCKNOW BENCH)

MALIK C. J. AND BEG J.

Shamsher Bahadur Singh and others, Appellants v. Lal Batuk Bahadur Singh and others, Respondents.

Second Appeal No. 217 of 1949, D/- 16-7-1952.

(a) Transfer of Property Act (1882), S. 67 — Suit on prior mortgage — Subsequent mortgagee impleaded — Failure of subsequent mortgagee to redeem — Effect.

If a subsequent mortgagee, who is impleaded in a suit on the basis of a prior mortgage, fails to redeem that mortgage and allows the property included in the first mortgage to be sold, his security in that property ceases and he can no longer claim to redeem the first mortgage. (Para 3)

Anno: T. P. Act, S. 67 N. 19 Pt. 3.

(b) Transfer of Property Act (1882), S. 73 — Principle of substituted security — Usufructuary mortgage of zamindari rights and 'sir' land — Loss of zamindari rights — Mortgage attaches to exproprietary tenancy — Non-transferability of exproprietary tenancy — Effect — (Limitation Act (1908), Art. 144).

Where a zamindar mortgages by way of usufructuary mortgage his zamindari together with his 'sir' lands, and by losing his zamindari rights becomes an exproprietary tenant of the 'sir' lands, the usufructuary mortgage does not become ineffectual but takes effect as a mortgage of the exproprietary rights. (Para 4)

But when the exproprietary tenancy is not transferable under the appropriate Rent Act, the mortgagor cannot validly mortgage it and hence no valid mortgage can be created by the application of the doctrine of substituted security and the mortgagor zamindar can claim back possession of the property from the mortgagee. He has however to pay to the mortgagee the amount that he had borrowed before he could be restored possession of the property. The only ground on which the mortgagee can resist the delivery for possession of the property on payment of the money due to him is a plea of limitation if it is open to him. AIR 1950 All 604 (FB), Foll.; AIR 1914 All 468, Ref.; 24 All 538, Disting. (Para 5)

It is not open to the mortgagee who has entered into possession under the mortgage to set up any adverse title against the mortgagor and claim that by lapse of time he has perfected his title to the mortgaged property. (Para 6)

Anno: T. P. Act, S. 73, N. 1; Lim. Act, Art. 144, N. 28.

S. C Das, for Appellants; B. K. Dhaon, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('02) 24 All 538: (1902 All WN 155) 4, 5
('14) 25 Ind Cas 201: (AIR 1914 All 468) 5
('50) 1950 All LJ 713: (AIR 1950 All 604 FB) 5, 6

MALIK C. J.: This appeal has been filed on behalf of the defendants against a decree for redemption passed by the learned Civil Judge of Pratapgarh. The predecessor-in-interest of one Raja Bhairon Bux Singh had executed a mortgage of the zamindari rights in village Tina in favour of the Allahabad Bank Ltd. The Allahabad Bank filed a suit on the mortgage, obtained a decree and put the village to sale. It was purchased in auction in the year 1905 by the Rani of Pratapgarh. She obtained possession on 4th of February 1906. On 12th June 1891, Raja Bhairon Bux Singh had mortgaged to one Harpal Singh five plots Nos. 139, 190, 196, 197 and 198 measuring 22 bighas 19 biswas and 9 biswansis. This mortgage was subsequent to the mortgage in favour of the Allahabad Bank Limited and the Allahabad Bank Limited in the suit filed by it for sale had impleaded Harpal Singh as a subsequent mortgagee. Harpal Singh, however, made no attempt to redeem the mortgage and the village property was sold as mentioned above.

(2) It now transpires that these five plots were probably the 'sir' or 'khudkasht' land of Raja Bhairon Bux Singh and Raja Bhairon Bux Singh and Harpal Singh claimed under S. 108, clause 10 of the Oudh Rent Act that the plots had become their exproprietary tenancy. This matter was ultimately decided in their favour and it was held that the plots were their exproprietary tenancy. The judgment in that case is not before the court but the mortgagee Harpal Singh could not have claimed to be an exproprietary tenant and, if he joined with Raja Bhairon Bux Singh in the claim, it must have been as a mortgagee from him. From the village papers it appears that after that decision the mortgagee remained in possession and in the village papers a record was made that the mortgagor was Raja Bhairon Bux Singh and the mortgagee in possession was Harpal Singh. The village papers for those years that are on the record uniformly contain the said entries. In the year 1947 the legal representatives of the

mortgagor filed a suit for redemption of the mortgage of 12th June 1891, and the suit was decreed by both the Courts and against the decree of the lower appellate Court this second appeal has been filed.

(3) The contention of the learned counsel is that no mortgage subsisted after the auction sale in 1905 and the rights, if any, of Harpal Singh, mortgagee, in the mortgage of 12th June 1891, must be deemed to have come to an end. Reliance is placed on the well established rule that, if a subsequent mortgagee is impleaded in a suit on the basis of a prior mortgage and he fails to redeem that mortgage and allows the property included in the first mortgage to be sold, his security in that property ceases and he can no longer claim to redeem the first mortgage. The proposition that after the auction sale of the year 1905 Harpal Singh or his legal representatives had no right to redeem the mortgage in favour of the Allahabad Bank Limited and get back possession of the property that had been sold in execution of the decree cannot be challenged. The question however is what were the rights of the mortgagor and the mortgagee qua the expropriatary tenancy which came into existence as a result of the auction sale of 1905.

(4) The lower Courts relied on a decision of this Court in — 'Sham Das v. Batul Bibi', 24 All 538. The facts in that case upto a certain stage were exactly similar. A zamindar had mortgaged by way of usufructuary mortgage his zamindari together with his 'sir' lands. He lost his zamindari rights and became an expropriatary tenant of the 'sir'. It was held in that case that the usufructuary mortgage did not become ineffectual but took effect as a mortgage of the expropriatary rights. This was on the ground that if a mortgagor's title is altered, the land held under the new title is still subject to the mortgage. The point urged in that case was that the expropriatary rights were not in existence at the time when the mortgage was made in the year 1890, and it could not, therefore, be said that the mortgage attached itself to the property which came into existence long after. Dealing with this argument the learned Judges said:

> "The District Judge says, what Rajab Ali himself did not possess at the time of the mortgage to defendants, he could not transfer. He overlooks the fact that a mortgagee is entitled for the purpose of his security to all such interests as may be acquired either as accretions to or in place of the original interest which was conveyed to him: for example, in the case of a mortgage or charge upon lease-holds, if a new lease be obtained by a mortgagor, either on a forfeiture of the original lease or by other means, the owner of the mortgage or charge will have the benefit of the new lease for the purpose of his security, and yet the mortgagor could not at the time of the mortgage have transferred the new lease to the mortgagee as it was not in existence."

This case, therefore, would fully cover the case before us but for the fact that at the time when this decision was given expropriatary tenancy was not non-transferable as it was made in the year 1901.

(5) In a single Judge decision of this Court in the case of — 'Ram Racha v. Gokul Rai', 25 Ind Cas 201 (All), it was doubted whether the principle laid down in the case of — 'Sham Das v. Batul Bibi', (24 All 538), would still be applicable when the rights of an expropriatary tenant had become non-transferable. The observations of Piggott J. are as follows:

> "The contention on their behalf, however, is that the result of the foreclosure suit was merely to extinguish any interests they might have previously possessed in the proprietary rights over the plots of land mortgaged to them; but that their mortgagee rights enured in respect of the ex-proprietary tenancy created by Statute in favour of the defendants of the first party from the date of the foreclosure decree. For this proposition of law the authority quoted is the case of — 'Sham Das v. Batul Bibi', (24 All 538). A consideration of this ruling shows that one important factor in the decisions arrived at by the learned Judges who decided that case was the view taken by this Court that there was nothing in the provisions of the old Rent Act of 1881 to prevent an occupancy tenant from transferring possession over his holding by way of usufructuary mortgage. It may be doubted, therefore, whether this case is any longer to be relied on since the alteration in the law affected by the passing of the Agra Tenancy Act of 1901."

Though, no doubt, if the property actually mortgaged is destroyed any other property obtained by the mortgagor in lieu thereof would be treated as substituted security; it is doubtful whether it would operate as a valid mortgage when such property has been made inalienable under the law. We are inclined to the view that, as the mortgagor could not have made a valid mortgage of the expropriatary tenancy by application of the doctrine of substituted security, no valid mortgage could be created of the expropriatary tenancy. But the matter does not rest here. In the case before us the mortgagor allowed the mortgagee to remain in possession instead of claiming back possession of the property after the auction sale of 1905, as he was entitled to do. If the mortgagor had claimed back possession of the property in accordance with the view taken by this Court in — 'Mahabal Singh v. Ram Raj', 1950 All LJ 713 (FB), he would have had to pay to the mortgagee the amount that he had borrowed before he could be restored possession of the five plots that had been mortgaged. The only ground on which, therefore, the mortgagee could resist the delivery for possession of these plots on payment of the money due to the mortgagee was a plea of limitation if the plea was open to him. As we have already said, the mortgagee had continued to occupy the land as a mortgagee and the entries in the village papers have been consistent throughout that Raja Bhairon Bux Singh or his legal representatives were the mortgagors and Harpal Singh or his legal representatives were the mortgagees.

(6) The question of limitation was considered in the Full Bench case of — 'Mahabal Singh v. Ram Raj', (1950 All LJ 713 FB), cited above and their Lordships held in that case that it was not open to the mortgagee who had entered possession under the mortgage to set up any adverse title against the mortgagor and claim that by lapse of time he had perfected his title to those plots. The result, therefore, is that though the mortgage might not have validly subsisted yet the mortgagor was entitled to get back possession of the five plots on payment of the money which had remained due to the mortgagee. This, in substance, is the decree passed by the lower Courts.

(7) The appeal, therefore, fails and is dismissed with costs.

(8) As the appeal has been dismissed, the stay application is also dismissed and the ad interim stay is discharged.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 ALL. 149 (Vol. 40, C. N. 66)
(LUCKNOW BENCH)

KAUL J.

Union of India, Applicant v. Girish Chandra and others, Opposite Party.

Application No. 61 of 1951, D/- 10-10-1952.

(a) Arbitration Act (1940), S. 34 — "Step in proceeding" — Application for adjournment to file written statement is a step in the proceeding. AIR 1949 All 611, Foll. (Para 6)

Anno: Arb. Act, S. 34 N. 16.

(b) Provincial Small Cause Courts Act (1887), S. 25 — Exercise of discretion of Small Cause Court, not to stay suit under S. 34, Arbitration Act — Revision shall not be entertained — (Arbitration Act (1940), S. 34). (Para 7)

Anno: Prov. Small Cause Courts Act, S. 25 N. 1; Arbn. Act, S. 34 N. 11.

B. N. Roy, for Applicant; Hyder Husain, Ganesh Prasad and A. N. Trivedi, for Opposite Party Nos. 1 to 3.

REFERENCES: Courtwise/Chronological/ Paras
('45) AIR 1945 All 24: (218 Ind Cas 159) 2, 3, 4
('49) AIR 1949 All 611: (ILR (1950) All 244) 2, 4
('41) AIR 1941 Lah 64: (193 Ind Cas 167) 4

ORDER: This is an application for revision of an order passed by the learned Judge, Small Cause Court, Lucknow. The material facts lie within a short compass:

(2) A suit for recovery of rent for certain premises was instituted by Shekhar Chandra Jain against the Union of India, Defence Department. Shekhar Chandra Jain died during the pendency of the suit and the names of his legal representatives were substituted in his place on the record. The suit was instituted on 13th May 1950. 18th August 1950 was fixed for final disposal of the case. On that day the Additional Government Pleader for the U. P. Government appeared before the Court and prayed for an adjournment. The application made by him stated that as he had not received a copy of the plaint or other papers from the office concerned, he might be granted two months' time for filing the written statement. This application was allowed and time was granted till 13th October 1950. On that day an application was made by the plaintiff inviting the Court's attention to S. 34 of the Arbitration Act 10 of 1940. It was contended that as the application for adjournment of the case to enable the defendant to file a written statement made on 18th August 1950, was a step in the proceedings the suit could not be stayed. The matter was argued before the learned Judge. Relying on two cases of this Court, — 'United Provinces Government v. Sri Har Nath', AIR 1949 All 611 and — 'Roop Kishore v. United Provinces Government, Lucknow', AIR 1945 All 24 he held that the proceedings could not be stayed. Dissatisfied with this decision, the present revision application has been filed.

(3) It was contended by the learned counsel for the Union of India that it was held by their Lordships, Dar and Sinha JJ. in — 'Roop Kishore's case', (AIR 1945 All 24) that it was possible to hold in some cases that an application for adjournment of a case to enable the defendant to file a written statement was not a step in the proceedings within the meaning of S. 34 of the Act and his case was one of that kind. He invited my attention to the statement made by the Government Pleader in his application of 18th August 1950, that he had not received a copy of the plaint and other papers from the office concerned. It was contended that in view of this clear statement the Government Pleader could not be in a position to say what defence would be taken and it should not be taken that by making that application he had acquiesced in the case being decided by the Court and not being referred to arbitration.

(4) Having heard the learned Counsel for the parties, I am of opinion that the case is covered by the later decision of this Court in — 'United Provinces Government v. Sri Har Nath', AIR 1949 All 611. Malik C. J. and Mushtaq Ahmad J. referred to a number of cases including that of — 'Messrs. Prem Nath Pran Nath v. Amba Parshad', AIR 1941 Lah 64. Their Lordships observed:

> "The Lahore High Court appears to have been reluctant to accept this view and seems to have indicated that an application for extension of time to file a written statement is not such a 'step in proceedings' as contemplated by those words of S. 34, Arbitration Act. In the first place that case is in our opinion distinguishable from the present one, inasmuch as there the defendants had not received a copy of the plaint filed in Court. That being so, he was not in a position to know anything about the nature of the suit filed, so as to realise that the suit related to a matter about which there had been an agreement for arbitration between the parties."

They further observed:

> "In any case we feel that the preponderance of authority is in favour of the view taken by this Court in — 'Roop Kishore v. U. P. Government, Lucknow', AIR 1945 All 24."

(5) This is a Bench decision of our Court and is binding upon me. I may further add, if I may say so without disrespect, that it is based on sound reasoning. Ordinarily disputes between parties as to their rights are decided by the Courts of the Country and it is open to either party to the dispute to approach the appropriate Court for a decision. There may, however, be cases where the parties agree, when entering into a contract, that all or any particular dispute relating to that contract shall be referred to arbitration, and thus exclude the jurisdiction of ordinary courts. Section 34 provides that if in such a case one of the parties institutes a suit or other legal proceedings then it is open to the other party to apply to the judicial authority before which the proceeding is pending to stay the proceeding. But such an application can be made only before the written statement is filed or "any other steps in the proceedings" are taken. Once any step is taken in the proceedings, the right to apply for stay of proceedings is lost. The principle seems to be that the parties having agreed to exclude the jurisdiction of the Court are entitled to have that agreement enforced provided as soon as any party institutes a legal proceeding there is a refusal by the other party to have a decision from a Court of law and an indication on his part that he wants to rely on the agreement to refer the dispute to arbitration. If any step whatsoever is taken by such party in the proceeding in Court his right to apply for stay of proceedings and to take advantage of the reference to arbitration clause is lost. The words

used in the section are unqualified — "before filing a written statement or 'taking any other steps in the proceedings' ". Accordingly once an application is made for time to file a written statement there is a step taken in the proceedings.

(6) Mr. Haider Husain, learned counsel for the opposite parties, invited my attention to the observations made by the author in Shambhu Dayal Singh's Law of Arbitration in India. In paragraph 585 at page 361 of his book, he says:

"According to the practice in the Sind Chief Court, when a suit is pending on the original side of that Court, an application under S. 34 for stay of the suit should be filed by way of a separate proceeding and not to file the application in the suit."

Possibly the Sind Court takes the view that even if an application under S. 34 for stay of the suit is filed in the proceeding, the making of the application would come within the purview of the words "any other steps in the proceedings" as used in that section and the intention to exclude any such objection has given rise to the practice referred to by the author. I hold therefore that the view taken by the learned Judge in the Court below cannot be said to be erroneous.

(7) Mr. Haider Husain further contended that the determination whether the proceedings shall or shall not be stayed on an application under S. 34 was a matter for the discretion of the judicial authority before whom the application was made. In the present case the judicial authority concerned was the Judge Small Cause Court, Lucknow, and according to the well established practice of this Court that in a matter where discretion is exercised by a Court of Small Causes, a revision application under S. 25 of the Provincial Small Cause Courts Act shall not be entertained. The argument is not without substance, and on this ground also this application must be dismissed.

(8) The application is dismissed with costs. The stay order is vacated.

B/R.G.D. Application dismissed.

A.I.R. 1953 ALL. 150 (Vol. 40, C. N. 67)

MALIK C. J. AND V. BHARGAVA J.

Ram Kumar Ram Niwas Nanpara, Applicant v. Commr. of Income-tax, U. P. and Ajmer Merwara, Lucknow, Respondent.

Misc. Case No. 371 of 1948, D/- 29-8-52.

† **(a) Partnership Act (1932), S. 4 — Joint Hindu family and partnership — Joint family as a unit cannot be a partner in a firm — Two brothers as a co-parcenary unit entering into partnership with others — Non-specification of respective shares of brothers — Effect — (Income-Tax Act (1922) S. 26A).**

It is not correct to say that a joint Hindu family as such is a unit which can enter into a partnership. Partnership is a contractual relationship which can be entered into only by some one who is entitled to enter into a contract and it is possible that the Karta or the adult members of the family, acting within their rights under the Hindu law, may be able to enter into a partnership and make the entire joint family liable for the debts of the partnership and entitled to the benefits thereof, but in point of law it is only those who enter into the contract who can be deemed to be the partners, though they may be there in their representative capacity on behalf of the family. The other members of the joint family cannot, each of them, claim in his individual right that he has become a partner in the partnership and is entitled to exercise the rights of a partner. He becomes a sort of sub-partner and can only act through the Karta who has joined the partnership on his behalf: AIR 1948 P. C. 8 Discussed; AIR 1950 Bom 94 and 28 Mad 344, Ref. to. (Paras 10, 12, 13)

Two brothers G and S constituting a joint Hindu family entered into partnership with four other persons. The share of the two brothers G and S as a coparcenary unit was specified in the partnership deed to be equal to that of each of the other partners but there was no specification of their shares inter se. An application for registration of the firm under S. 26-A, Income-Tax Act was filed by all the partners constituting the firm.

Held that G and S as a coparcenary unit could not as such be partners in the partnership. G and S could be partners in the firm in their individual capacity but in that case it was necessary that their shares should have been specified. In the absence of such specification the partnership was inoperative and illegal within the meaning of S. 4, Partnership Act. (Para 14)

Anno: Partnership Act S. 4 N. 7. Income Tax Act S. 26A N. 1.

(b) Hindu Law — Joint family — Status of — It has no legal entity distinct and separate from its members.

A Hindu undivided family as such has no legal entity distinct & separate from that of the members who constitute it. It may be that a member of a Hindu undivided family may continue to have certain personal rights and may be able to own property in his own right and enter into a contract in his own right but a Hindu undivided family is not like a corporation or a limited concern and it cannot, therefore, be said that it has a legal entity quite distinct and separate from that of those who constitute it. A joint Hindu family is a unit to which no outsider can be admitted by agreement; it is a status which can only be acquired by birth or by adoption & the head or Karta of that family has certain rights and, while acting within those rights, he can bind every member of the family by his actions or deal with the joint family property which, though it does not belong to him and belongs to all, he has been given the power to manage or dispose of, in the interest of the family. (Para 11)

G. S. Pathak and R. S. Pathak, for Appellant; J. Swarup and S. C. Das, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('48) 1948-16 ITR 35: (AIR 1948 P C 8) 6, 7, 8
('50) AIR 1950 Bom 94: (ILR (1949) Bom 741) 6, 10
('05) 28 Mad 344 9

MALIK C. J.: The Income-tax Officer refused an application under S. 26A, Income-tax Act, for registration of a partnership firm. This order was upheld by the Appellate Tribunal and thereafter an application was made that a case be stated to this Court under S. 66(1), Income-tax Act. The Tribunal has thereupon referred to this Court the following two questions.

1. Whether the inclusion of Ghanshayam Das and Sunder Lal (two brothers constituting a Hindu undivided family) in the deed of partnership dated 7-3-1945, as partners of 3.1/5 as a co-parcenary unit, without specification of their shares inter se, rendered the partnership inoperative and illegal within the meaning of S. 4, of Partnership Act.
2. Whether the application under S. 26A, Income-tax Act, seeking registration of the Instrument of Partnership dated 7-3-1945, in which application the collective share of 3.1/5 annas of Ghanshyam Das and Sunder Lal had been shown against their names as a unit, which application was admitted before the Tribunal to have been signed by Ghanshyam Das only, was a proper and valid application within the meaning of R. 2, Income-tax Act, on the basis of which registration could be allowed for purposes of Income-tax Act.

(2) The facts, as gathered from the statement of the case and from the appellate order of the Tribunal are that there was a joint Hindu family comprising the descendants of one Jotha Ram which was carrying on business & was assessed to Income-tax as a Hindu undivided family. There was a partition in the family and, after the partition, a deed of partnership was executed in March 1945. In the deed of partnership it was mentioned that Ghanshyam Das Sunder Lal constituting a Hindu undivided family were joining this partnership through L. Ghanshyam Das and L. Sunder Lal, both being sons of L. Bilas Rai. The share of the joint family represented by Ghanshyam Das Sunder Lal was 3.1/5 annas while the shares of the other four partners, Ram Kumar, Babu Lal Ram Niwas and Govind Prasad were also 3.1/5 annas each. In the assessment year 1944-45 an application for registration was made under S. 26A, Income-tax Act, on behalf of (1) Ram Kumar, (2) Babu Lal, (3) Ram Niwas, (4) Ghanshyam Das Sunder Lal and (5) Govind Prasad. The application, we are informed by learned counsel, was signed by Ram Kumar, Babu Lal, Ram Niwas, Govind Prasad and also by Ghanshyam Das and Sunder Lal. There was, however, some confusion whether both Ghanshyam Das and Sunder Lal had signed the application or only Ghanshyam Das had signed it. But we shall come to that point later.

(3) Three points were raised before the Tribunal. Firstly, it was said that Ghanshyam Das Sunder Lal, a Hindu undivided family, could not as such be partners in this partnership firm. Secondly, it was said that there was no specification of shares as between Ghanshyam Das and Sunder Lal, if it was alleged that they were to be treated as partners in the partnership. Lastly, it was alleged that the application was defective inasmuch as Sunder Lal had not signed the original application under section 26A.

(4) On all these points the Tribunal, in its appellate order, decided against the assessee. At the time when the Tribunal decided the appeal the original application for registration under S. 26A was not before it, as it was with the Income-tax Officer at Gonda. It was assumed that the application was signed only by Ghanshyam Das and the case was argued on that hypothesis and the learned counsel had urged that the fact that Sunder Lal had not signed the application would make no difference.

(5) After the case was decided by the Tribunal the assessee discovered that the original application under S. 26A had been signed by both Ghanshyam Das and Sunder Lal and an application was, therefore, made to the Tribunal bringing this fact to its notice. The Tribunal, however, rejected this application on the 24th of February 1948, and the statement of the case proceeds on the footing that the application was signed by only Ghanshyam Das. The Tribunal, when referring the case, directed that the original application under S. 26A shall form part of the statement of the case and it is Annexure 'A' (Copy) of the application dated the 6th of March 1945 for the registration of the firm. From the copy annexed it appears that there were, as a matter of fact, six signatories to the application. Though the names of the first five signatories are not mentioned in the copy, it may safely be presumed that one of the signatures was of Sunder Lal as stated by Mr. Pathak. As the mistake was made by him by inadvertence by reason of the original application being not available, as it was in the Income-tax office at Gonda, we do not think the Tribunal should have refused to make the correction. In any case the application being a part of the statement of the case, we cannot ignore the fact that it bears six signatures and there are six executants to the document.

(6) Coming to the next point whether a Hindu undivided family as such could be a partner, learned counsel has urged that, whatever might have been the view of this Court prior to the year 1948, the decision of their Lordships of the Judicial Committee in — 'Lachhman Das v. Commr. of Income-tax, Punjab', NWF and Delhi Provinces, Lahore' 1948-16 ITR 35 (P.C.) makes it now clear that that view should be re-considered. Reliance is also placed on a judgment of the Bombay High Court in — 'Udhavji Anandji v. Bapudas Ramdas', AIR 1950 Bom 94.

(7) In —'Lachhman Das's case', (1948-16 ITR 35 P. C.) the point for decision was whether a valid partnership could be entered into by a member of Hindu undivided family with the Karta as representing that family. Their Lordships of the Judicial Committee relied on the fact that a member of a joint Hindu family is competent to enter into a contract in his own individual capacity. Their Lordships pointed out that it was open to a managing member of a joint Hindu family to enter into partnership with a stranger and held that there was no reason, therefore, why a coparcener could not, in his individual capacity, enter into partnership with the Karta of the joint family. Learned counsel has relied on a passage towards the end of the judgment which is as follows:—

> "But, apart from this answer, it may be pointed out that though in its nature a joint Hindu family may be fleeting and transitory, it has been regarded as capable of entering, through the agency of its karta, into dealings with others. Without accepting the view of some eminent Hindu Judges that a Hindu joint family is, in its true nature, a "corporation" capable of a continuous existence in spite of fleeting changes in its constitution, it is enough to state that for the purpose of such a transaction effected through the medium of its karta, it has been, for a long time past, regarded as an entity capable of being represented by its manager."

It is argued that their Lordships must be deemed to have laid down that a joint Hindu family as such can enter into a partnership. It is difficult to understand how such a result can be derived from the decision in Lachhman Das' case or from the quotation given above. As a matter

of fact, it would appear from the following passage that the point was left undecided:

"Their Lordships are, therefore, concerned in this case only with the validity of a partnership between the Karta of the family representing it on the one hand and a member of that family in his individual capacity on the other. It is unnecessary to consider in this case the question relating to the validity of a partnership between a Hindu undivided family as such of the one part and one of its undivided members in his individual capacity of the other. With reference to the latter kind of partnership, there seems to be some authority favouring the view that such a partnership cannot exist under the rules of Hindu law, but their Lordships do not propose to deal with that question in this case."

A person cannot enter into partnership with himself and the partnership of a co-parcener with the Karta of the joint Hindu family can be supported only on the ground that it was a partnership between the Karta on the one hand and the member on the other, though the Karta may be there in his representative capacity and may be accountable as such to the joint family.

(8) It is now well recognised that the Karta or the adult members of a joint Hindu family may enter into a partnership with a stranger &, where it is a trading family, represent the joint Hindu family. In Lachhman Das's case (1948-16 ITR 35 P.C.) their Lordships did not consider the question whether a Hindu undivided family as such, which is a fleeting and changeable body, could enter into a partnership under the Partnership Act. Their Lordships pointed that the partnership is in its nature a contractual relationship and only such of its members as in fact enter into contractual relations with the stranger become partners.

(9) The fact that it is the Karta who becomes the partner and not every member of the joint Hindu family or the joint Hindu family as such, is supported by the decision of the Madras High Court in —'Sokkanadha Vannimundar v. Sokkanadha Vannimunder', 28 Mad 344, where the manager of a joint Hindu family had entered into a partnership with a stranger and the partnership was entered into by the manager, not for his personal benefit but on behalf of the family, and it was held that the death of the manager dissolved the partnership. The learned Judge observed:

"It is scarcely necessary to say that a joint Hindu family though at times spoken of by Judges as a corporation cannot, as contended for by the plaintiff, be taken as a legal person in the strict sense of the term so as to constitute a partnership such as the present one subsisting between the plaintiff on the one hand and a real corporation on the other."

(10) Reliance is placed by learned counsel for the assessee on paragraph 14 of the judgment in —'Udhavji Anandji Ladha v. Bapudas Ramdas', AIR 1950 Bom. 94, where the learned Chief Justice (Chagla C. J.) pointed out that

"There is nothing in Hindu law to prevent a member of a joint family becoming a partner with a stranger. Whether a Karta becomes a partner in his own right and incurs liabilities only personally or whether a joint family becomes a partner is always a question of fact and must be decided on the circumstances of each case."

It is said that from this quotation it appears that a joint Hindu family as such is a unit which can enter into a partnership. Partnership is a contractual relationship which can be entered into only by some one who is entitled to enter into a contract and it is possible that the Karta or the adult members of the family, acting within their rights under the Hindu law, may be able to enter into a partnership and make the entire joint family liable for the debts of the partnership and entitled to the benefits thereof, but in point of law it is only those who enter into the contract who can be deemed to be the partners, though they may be there in their representative capacity on behalf of the family. This view is not in conflict with the view expressed by the learned Chief Justice in —'Udhavji Anandji Ladha's case.

In that case, a partnership was started between the plaintiff's father and the defendant No. 1 in 1904. The plaintiff's father died on 30th of April 1927. The plaintiff filed a suit, out of which the appeal arose, for dissolution of partnership and for accounts alleging that even after the death of his father the partnership had continued. In 1935 the plaintiff applied for amending the plaint and added an alternative cause of action that even if after the death of the plaintiff's father there was no subsisting partnership and the partnership stood dissolved on his death, limitation was saved on other grounds mentioned in the application. The greater part of the judgment is devoted to the question whether limitation was saved by certain acknowledgments. If the learned Chief Justice had accepted the view now pressed for by Mr. Pathak that the partnership was not with the plaintiff's father but with the joint family as such, then the partnership would not have stood dissolved on the death of the plaintiff's father and no question of limitation would have arisen. The observations relied on were with respect to the point whether it is only the personal property of the manager or the entire joint family property that was liable for the debts of the partnership which had been entered into on behalf of the joint family and we respectfully agree with the view expressed by the learned Chief Justice that if a manager has had the right under the Hindu law to enter into the partnership the entire joint family property might be made liable for the debts of the partnership.

(11) The next point for consideration is whether a Hindu undivided family as such has a legal entity distinct and separate from that of the members who constitute it. It may be that member of a Hindu undivided family may continue to have certain personal rights and may be able to own property in his own right and enter into a contract in his own right but a Hindu undivided family is not like a corporation or a limited concern and it cannot, therefore, be said that it has a legal entity quite distinct and separate from that of those who constitute it. A joint Hindu family is a unit to which no outsider can be admitted by agreement; it is a status which can only be acquired by birth or by adoption and the head or Karta of that family has certain rights and, while acting within those rights, he can bind every member of the family by his actions or deal with the joint family property which, though it does not belong to him and belongs to all, he has been given the power to manage or dispose of, in the interest of the family. It is difficult to equate or define the position of a joint Hindu family as understood under the Hindu Law with the modern conception of a company or a firm or association of individuals for trade or business purposes.

(12) The important point, however, that has to be borne in mind in this connection is that a

Hindu undivided family as such must act through some one and the only person under the Hindu law who can act for the Hindu undivided family is the Karta (who may be a single individual or several adult members). Partnership is defined in S. 4, Partnership Act, as the relationship between persons who have agreed to share the profits of a business. It is thus based on a contract. To say, therefore, that a Hindu undivided family can become a partner in a firm ignores the fact that this partnership agreement must be entered into either by the Karta or by such other members of the Hindu undivided family who may be adults, a minor being incompetent to enter into a contract. If the Karta enters into the contract on behalf of the family with a stranger, it is he who is the partner and his other co-parceners cannot claim the rights and obligations which arise under the contract entered into by him, except through him. If the Karta has not acted within his powers under the Hindu Law, they would not be bound at all. If, however, he has acted within his rights under the Hindu Law he may be able to bind the entire joint family property for the liabilities that might be incurred by the partnership. When the adult members of a joint family enter into partnership they must be deemed to be partners in the partnership firm though, if they were acting on behalf of the family and have the right to bind the members of the family, the members of the family may be entitled to the benefits and the joint family property may be liable for the debts of the partnership. The joint Hindu family can, therefore, be a partner only in a loose sense. The persons entering into the contract of partnership alone are partners, and through them the joint Hindu family may be entitled to the benefits and the joint family property may be liable for the losses of the partnership.

(13) The result, therefore, is that in our view it is the Karta of a joint family who becomes the partner and if he has acted within his rights as Karta and has joined the partnership, not in his individual capacity but as representing the joint family, then he may bind other co-parceners who would be entitled to get the benefits of the partnership and whose share in the joint family property would be liable for the debts of the partnership. But the other members of the joint family cannot, each of them, claim in his individual right that he has become a partner in the partnership and is entitled to exercise the rights of a partner. He becomes a sort of sub-partner and can only act through the Karta who has joined the partnership on his behalf. If the contention of the learned counsel for the assessee is accepted then, on the Karta becoming a partner on behalf of a joint Hindu family, every member of the joint family would become a partner and, even though some of them may not have been in existence or capable of entering into a contract, each member of a joint Hindu family would have the right to claim all the rights reserved to a partner under the Partnership Act and be liable for all the liabilities imposed on a partner under that Act. If a joint Hindu family as a unit distinct and separate from its members is deemed to be the partner then also this absurd result would follow that the death of the Karta or those adult members who had entered into the partnership would not result in the dissolution of the firm, as on the death of one Karta there will be another to take his place and the partnership would continue so long as the joint family continued to exist even though there may come a time when a joint Hindu family consists of only minors. The whole scheme of the Partnership Act goes against such conclusions.

(14) Having, therefore, carefully considered this matter we are of the opinion that:

1. The Hindu undivided family of Ghanshyam Das Sunder Lal, as a co-parcenary unit, could not as such be partners in the partnership. Ghanshyam Das and Sunder Lal could be partners in the partnership but in that case it was necessary that their shares should have been specified.
2. We have already said that the facts being as stated by learned counsel when he applied for correction, the Tribunal should not have gone on to hold that the application was signed only by Ghanshyam Das when it was apparent from the application itself that it had been signed by both.

(15) The second question, therefore, does not arise.

(16) The assessee must pay the costs to the Department which we assess at Rs. 300/-.

B/K.S. Answer accordingly.

A.I.R. 1953 ALL. 153 (Vol. 40, C. N. 68)
(LUCKNOW BENCH)

P. L. BHARGAVA AND BEG JJ.

Lal Behari and others, Applicants v. State through the Special Manager, Court of Wards, Sitapur, Opposite Party.

Criminal Misc. Nos. 477, 478 and 479 of 1951, D/- 26-5-1952.

(a) Constitution of India, Art. 215 — Communication with Presiding Officer of Court and the administrative head, regarding the pending case — Course to be adopted by presiding officer suggested — Communication amounts to contempt of Court — Actual danger or prejudice to party is not essential — Mens rea is not necessary — (Contempt of Courts Act (1926) S. 1).

Any private communication by a party to a case or even a stranger to a cause addressed or made to the presiding officer of a Court, which is calculated to influence his decision in pending case, constitutes a most serious form of contempt.

A person is presumed in law to have the intention conveyed by his words and to intend the consequences which are bound to follow from his own acts. The test of the offence of the contempt of Courts does not lie in mens rea. Whatever the intention of the contemner might have been, he is brought within the clutches of law as soon as the Court finds that by his word or by his conduct he has set into motion a chain of events which is by its very nature likely to interfere with the course of justice. The crucial test of the offence lies not in the object within the mind of the contemner but in the tendency which his manifest and outward acts inherently possess, to interfere with the uninterrupted flow of justice in an impartial manner. (Para 12)

The gravamen of the offence consists in robbing the Court of that confidence which it is the duty of the Court to inspire and the corresponding obligation of the public to repose in the same. The essence of the offence lies not in the prejudice that it might cause to the parties but in the

damaging nature of the act itself qua the administration of justice in the state. In other words, the essence of the offence lies not so much in the capacity of the impugned act to cause damage to the cause of a party as in its tendency to cause damage to the cause of justice itself. (Para 14)

Ignorance of law cannot be an excuse specially when the perpetrator of the offence is a literate man holding a responsible position of a manager of a big estate. (Para 13)

The manager of an estate which was under the Court of Wards, wrote to the Deputy Commissioner, that a certain tenant in the estate was about to file an application under S. 145, Criminal P. C. before the S. D. O. and that the S. D. O. should be asked to look into the matter carefully and do the needful. Subsequent to the filing of the application, the manager again wrote to the Deputy Commissioner to look into the matter and consider his previous letter. Upon this the Deputy Commissioner wrote that he would speak to the S.D.O. and the manager was asked to bring this fact to the notice of the S.D.O. The manager therefore wrote to the S.D.O. and suggested that the attachment of crop in the case was absolutely necessary. On the same date the S.D.O. passed a preliminary order in the case ordering attachment of the crop. The opposite party moved the High Court for taking contempt proceedings against the manager and for transfer of the case to another court outside the jurisdiction of Deputy Commissioner.

Held that the manager was guilty of contempt of Court. (Conduct of the Deputy Commissioner and the S.D.O. criticised) (The case was transferred to another District). (Paras 7, 9, 12, 20)

Anno: Contempt of Courts Act, S. 1 N. 3.

(b) Constitution of India, Art. 215 — Contempt of Court — Apology tendered, when can be accepted — (Contempt of Courts Act (1926), S. 3).

In cases of contempt the Court is not bound to accept an apology or even an unqualified apology. The question whether it should do so or not would depend on circumstances of each particular case. A Court can refuse to accept an apology which it does not believe to be genuine, it can even when it accepts the apology, commit an offender to prison or otherwise punish him. Furthermore, there cannot be both justification and apology. The two things are incompatible. Where the apology does not seem to be so much the outpouring of a penitent heart moved by feeling of remorse and overcome by a sense of ones own guilt, as a convenient device clutched up by a person driven and compelled by the logic of events to resort to a measure which seems to him to provide the only mode of escape from the impending doom or as a last desperate throw in a game of chance hazarded by him at a time when all else has failed and everything seems to be lost, it should be considered to be merely an apology for an apology. It deserves to be given short shrift at the hands of the Court. AIR 1940 Nag 407, AIR 1940 Sind 239 (FB) and AIR 1952 All 86, Rel. on. (Paras 15, 16, 18)

Anno: Contempt of Courts Act, S. 3 N. 2.

S. C. Das and J. S. Trivedi, for Applicants; Saraswati Prasad, for Opposite Party; Addl. Govt. Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('51) 1951-6 Dom LR (All) 309: (AIR 1952 All 86) 7, 17
(1865) 5 WR 86 8
('43) AIR 1943 Lah 329: (45 Cri LJ 445 FB) 12
('40) AIR 1940 Nag 407: (42 Cri LJ 237) 15
('45) AIR 1945 Nag 33: (ILR (1945) Nag 74) 13
('48) AIR 1948 Oudh 114: (49 Cri LJ 108) 8
('40) AIR 1940 Sind 239: (42 Cri LJ 1 FB) 16
(1742) 2 Atk 469: 26 ER 683 7
(1903) 2 KB 432: (72 LJKB 839) 8
(1900) 2 QB 36: (69 LJQB 502) 6

BEG J.: These are three applications, one of which is an application for contempt of Court against the Special Manager, Court of Wards, Sitapur incharge Rampur Mathura estate (Criminal Misc. Appln. No. 479 of 1951) and other two are applications for the transfer of two cases pending in the Court of the Sub-Divisional Magistrate Sidhauli, district Sitapur (Criminal Misc. Applns. Nos. 477 and 478 of 1951). The circumstances which have given rise to these applications may be briefly stated as follows:

(2) Rampur Mathura estate and Kapurthala estate in Avadh are separated by the river Gogra which constantly changes its course. On account of alluvion and diluvion disputes constantly arise regarding the boundaries of the two estates. Rampur Mathura estate is under the superintendence of the Court of Wards and Sri Balbir Saran Das was the Special Manager of the Court of Wards in the month of October 1951. One Mitunjai Bakhsh Singh, who alleged himself to be the tenant of certain plots situated in Rampur Mathura estate, applied on 15-10-1951, to the Special Manager, Court of Wards, Sri Balbir Saran Das, stating that he was a tenant of Rampur Mathura estate, and that Sardar Sohan Singh Tehsildar Kapurthala Estate and others were raising a dispute about the possession of the plots and praying that proper steps may be taken against them. The special Manager, incharge of Rampur Mathura estate, directed the said Mirtunjai Baksh Singh to file a complaint under S. 145, Criminal P. C. On 16-10-1951, the said Special Manager, Court of Wards, Rampur Mathura estate, sent a report to the Deputy Commissioner of Sitapur about the proposed application under S. 145, Criminal P. C. by Jagatpal Singh, who was the mukhtar of Mirtunjai Bakhsh Singh and was going to file an application on behalf of his master before the S. D. O., Sidhauli. The last paragraph of this report runs as follows: "The S. D. O., Sidhauli may be asked to look into this matter carefully and do needful." On this report the remark of the Deputy Commissioner was "seen".

On 17-10-1951, the said Mirtunjai Bakhsh Singh through his mukhtar Jagat Pal Singh put in his application for action being taken under S. 145, Criminal P. C. against the applicants in the Court of Sri S. N. Sharma Sub-Divisional Magistrate, Sidhauli. On 18-10-1951, the Special Manager Rampur Mathura resubmitted his report of 16-10-1951, with the remark that "as orders have not been passed on portion marked X of my report hence it is resubmitted." The portion marked X referred to his report of 16-10-1951, in which he had requested the De-

puty Commissioner to ask the S. D. O., Sidhauli to look into the matter carefully and do the needful. After the file was submitted to him again the Deputy Commissioner passed the following order:

"This will be done when the S. D. O. comes to see me and you may also bring this fact to his notice."

On 29-10-1951, the Special Manager, Court of Wards, after referring to the various reports and orders mentioned above wrote to the Sub-Divisional Magistrate, Sidhauli as follows:

"Please see this. I will speak to you when we meet. Attachment of crop is absolutely necessary."

On the same date the Sub-Divisional Magistrate, Sidhauli passed a preliminary order attaching the crops. The actual order runs as follows:

"Whereas I am satisfied from the report of S. O. Thangaon and of Special Manager Court of Wards that there is dispute likely to result in breach of peace regarding cultivated areas mentioned in Jagatpal Singh's application of plots Nos. 1626 and 1180 situated in village Keora and plot No. 466 situated in village Soharia, I hereby order that the contending parties be called to appear before me on 17-11-51 and put in written statements of their respective claims of possession. I further order that the disputed land along with crops standing thereon be put under attachment at once. The crops should be given in the supurdagi of some reliable and independent person of the locality."

The above proceedings took place in the case of — 'Jagatpal Singh v. Sardar Sohan Singh', No. 250 of 1951.

(3) On 5-12-1951 the applicants made the above-mentioned application in this Court stating the above facts and praying that in view of the facts stated therein Sri Balbir Saran Das, Special Manager, Court of Wards, Rampur Mathura, was guilty of contempt of Court and suitable action be taken against him. This is Criminal Misc. Appln. No. 479 of 1951. The applicants have also filed an application submitting that the above facts and circumstances showed that Sri Balbir Saran Das, Special Manager, Court of Wards, Rampur Mathura estate and the Deputy Commissioner of Sitapur (incharge of the Court of Wards) had been trying to influence the mind of the court and the Sub-Divisional Magistrate, Sidhauli being subordinate to the Deputy Commissioner of Sitapur, there was an apprehension in the mind of the applicants that they would not receive a fair and impartial trial in his Court. Further in view of the fact that all the Sub-Divisional Magistrates of Sitapur were subordinate to the Deputy Commissioner of Sitapur who was taking interest in the case, it was expedient in the interests of justice that the case be transferred from the district of Sitapur to some other district. This is Criminal Misc. Appln. No. 478 of 1951 and relates to case No. 250 of 1951.

(4) On the basis of the same facts another application for the transfer of a similar case under S. 145, Criminal P. C. between Rampur Mathura estate, through the Special Manager Courts of Wards, Sitapur and Lal Behari munsarim Kapurthala estate Nanak Prasad qanungo Kapurthala estate, Sohan Singh, tahsildar Kapurthala estate and others (Case No. 434 of 1951) pending in the Court of Sub-Divisional Magistrate, Sidhauli was filed in this Court. This application is Criminal Misc. Appln. No. 477 of 1951.

(5) In view of the fact that the main grounds of the transfer of the two cases are the same as those which have been made the basis of the application for contempt of Court, it would be convenient to take up the application for contempt of Court first.

(6) The offence of contempt of Court has not been defined either in the Contempt of Courts Act or any other Indian Statute. The reason for it is obvious. The offence covers such a wide field of activity that it is very difficult to confine it within the bounds of a definition that would be applicable to all cases. Lord Russel in — 'Reg v. Gray', (1900), 2 Q B 36 at p. 40, defined it as follows:

"Any act done or writing published calculated to bring a Court or Judge of the Court into Contempt, or lower its or his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."

(7) In the case of — 'Read v. Huggonson', (1742) 2 Atk. 469: 26 E R 683, Lord Hardwicke said:

"There are three different sorts of contempt. One kind of contempt is scandalising the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard."

The facts of the present case may now be examined in the light of the above exposition of its meaning with a view to ascertain as to whether the offence of contempt has been committed. The chain of events in the present case starts on 15-10-1951, when, it would be remembered, the Special Manager directed Mirtunjai Bakhsh Singh to file a complaint under S. 145, Criminal P. C. Having done so, on the next day, i.e., on 16-10-1951, the Special Manager wrote to the Deputy Commissioner of Sitapur about the application which was going to be filed and asked him in his report to direct the Sub-Divisional Magistrate of Sidhauli to look into the matter carefully and do the needful. This was clearly a request on the part of the Special Manager to the Deputy Commissioner to contact the presiding officer of the Court in an extra-judicial manner and to impress upon him the urgency of the matter and the necessity of special and careful attention. The Sub-Divisional Magistrate of Sidhauli was subordinate to the District Magistrate and there could be no doubt that he was likely to be influenced by any conversation or direction that his higher officer would have with him or issue to him about the case. There is further no doubt that the report in question was written with this mischievous purpose. The request to impress upon him the necessity of careful action in the matter would naturally have the effect of making the Sub-Divisional Magistrate concerned think that there was a foundation in the application which was going to be launched in his Court. The extra care which he was to be enjoined to take into the matter was obviously meant to bring home to him the urgency of the situation. Whatever the merits of the case might have been, it is clear to us that it was an absolutely unauthorised manner of approach to

a legally constituted authority and cannot be justified for a moment. It was calculated to prejudice the mind of the presiding officer in favour of a particular party and to prevent the application of that unclouded and impartial attitude to mind which a Court is expected to bring to bear on a case pending before it. The District Magistrate having perused the report seems to have realised his position and he merely wrote the word "seen"' on it.

The Special Manager does not seem to have been satisfied with this non-committal reply of the Deputy Commissioner. Accordingly after the application under S. 145, Criminal P. C., was filed on 17-10-1951, he resubmitted the matter to the Deputy Commissioner on 18th October and solicited clearer orders on the request which he had made on 16-10-1951. One would expect that the Deputy Commissioner would have resented this action on the part of the Special Manager. Far from doing it, we find that he approved of it and wrote a remark that indicated that the request of the Special Manager would be complied with when the Sub-Divisional Magistrate came to see him. It is further regrettable to find that a high official like the Deputy Commissioner did not stop there. He directed the Special Manager, Court of Wards, to himself bring this fact to the notice of the said Sub-Divisional Magistrate thereby encouraging him to make a direct approach to the Court by contacting him personally.

Embodied (emboldened?) by the direction received from the Deputy Commissioner, the Special Manager had the courage to write to the Sub-Divisional Magistrate, Sidhauli, before whom the application was pending that he would speak to him personally about the matter. He went to the extent of suggesting the proper order that should be passed in the case by writing to him that "attachment of crop is absolutely necessary". We cannot conceive of a graver and grosser form of the offence of contempt of Court than the one that is manifested in this piece of conduct of the Special Manager. Here is an unabashed and clear attempt to poison the fountain spring of justice at its very source and to divert its flow in a direction polluted with prejudice and coloured with bias.

At this stage again, we may observe that the duty of the Court receiving any such suggestion is clear, definite and admits of no doubt. The only course which should have been adopted by the Sub-Divisional Magistrate was to refer the matter to this Court for necessary action. Again, we regret to note that instead of doing it, we find that the Court on the same day passed an order in terms of the suggestion made by the Special Manager. If it is permissible to read between the lines and if the consequences that flow from an act are an indication of its causes, then the only conclusion that is open to this Court, in view of the circumstances that are starting (staring?) in our face, is that the officer concerned seems to have surrendered his judgment in a manner tantamount to an abdication of his own functions. We have expressed ourselves rather strongly on this point, because it is not the first time that reaction of this nature on the part of the lower court has been brought to our notice when the presiding officer of such Court has allowed himself to be a passive recipient of such requests & has unfortunately succumbed to the force and pressure exercised on him.

We may only refer to a case which only very recently came to our notice and which is reported in — 'State v. Krishna Madho', 6 Dom L R (All) 309 and in which a similar action on the part of presiding officer of the Court was the subject-matter of condemnation and disapproval by a judgment of this Court to which one of us was a party.

(8) We have no doubt that any private communication by a party to a case or even a stranger to a cause addressed or made to the presiding officer of a Court, which is calculated to influence his decision in a pending case, constitutes a most serious form of contempt. The following remarks of Norman J. in — 'Taylor v. Asmedh Koonwar', (1865) 4 W R 86 quoted in — 'Additional Sessions Judge, Hardoi v. Banwari Lal', AIR 1948 Oudh 114 are pertinent in this connection:

> "It is contrary to the practice of all Courts and highly dangerous to the administration of justice that a suitor on any pretext whatever should communicate with a Judge either by letter or any conversation or in any manner whatsoever other than by public proceedings in open Court respecting the merits of any case in which he is interested and which is either pending in the Court of such Judge or likely to come before him."

The following observations of Lord Cottentram are also relevant in this connection (Vide Aiyer's Law of Contempt, 1949 edition page 211).

> "Every private communication to a Judge for the purpose of influencing his decision upon a matter publicly before him, always is and ought to be reprobated. It is a course calculated, if tolerated, to divert the course of justice, and is considered and ought more frequently than it is to be treated as, what is a high contempt of Court."

Dealing with the effect of certain articles published in a newspaper with a view to create a prejudicial atmosphere, Wills J. in — 'Reg v. Parke', (1903) 2 K B 432 explained the grounds on which such writings are drawn into the category of the offence of contempt in the following words:

> "The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely to administer justice duly, impartially and with reference solely to the facts judicially before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of Court'." (Vide Aiyer's Law of Contempt pages 75 and 76).

It goes without saying that the offence would be a much graver one in cases where instead of being expressed in a newspaper in a general form, such remarks are directed specifically to the particular officer who is seised of the case and responsible for the effectual administration of justice in the matter.

(9) In view of the fact that in the present case the ingredients of the offence are made out so clearly, we would have expected that an unequivocal unqualified apology on the part of

the contemner offered at the very outset would have provided a relieving feature and a saving grace. On the other hand, the case on behalf of the Special Manager was argued with a determination, zeal and force worthy of a better cause. The District Magistrate in his explanation stated that

> "the orders referred to in the application were passed by me in the routine way on the reports submitted by the Special Manager and it is wrong on the part of the applicants to say that I am taking interest in the case and trying to influence the mind of the Magistrate who is seised of the case."

(10) The Sub-Divisional Magistrate, Sidhauli, having admitted the correctness of the facts which formed the foundation of the complaint for contempt stated in his explanation that it was not correct that the Special Manager or the Deputy Commissioner in any way tried to influence him in the case and that the inference drawn from those facts in the said application was not justified.

(11) The Special Manager himself filed an affidavit raising all kinds of pleas in his defence. They ranged from an expression of his complete ignorance of the law of Criminal Procedure and the Indian Penal Code to an allegation that it was his duty as Special Manager, Court of Wards, to address the impugned communications and to act in the manner in which he did. We need hardly say that the position adopted by the parties concerned in the matter only adds insult to injury.

(12) The learned Additional Government Advocate, who appeared for the Special Manager, vehemently argued on his behalf that throughout his client was acting in a bona fide manner and that he had no intention of interfering with the due process of justice. In view of the facts mentioned by us above, we do not think that there is any vestige of truth in it so far as the factual aspect of the argument is concerned. A person is presumed in law to have the intention conveyed by his words and to intend the consequences which are bound to follow from his own acts. We may observe that the argument itself rests on the mistaken assumption that the test of the offence of the contempt of Courts lies in 'mens rea'. Whatever the intention of the contemner might have been, he is brought within the clutches of law as soon as the Court finds that by his word or by his conduct he has set into motion a chain of events which is by its very nature likely to interfere with the course of justice. The crucial test of the offence lies not in the object within the mind of the contemner but in the tendency which his manifest and outward acts inherently possess to interfere with the uninterrupted flow of justice in an impartial manner. Reference in this connection may be made to the case — 'In re Subrahmanyan, Editor, Tribune', AIR 1943 Lah 329 (FB). If this test is applied to the present case, we have no hesitation in holding that the offence which he has committed admits of no doubt. In this particular case, however, it may be mentioned that matters had transcended the region of intention and had actually taken the form and shape of action resulting in serious prejudice. It may be remembered that the suggestion of the Special Manager that attachment was necessary was followed by a similar order by the Court, and the fact that the dates of both synchronise leads to a suspicion that the one is merely an echo of the other.

(13) It was further argued on the contemner's behalf that he was ignorant of the law of Criminal Procedure Code and the Indian Penal Code, a statement which is incorporated in his affidavit. It would be difficult to credit him with this blissful ignorance considering that he holds the position of a responsible manager of vast estates which are constantly surrounded with cases under S. 145, Criminal P. C. His suggestion to the Sub-Divisional Magistrate, Sidhauli, that attachment under the circumstances was necessary itself speaks eloquently of his knowledge of the law on the subject and shows that he was fully cognizant of the relevant provisions of law. His own conduct, therefore, belies the statement which he has solemnly made in his affidavit. In any case, ignorance of law cannot be an excuse specially when the perpetrator of the offence is a literate man holding a responsible position. Vide — 'Balkrishna Narayan v. Col. N. S. Jatar', AIR 1945 Nag. 33.

(14) Next, it was argued on his behalf that no actual damage was done in the case as the matter is still at an initial stage and hence no offence could be said to have been committed. This argument again betrays a misapprehension of the nature of the law of contempt. The damage in such cases is not merely damage to the parties but damage to the reputation of the Court itself. The gravamen of the offence consists in robbing the Court of that confidence which it is the duty of the Court to inspire and the corresponding obligation of the public to repose in the same. In this particular case, it so happened that fortunately the relevant papers were retained on the file as bearing unimpeachable testimony of the ingredients of the offence. The documentary evidence remained on record till it was brought to the knowledge of the applicants (the opposite-parties in the case under S. 145, Criminal P. C.). Its alarming nature naturally impelled the applicants to take the earliest step to move this Court to take action and to transfer the cases from the district. The matters therefore were brought to our notice before any substantial damage to any party accrued. The essence of the offence, however, as observed by us above, lies not in the prejudice that it might cause to the parties but in the damaging nature of the act itself 'qua' the administration of justice in the state. In other words, the essence of the offence lies not so much in the capacity of the impugned act to cause damage to the cause of a party as in its tendency to cause damage to the cause of justice itself.

(15) At the close of the arguments learned Counsel appearing for the contemner freely suggested that in case the Court held that he had committed an offence, an unqualified apology on his behalf might be accepted. It may be mentioned that in cases of contempt the Court is not bound to accept an apology or even an unqualified apology. The question whether it should do so or not would depend on circumstances of each particular case. In — 'Sub-Judge, First Class, Hoshangabad v. Jawahar Lal', AIR 1940 Nag 407. Vivian Bose J., now a Judge of the Supreme Court of India, observed that

> "An Apology is not a weapon of defence forged to purge the guilty of their offences. It is not an additional insult to be hurled at the heads of those who have been wronged. It is

intended to be evidence of real contriteness, the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then it is of any avail in a Court of justice. But before it can have that effect, it should be tendered at the earliest possible stage, not the latest, and even if wisdom dawns only at the appellate stage, the apology should be tendered unreservedly and unconditionally before the arguments begin and before the person tendering the apology discovers that he has a weak case and before the Judge has indicated the trend of his mind. Unless that is done, not only is the tendered apology robbed of all grace but it ceases to be an apology."

Everything depends upon the circumstances as well as upon the nature of the apology and the manner in which it is tendered.

(16) In — 'Emperor v. P. C. Tarapore', AIR 1940 Sind 239 in a Full Bench case Davis, C. J., laid down that it does not follow that because an apology is offered the Court must accept it and is disarmed. A Court can refuse to accept an apology which it does not believe to be genuine; it can, even when it accepts the apology, commit an offender to prison or otherwise punish him. Furthermore, there cannot be both justification and apology. The two things are incompatible.

(17) Similarly, an apology offered by the contemner in a recent case in —'State v. Krishna Madho', 6 Dom L R (All) 309 was rejected by this Court.

(18) An apology made in such circumstances does not seem to be so much the outpouring of a penitent heart moved by a feeling of remorse and overcome by a sense of one's own guilt, as a convenient device clutched up by a person driven and compelled by the logic of events to resort to a measure which seems to him to provide the only mode of escape from the impending doom or as a last desperate throw in a game of chance hazarded by him at a time when all else has failed and every thing seems to be lost. Apology tendered under such circumstances should be considered to be merely an apology for an apology. It deserves to be given short shrift at the hands of the Court. We have accordingly no hesitation in treating this belated show of regret as unworthy of consideration and summarily reject the so-called apology thus offered.

(19) For the reasons given above, we find Sri Balbir Saran Das guilty of contempt of Court and order him to pay a fine of Rs. 100/- within a month of the date of this order or in default to undergo one month's simple imprisonment. He will also be liable to pay Rs. 150/- as costs to Mr. Das, who appeared for the applicants and Rs. 80/- as costs to Mr. B. N. Roy, Assistant Standing Counsel who appeared for the State.

(20) In view of the circumstances discussed above, the grounds of transfer of both the cases are self-evident. The state of affairs disclosed by the narration of events, which formed the basis of the application for contempt of Court provides a sad commentary on the atmosphere prevailing in that particular area regarding the attitude that is to be adopted by high-placed officials in cases of this nature. We accordingly order that both the cases mentioned above which are pending in the Court of the Sub-Divisional Magistrate, Sidhauli, be transferred from Sitapur district to Lucknow district. The files of the said cases shall be sent to the District Magistrate of Lucknow, who shall either try the cases himself or transfer them to any stipendiary Magistrate authorised by law to try the same.

B/R.G.D. Orders accordingly.

A.I.R. 1953 ALL. 158 (Vol. 40, C. N. 69)

CHATURVEDI J.

Bishambhar Dayal, Plaintiff-Applicant v. Girdhar Lal Odhavji, Defendant-Opposite Party.

Civil Revn. No. 949 of 1948, D/- 28-10-1952.

(a) Civil P. C. (1908), S. 115 — "Case decided" — Issue in suit decided and as result part of claim going out of suit — Decision of issue is "case decided" and revision lies. AIR 1936 All 686 (FB), Distinguished. (Para 4)

Anno: Civil P. C., S. 115 N. 4.

(b) Houses and Rents — U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5(4) and (5) — Suit for fixation of enhanced rate of rent and for arrears of rent at that rate — Civil Judge has jurisdiction to entertain it, even if valuation is less than Rs. 5,000 — (Civil P. C. (1908), S. 15) — (Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 18) — (Provincial Small Cause Courts Act (1887), S. 16).

Sub-sections (4) and (5) of S. 5 lead to the conclusion that the Civil Court is authorised to fix the enhanced rate of rent from a date prior to the date of the institution of the suit for enhancement of rate of rent. If the court is authorised to fix the rent from such date as it may think proper, it is very difficult to hold that it cannot pass a decree for recovery of rent at the enhanced rate, from the date the court thinks it proper that it should be paid.

It is certainly more convenient that the court which fixes the rate of rent, and which also directs that the rent is to be paid at that rate from a back date, should also have the power to actually pass a decree for the recovery of the amount which it thinks the tenant is liable to pay. Therefore the joinder of the two claims is permissible under the Code of Civil Procedure and it is not prohibited by any provision of the Control of Rent and Eviction Act. Section 15, Civil P. C., contains merely a procedural provision and its object is not to oust the jurisdiction of a court of higher grade to try and dispose of a suit of smaller valuation. Consequently, the Civil Judge has jurisdiction to try the claim for recovery of less than Rs. 5,000/- also; and the two claims i.e. of fixing of enhanced rate of rent and for arrears of rent at that rate can be joined together in a suit instituted under S. 5(4) of the Act. 7 All 230 (FB) and 17 Cal 155, Relied on. (Paras 6, 7, 8)

The fact that the claim for arrears of rent is triable by Small Cause Court is immaterial. What S. 16, Provincial Small Cause Courts Act prohibits is the institution of a suit in any other court, if the entire suit as is stood was triable by a court of small causes. The suit as a whole is certainly not cognisable by any court of

small causes and the suit as it stands is not of a small cause court nature. (Para 9)

The court of the Munsif or of the Civil Judge, trying a suit under S. 5, Control of Rent and Eviction Act, is not a persona designata; and it cannot be said that he can try only a suit as provided by the special Act and not any other claim made in that suit. Only an additional jurisdiction has been conferred on the ordinary civil courts, to try suit under the Rent Control and Eviction Act also. (Para 10)

The fact that the court has been conferred a special jurisdiction does not mean that the ordinary jurisdiction of the Court has been taken away. The court will determine the rate of rent as provided by the provisions of the Control of Rent and Eviction Act, and at the same time can pass a decree for that amount under its ordinary jurisdiction. (Para 11)

Moreover there would be no serious anomaly even if one part of the decree granting arrears of rent is made appealable and the other part of the decree determining the rate of rent is not made appealable. The appellate court will not be able to hold that the rate of rent fixed by the trial court was not correct and it will only be in a position to here the appeal on a supposition that the rate of rent fixed could not be challenged before it. If there are certain pleas of payment or other such matters, the appellate court would be able to deal with those points and those points only. In any case, a consideration like this cannot be allowed to affect the jurisdiction of the court, if the court otherwise is entitled to try and determine both the claims. (Para 12)

Anno: Civil P. C., S. 15 N. 1, 4, 27; Prov. Small Cause Courts Act, S. 16 N. 1, 3.

Surendra Nath Verma, for Applicant; Dularey Lal and D. Sanyal, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras

('85) 7 All 230: (1885 All WN 1 FB) 6
('36) 1936 All LJ 923: (AIR 1936 All 686 FB) 5
('90) 17 Cal 155 6
('10) 8 Ind Cas 1158: (103 Pun Re 1910) 10
('26) AIR 1926 Rang 25: (3 Rang 560 FB) 10

ORDER: This is a plaintiff's application in revision from the part of the order, passed by the First Civil Judge of Kanpur, holding that he had no jurisdiction to deal with the claim for recovery of arrears of rent.

(2) The suit was by the landlord for the enhancement of rent under S. 5(4), U. P. Temporary Control of Rent and Eviction Act (3 of 1947), (hereinafter called the Act). The plaintiff wanted the rent to be fixed at a sum of Rs. 50/- per mensem and valued the suit at Rs. 600/-, the amount of rent for one year. He also claimed Rs. 900/- as arrears of rent for eighteen months at the same rate of Rs. 50/- per mensem. One of the pleas taken in defence was that the claim for recovery of arrears of rent was not cognizable by the learned Civil Judge and such a claim could not be joined to a suit for fixation of rent under S. 5(4) of the Act. This is the only point with which I am concerned in this revision.

(3) The learned Civil Judge framed issue No. 4 on the point but, as he himself has remarked, the issue is not happily worded, still the parties knew what it meant and the learned Civil Judge has decided only this issue by his order under revision. The learned Civil Judge has held that the claim for recovery of arrears of rent would be cognizable by a court of small causes and not by his court, and that Act 3 of 1947 did not contemplate a suit for arrears of rent. He further held that if the valuation of the suit for determination of rent and for recovery of arrears of rent had exceeded Rs. 5000/-, he might have had jurisdiction to entertain both the claims; but, as the total valuation of both the claims is less than Rs. 5000/-, he came to the conclusion that the claim for recovery of arrears of rent was not cognizable by him. The plaintiff has, accordingly, come up in revision to this Court under S. 115, Civil P. C. and has challenged the correctness of the decision of the learned Civil Judge.

(4) The learned counsel for the defendant opposite party has raised a preliminary objection to the maintainability of this revision. His contention is that only an issue in the suit has been decided and this decision does not amount to the decision of any 'case' within the meaning of the word as used in S. 115, Civil P. C. In my opinion, this preliminary objection is not well founded. The result of the order of the court below is that a part of the claim has gone out of the suit and with respect to this part it cannot be said that no case has been decided.

(5) The learned counsel drew my attention to the Full Bench case of — 'Suraj Pali Mt. v. Ariya Pretinidhi Sabha, U. P.', 1936 All L J 923 (FB). This case is an authority for the proposition that a revision is not maintainable from an order refusing to amend the pleadings. At the end of the judgment the learned Judge, delivering the judgment of the court, has said:

> "Cases where the amendment comes under some other order of the Code, for example, the addition or substitution of parties, or striking off a pleading may amount to a case decided; but an order passed purely under Order 6, Rule 17 is not."

In my opinion, the above decision does not touch the point in question before me; if anything, it only suggests that a decision concerning a point like the present one may amount to a 'case decided'. I, therefore, think that there is no force in the preliminary objection.

(6) The contention of the learned counsel for the applicant on the main issue arising in this revision is that the learned Civil Judge had jurisdiction to decide the claim for arrears of rent also, and such a claim could be joined to a suit for determination of a rent filed under S. 5(4) of the Act. Learned counsel has relied on the provisions of S. 18, Bengal, Agra and Assam Civil Courts Act, which provides that a Civil Judge will have jurisdiction to try any suit irrespective of its valuation, subject to the provisions of any other enactment which may be in force. His contention, therefore, was that the learned Civil Judge had jurisdiction to try a suit the valuation of which was less than Rs. 5,000/-. This contention appears to be somewhat inconsistent with the provisions of S. 15, Civil P. C. which provides that a suit shall be instituted in the court of the lowest grade competent to try it.

With respect to this provision the contention of the learned counsel for the applicant was that the section did not mean that the Court

of a higher grade had no jurisdiction to try a suit which was also maintainable by a Court of a lower grade. The section was said to be merely a procedural provision, and it did not purport to take away the jurisdiction of a higher Court to try and decide a suit of smaller valuation. In support of this argument the learned counsel cited the case of *Nidhi Lal* v. *Mazhar Husain*, 7 ALL 230 (F. B.) and also the case of *Matra Mondai* v. *Hari Mohun*, 17 cal. 155. These cases, in my opinion, fully bear out the contention of the learned counsel that S. 15, Civil P. C. contains merely a procedural provision and its object is not to oust the jurisdiction of a Court of higher grade to try and dispose of a suit of smaller valuation. The contention of the learned counsel was that the learned Civil Judge had the jurisdiction to try the suit and there could be no doubt that the point that the joinder of these two reliefs was permissible, under the Code of Civil Procedure. In any case, it was not prohibited by any provision of the Control of Rent and Eviction Act. I may mention in this connection that the plaintiff has claimed arrears of rent at the same enhanced rate of Rs. 50 per mensem, which he wants the learned Civil Judge to fix for future also. Sub-section (5) of S. 5 of the Act further provides that the rent fixed by the Court under sub-s. (4) shall be payable from such date as the Court may direct. This provision leads to the conclusion that the Court is authorised to fix the enhanced rate from a date prior to the date of the institution of the suit. If the Court is authorised to fix the rent from such date as it may think proper, I find it very difficult to hold that it could not pass a decree for recovery of rent at the enhanced rate, from the date the Court thinks it proper that it should be paid.

[7] It is certainly more convenient that the Court which fixes the rate of rent, and which also directs that the rent is to be paid at that rate from a back date, should also have the power to actually pass a decree for the recovery of the amount which it thinks the tenant is liable to pay.

[8] The position, therefore, is that the joinder of the two claims is permissible under the Code of Civil Procedure and it is not prohibited by any provision of the Control of Rent and Eviction Act. It further appears, from what has been stated above, that the learned Civil Judge had the jurisdiction to try the claim for recovery of less than Rs. 5,000 also; and I, therefore, think that the two claims can be joined together in a suit instituted under S. 5 (4) of the Act.

[9] The learned Civil Judge has mentioned in his judgment that the claim for recovery of rent is triable by a Court of small causes and he appears to be correct so far; but it does not mean that, if the suit for fixation of rent has been properly filed before the learned Civil Judge, a claim for recovery of arrears of rent, at the rate to be fixed, could not be added to the claim for enhancement. Reference may also be made in this connection to ss. 15 and 16, Provincial Small Cause Courts Act. Section 16 provides that a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes. What this section prohibits is the institution of a suit in any other Court, if the entire suit as it stood was triable by a Court of small causes. The present suit as a whole was certainly not cognizable by any Court of small causes and the suit as it stood was not of a Small Cause Court nature. We find that in ordinary suits for recovery of possession of immovable property a prayer is also added for recovery of certain sums of money as damages for use and occupation. If the latter relief alone formed the subject-matter of the suit, it would certainly be cognizable exclusively by a Court of Small Causes, but the section does not prohibit the inclusion of a relief like that, to a suit brought properly for another relief in the appropriate Court.

[10] The learned counsel for the opposite party has contended that the Court of the Munsif or of the Civil Judge, trying a suit under S. 5, Control of Rent and Eviction Act, is a persona designata; the said officer has been conferred a particular jurisdiction by this special Act. He can, therefore, try only a suit as provided by the special Act and not any other claim made in that suit. I do not find it possible to agree with the learned counsel in his submission that the learned Munsif or the learned Civil Judge is a persona designata when trying a suit under S. 5 (4). In my opinion, only an additional jurisdiction has been conferred on the ordinary civil Courts, to try suit under the Rent Control and Eviction Act also. It is the same kind of power which has been conferred on these Courts by the different provisions of the Agriculturists' Relief Act, the Debt Redemption Act, and numerous other enactments. The legislature was probably conscious of the fact that a decree passed by a Court under S. 5 (4) would ordinarily be appealable and it, therefore, considered it necessary to provide that no appeal would lie from a decree passed under S. 5 (4) of the said Act. Simply because a special enactment confers jurisdiction on ordinary civil Courts to decide certain additional matters, it does not follow that the said Courts have been made "persona designata" for the purposes of that case. In this connection the learned counsel for the opposite party cited two cases before me. These cases are reported in — '*Mrs. Davies* v. *Brock Smith*', 8 Ind. Cas. 1158 (Lah.) and — '*Municipal Corporation of Rangoon* v. *M. A. Shakur*', A.I.R. 1926 Rang. 25 (F.B.). In my opinion these cases deal with very different facts and have no application to the circumstances of the present case.

(11) The learned counsel for the opposite party next contended that a special jurisdiction has been conferred on the Civil Judge to try a suit of the nature mentioned in S. 5 (4) and, therefore, no other cause of action can be joined to that prayer. I do not find any force in this contention either, because the fact that the court has been conferred a special jurisdiction does not mean that the ordinary jurisdiction of the court has been taken away. The court will determine the rate of rent as provided by the provisions of the Control of Rent and Eviction Act, and at the same time can pass a decree for that amount under its ordinary jurisdiction.

(12) The learned counsel for the opposite party further contended that if a claim for recovery of arrears of rent is permitted to be added to a claim for determination of rent, it would lead to a serious anomaly, inasmuch as an appeal would lie from the decree granting the arrears of rent, but no appeal would lie from the part of the decree determining the rate of rent. I do not think there would be any serious anomaly if one part of the decree is made appealable and the other part of the decree is not made appealable. The appellate court will not be able to hold that the rate of rent fixed by the trial court was not correct and it will only be in a position to hear the appeal on a supposition that the rate of rent fixed could not be challenged before it. If there are certain pleas of payment or other such matters, the appellate court would be able to deal with those points and those points only. In any case, a consideration like this cannot be allowed to affect the jurisdiction of the court, if the court otherwise is entitled to try and determine both the claims.

(13) The learned counsel for the parties have not cited before me any case of this Court or any other court in which a question like this was considered and decided. I have, therefore, given this case a most careful consideration. In my opinion, a prayer for recovery of arrears of rent at the same rate at which the plaintiff seeks to have the rent fixed by the court, can be joined to the claim for fixation of rent. Such a procedure is certainly permitted by the Code of Civil Procedure; it avoids multiplicity of suits and at the same time is not prohibited by any provision of law. It further prevents a great hardship, which might otherwise be caused to the landlord, if he has to wait for filing a suit for recovery of rent till the rent has been finally determined under S. 5 (4) of the Act. The civil suits sometimes take long to come up for decision, and meanwhile the plaintiff's claim for recovery of arrears of rent for several years might get barred by time. Such a situation should be avoided if it legally can be avoided; and, as I have stated above, I think there is nothing illegal in permitting the two claims to be joined together and in asking the same court to adjudicate upon both of them in the same suit. For the reasons given above, I think the present application in revision should be allowed.

(14) I, accordingly, set aside the order under revision, and direct the court below to entertain and decide the claim for the recovery of arrears of rent also.

(15) The applicant will have his costs of this revision from the opposite party.

B/R.G.D. Revision allowed.

1953 All/21 & 22

A.I.R. 1953 ALLAHABAD 161 (Vol. 40, C. N. 70)
(LUCKNOW BENCH)

LAL AND BEG JJ.

Chatter Singh, Accused-Applicant v. The State, Opposite Party.

Criminal Revn. No. 291 of 1951, D/- 12-9-1952.

(a) U.P. Village Panchayat Raj Act (26 of 1947), S. 52, 55 and 56 — Splitting up of case — Two accused tried under Ss. 325 and 326, I.P.C. — One convicted under S. 326, the other under S. 323 — No illegality.

The words "any case" in S. 55 and "a criminal case" in S. 56 mean the entire case and not a case against any particular accused only. If the entire case is one which lies within the exclusive jurisdiction of the Panchayat Court, it is to be tried by that Court and not by any other Court. But if any one of the offences with which any individual accused stands charged is excluded from the jurisdiction of the said Court, the entire case stands excluded notwithstanding the fact that the offences with which another accused is charged lie within the exclusive jurisdiction of the Panchayat Court.

Where out of the two accused tried together by the Magistrate under Ss. 325 and 326, Penal Code, one was convicted under S. 326, I.P.C. and the other under S. 323, I.P.C. and in revision to the High Court it was contended on behalf of the latter that he should have been tried by the Panchayat Court.

Held that the case was one which was not triable by the Panchayat Court and therefore there was no obligation on the Magistrate to split up the case and to refer the case against the applicant to the Panchayat Court for trial. (Para 5)

(b) Interpretation of Statutes — Addition of words — "Any case" in S. 55 and "Criminal case" in S. 56, U.P. Village Panchayat Raj Act (26 of 1947).

Courts cannot read in the section words which do not exist. So the words "any case" in S. 55 and "a criminal case" in S. 56 cannot be read as "any case against an accused." (Para 5)

(c) Criminal P. C. (1898), S. 233 — Separate trial — Right of, when can be claimed — U.P. Village Panchayat Raj Act 26 of 1947, Ss. 52, 55, 56.

Section 233, Criminal P. C. lays down that, subject to the exceptions mentioned in the succeeding sections, there shall be a separate trial for every distinct offence. It has not been laid down that there shall be a separate trial in respect of each accused. The criterion is whether on the assumption that the case is triable by a Magistrate, an accused can, as a matter of right, claim a separate trial. If the answer is in the negative the contention that every accused is entitled to claim separate trial must fail. No such general right to claim separate trial exists and no such right has been created by the U.P. Village Panchayat Raj Act (26 of 1947). 9 All 452, Not foll. (Para 6)

Quaere: Whether a complainant can in a genuine case against an accused triable exclusively by a Panchayat Court, avoid the jurisdiction of the Panchayat Court, by falsely implicating a third person join

him in a trial with a charge punishable under one of the sections excluded from the jurisdiction of the Panchayat Court?

(Para 7)

Anno: Cr. P. C., S. 233 N. 1.

Hyder Husain and N. N. Misra, for Applicant; Deputy Govt. Advocate, for the State.

REFERENCE ..... /Para
('87) 9 All 452: (1887 All WN 111) 6

ORDER: This is an application in revision by one Chattar Singh who has been convicted by a learned Magistrate, First Class, of Tarabganj, Gonda, under S. 323, I.P.C. and sentenced to undergo one year's rigorous imprisonment. The conviction and sentence have been affirmed on appeal by the learned Sessions Judge of Gonda.

(2) It appears that a complaint was filed by one Munna against the applicant and one Samokhan, charging both of them with offences punishable under Ss. 326 and 325, I.P.C. The prosecution case, which both the Courts below have found proved, is that the applicant and his companion, Samokhan, went in the night between 4th and 5th January 1951, to Munna's house and attacked him. Samokhan was armed with a spear and the applicant with a lathi. Samokhan was convicted by the learned Magistrate under S. 326, I.P.C. and the applicant under S. 323, I.P.C. Samokhan's conviction has also been upheld on appeal by the learned Sessions Judge and has apparently become final.

(3) It may be pointed out that the circumstances were such that the applicant also could be convicted under S. 326 by invoking the aid of S. 34, I.P.C. But that was not done and the applicant is certainly entitled to argue that, as the judgments of the Courts below stand he had been guilty of an offence punishable under S. 323, I.P.C. only and the case is to be decided on the assumption that the offence committed by him was not one more serious than that punishable under S. 323, I.P.C.

(4) The point urged before us by the learned counsel for the applicant is that since an offence under S. 323, I.P.C. is triable exclusively by a Panchayat Court, the case against the applicant should have been separated from that against Samokhan and should have been sent to the Panchayat Court for decision. No authority having a direct bearing on the point has been cited before us by either side. In order to decide the point raised by the learned counsel for the applicant, reference may be made to Ss. 52, 55, and 56, U.P. Panchayat Raj Act (26 of 1947). Section 52 enumerates the offences which are triable by a Panchayat Court. Section 55 lays down that:

"No Court shall take cognizance of any case or suit which is cognizable under the Act by a Panchayati Adalat unless an order has been passed by a Sub-Divisional Magistrate or Munsif under S. 85."

No order such as is contemplated by this section has been passed by a Sub-Divisional Magistrate or Munsif in this case.

Section 56 runs as follows:

"If at any stage of proceedings in a criminal case pending before a Magistrate it appears that the case is triable by a Panchayati Adalat, he shall at once transfer the case to that Panchayati Adalat, which shall try the case de novo."

(5) The words "any case" in S. 55 and "a criminal case" in S. 56 mean the entire case and not a case against any particular accused only. If we accept the contention of the learned counsel for the applicant, we will have to interpret the said two sections as if the words were "any case against an accused." We cannot read in the section words which do not exist. It appears to us that if the entire case is one which lies within the exclusive jurisdiction of the Panchayat Court, it is to be tried by that Court and not by any other Court. But if any one of the offences with which any individual accused stands charged is excluded from the jurisdiction of the said Court, the entire case stands excluded notwithstanding the fact that the offences with which another accused is charged lie within the exclusive jurisdiction of the Panchayat Court. Had it been the intention of the Legislature to have the trial split up in a case like the present, there was no reason why should it not have said so in express language. Such an important intention of the Legislature could not have been left to be inferred from such doubtful language. There is always a possibility of conflicting findings being recorded by two different Courts if a trial is to be split up as suggested by the learned counsel for the applicant. In our opinion the case was one which was not triable by the Panchayat Court and therefore there was no obligation on the Magistrate to split up the case and to refer the case against the applicant to the Panchayat Court for trial.

(6) The learned counsel for the applicant has contended that it is the right of every accused to be tried separately. In support of this contention he places reliance on the following dictum of Mahmood J., in — 'Queen Empress v. Abdul Kadir', 9 All 452 at p. 457:

"Further it seems to me clear upon general principles that each individual member of the community is in the absence of exceptional authority conferred by the law to the contrary effect, entitled when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case shall be separately tried. In the eye of the law, each individual citizen is a separate integer or unit of the commonwealth and his rights of liberty cannot, without express authority in the law, be dealt with jointly with those of a crowd of other persons with whom, far from having a community of interests, he may have incompatibility of interests in matters of a nature such as this case presents."

Whatever may have been the state of law in the year 1886, when this dictum was made this is certainly not the law since 1898 when the present Code of Criminal Procedure was enacted. Section 233 of the said Code lays down that, subject to the exceptions mentioned in the succeeding sections, there shall be a separate trial for every distinct offence. It has not been laid down that there shall be a separate trial in respect of each accused. The criterion for judging the soundness of the applicant's argument is whether on the assumption that the case is triable by a Magistrate, an accused can, as a matter of right, claim a separate trial. If the answer is in the negative the contention that every accused is entitled to claim separate trial must fail. We are satisfied that no such general right to claim separate trial exists and that no such right has been created by the Panchayat Raj Act.

(7) We are not called upon in the present case to express any opinion as to what would happen if a complainant having a genuine case against an accused triable exclusively by a

Panchayat Court, falsely implicates a third person and joins him in the trial with a charge punishable under one of the sections excluded from the jurisdiction of the Panchayat Court. A question may arise whether he can, by employing this device, oust the jurisdiction of the Panchayat Court. Such however is not the present case. Here Samokhan has been found to be guilty of an offence not triable by a Panchayat Court. It cannot be contended that he had been falsely implicated simply to oust the jurisdiction of the Panchayat Court. In the circumstances, any expression of opinion on our part on that hypothetical question would be a mere obiter dictum and we, therefore, refrain from recording our views on that point.

(8) We are satisfied that the case against the applicant was rightly tried by a Magistrate and that there was no want of jurisdiction on his part. No other point was pressed before us. The revision is, therefore, rejected.

B/H.G.P. Revision rejected.

A.I.R. 1953 ALLAHABAD 163 (Vol. 40, C.N. 71)

RAGHUBAR DAYAL AND AGARWALA JJ.

State v. Rambali and others, Respondents.

Criminal Appeals Nos. 48 of 1950 and 639 of 1949, D/- 30-1-1952.

(a) Criminal P. C. (1898), S. 154 — First information report by phone — Report not signed — Person making it, having died not produced — Nothing to show that report was in fact made by him — Report though relevant could not be said to have been made by person who is said to have made it or that it was correct. **(Para 4)**

Anno: Cr. P. C., S. 154 N. 6, 9.

(b) Evidence Act (1872), S. 24 — Statement of accused not implicating himself is not a confession — (Criminal P. C. (1898), S. 164). **(Para 7)**

Anno: Cr. P. C., S. 164 N. 7; Evid. Act, S. 24 N. 2.

(c) Evidence Act (1872), S. 1 — Testimony is not unworthy of credit because it is of witness whose name is not mentioned in first information report, when the report itself was not proved and the informant had mentioned that there were other persons besides those mentioned there on the scene of occurrence. **(Para 12)**

Anno: Evid. Act, S. 1 N. 9.

(d) Evidence Act (1872), S. 1 — Witness either tenants or relations of deceased victim — Their evidence does not become unworthy of credit because of that, when from their fields they could have easily reached the place of occurrence. **(Para 13)**

Anno: Evid. Act, S. 1 N. 9.

(e) Evidence Act (1872), S. 134 — It is the quality and not quantity of evidence that is material for conviction of accused.

In law there is no bar for the Court from convicting a person upon the testimony of a single witness. The Court may convict a person if it implicitly believes a solitary witness. It is not the quantity of evidence but the quality that weighs with the Court. Ordinarily the courts have often held that the statement of one witness is not enough for the conviction of a person. No hard and fast rule can be laid down as to how many witnesses would be sufficient for the purpose. In some cases, not less than three witnesses have been held to be sufficient. In others, statements of only two witnesses have been considered to be enough. (Para 17)

Anno: Evid. Act, S. 134 N. 1.

B. D. Gupta, B. S. Darbari and C. S. Saran, for the State; J. R. Bhatt, Asst. Govt. Advocate and Chaturbhuj Sahai, for Respondents.

AGARWALA J.: These are two connected appeals arising out of the same case.

(2) Seventeen persons were prosecuted for committing a riot and for committing murder of one Babua Shambhu Prasad Singh, zamindar of village Rajhai, in the district of Gorakhpur. Of these only six, namely, Prag Chauthi, Girgit, Adhare Singh, Mangru and Budhram, were convicted by the learned Sessions Judge under Ss. 148 and 302/140, I. P. C. and sentenced to two years' R. I. under the former section and to transportation for life under the latter sections. The rest were acquitted. Those who were convicted have appealed to this Court and their appeal is No. 639 of 1949. Out of the eleven acquitted persons, the Government has appealed against the acquittal of three persons only, namely, Rambali, Jogi and Pirthi, and its appeal is No. 48 of 1950.

(3) The incident took place at about noon on 3rd October 1948. The prosecution evidence does not clearly disclose what the origin of the incident was. On the date in question one Gobri Choukidar is stated to have phoned to the Police Station Kotwali, Gorakhpur, at about 1 p.m. and is alleged to have made the following report:

"There is a field of Chauthi Pasi in which kodoarhar crop is sown. A case in respect of this field is going on between Babua Shambhu Prasad and Chauthi Pasi, resident of Rajhai. Chauthi Pasi along with 16-20 persons was getting the crop of this field reaped since 9 a.m. Bubua Shambhu Prasad on hearing about the reaping of the crop went to the field taking 12-14 Ahirs, whom he had called from outside, armed with lathis and prevented the work going on in the field. Ghauthi raised an alarm. Ram Bali, Parag Lonia, Girgit Lonia, Adhar Singh, Mahadeo Pasi, Algu Lonia, Prasad Lonia, Ram Deo Lonia, Panchoo Kewat and Deoki Pasi of Rajhai and other male members of the families of these persons, armed with lathis and spears and shouting "mar, mar" came up there. The Ahirs on seeing lathis and spears ran away. Then all those persons began to beat Shambhu Babua. I was at my house. On hearing the alarm I ran up. The place from where the fight was visible I ran up shouting that they should not beat him. Thereupon they stopped beating him and ran away. Kodai Singh, Bepat Lohar, Sita Ram Gosami, Sita Ram Koeri, Surat Koeri and several other male and female of the village reached there while the marpit was going on and witnessed everything. Babua Shambhu Prasad had become unconscious by the time I reached there. He was breathing faintly. I have come running here to send a message by phone. He has received lathi and spear injuries all over his body. He is bleeding profusely. He may be dead or alive. The marpit has taken place at noon."

(4) Gobri, the alleged maker of the report, died a few days after making the report and

could not be produced in Court. As the report is not signed by Gobri, there was no evidence that Gobri indeed had made this report. The fact that a report was made is relevant, but it cannot be said with confidence that it was Gobri Choukidar who made the report or that the contents of the report were correct.

(5) On receipt of this information on phone the circle Inspector proceeded to the spot at once. He remained there for about three hours but made no enquiry, or, at any rate, any official enquiry. The Sub-Inspector who investigated the case found that there were blood marks in the field of one Badri. This field was at a distance of three furlongs from the field of Chauthi in respect of the crop of which it was alleged in the aforesaid report that there was a dispute between Chauthi and the deceased Babua Shambhu Prasad Singh.

(6) The post mortem examination of the deceased showed that he had received no less than 16 injuries on the top of the head and about 23 other injuries on various other parts of the body. These injuries consisted of contusions, incised and punctured wounds and abrasions. The skull was fractured. In the opinion of the doctor, the cause of death was shock haemorrhage, multiple fracture of the skull and injury to the brain caused by blunt and sharp pointed weapons.

(7) One of the accused, namely, Chauthi made a statement which was recorded as a confession though it was not one. In this statement he stated that on the day of occurrence he was getting his field reaped by 16 or 17 labourers, that in the meantime Babua Shambhu Prasad Singh came up at about 10-11 a.m. with 25-30 persons armed with lathis and began to get him (Chauthi) beaten that upon this his (Chauthi's) labourers raised an alarm, that thereupon Babua Shambhu Prasad Singh ran away towards the jungle in the south and that he was chased by his (Chauthi's) labourers. Chauthi stated that he did not know what happened afterwards. It is obvious that this statement was wrongly recorded as a confession because Chauthi does not implicate himself at all.

(8) The police examined witnesses and put forward a case which was different from the one which was reported to it on the phone. In the new case which was set up it was alleged that there was enmity between one Jwala Prasad Singh, a newly settled cultivator of Rajhai and Babua Shambhu Prasad Singh deceased and the accused in the case were also in revolt against Babua Shambhu Prasad Singh. A few days before the murder, Jwala Prasad Singh convoked an assembly of the tenants who were hostile to Babua Shambhu Prasad Singh, at his house at night. The assembly decided to kill Babua Shambhu Prasad Singh. On the day of occurrence, Babua Shambhu Prasad Singh was returning from Gorakhpur to his Chhaoni. When he reached Badri's field, Mangru and Budhram, who were armed with spears, came up from behind and assaulted him with spears, and Chauthi and Adhare, who were also armed with spears, followed up their colleagues. Thereafter there was an onslaught by all the other accused who were armed with lathis, and the whole lot showered on him blows with their weapons. The village people rushed towards the scene of occurrence and the assailants, who had meanwhile finished their job, ran away into the neighbouring jungle. As a result of the injuries Babua Shambhu Prasad Singh expired on the spot.

(9) In support of what had happened at Jwala Prasad Singh's house, the prosecution produced three witnesses, namely, Bachu Khatik, P. W. 10, Lagan, P. W. 11, and Chatru, P. W. 12. The statements of these witnesses was disbelieved by the learned Sessions Judge and, in our opinion, rightly. There was no evidence in support of the motive assigned for the marpit in the telephonic report. Thus mystery shrouds the initial motive for the incident.

(10) In support of the prosecution case that Babua Shambhu Prasad Singh was in fact beaten by the appellants and others, the prosecution was able to produce ten eye-witnesses. These were, P. W. 1, Kodai, P. W. 2, Bipat, P. W. 3 Sitaram Goshain, P. W. 4, Jaddu, P. W. 5, Rambali Koeri, P. W. 6, Shiam Lal, P. W. 7, Sita Ram Koeri, P. W. 8, Bechu Koeri, P. W. 9, Badri, and P. W. 13, Surat Koeri. Of these ten witnesses, the learned Sessions Judge discarded the testimony of the six and relying upon the statements of P. W 4, Jaddu, P. W. 5, Rambali Koeri, P. W. 6, Shiam Lal, and P. W. 7, Sita Ram Koeri, he convicted the appellants as stated already.

(12) The non-proof of the origin of the fight is not very material if the actual beating by the appellants of the deceased were believed. The question, therefore, is whether these four witnesses on whom the learned Sessions Judge placed reliance are worthy of belief. The learned advocate for the appellants has strenuously urged that they are not. Of these four witnesses, the names of three were not mentioned in the so-called first information report alleged to have been made by Gobri choukidar. We do not think that this fact should discredit their testimony. In the first place, the report, as we have said, was not proved by Gobri, he being dead and the contents of the report cannot be taken either against the accused or against the prosecution. In the second place, it was stated by Gobri that in addition to the persons named in the report there were other persons also who witnessed the occurrence.

(13) As against Jaddu and Shiam Lal, it has been alleged that they are not independent witnesses because they are tenants either of the deceased or his relations Babua Debi Prasad or Babua Jhagru Singh. This again is a fact which, in our opinion, cannot entirely destroy the value of their testimony having regard to the fact that they had their fields in the village from where they could possibly have reached the place of occurrence and seen the marpit. When a dispute is between the zamindar of the village and the tenants, it is inevitable that witnesses would come either from one group or the other. Their testimony cannot be discarded solely on the ground of their being the zamindar's tenants.

(14) As against Sita Ram Koeri, it was alleged that his field was about three furlongs away from the place of occurrence and his statement that he heard the noise from the field where he was working could not be believed because he was so far away. But the witness stated that the place of incident was visible from the place where he was working and that he immediately rushed to the spot and saw the appellants from a distance of about one or one and a half bighas, that is about 60 or 70 yards. This statement does not appear to be improbable.

(15) There is, therefore, no overwhelming reason to discard the statements of these witnesses and yet it must be conceded that, although their testimony cannot be discarded outright, the statements of two of these witnesses, namely, Jaddu and Shiam Lal, who are admittedly tenants either of the deceased or of the relations of the deceased, must be looked upon with a certain amount of caution and implicit reliance cannot be placed upon them.

(16) There is no defect so far as the statements of Ram Bali and Sita Ram Koeri are concerned. Apparently they are independent witnesses. Ram Bali and Sita Ram Koeri swear that they saw the six appellants, Adhare Singh, Mangru, Budhram, Chauthi, Girgit and Prag amongst the assailants. Ram Bali does not mention the name of Jogi against whom there is a Government appeal and Sita Ram Koeri does not mention the names of Rambali and Pirthi, two of the other respondents in the Government appeal. It seems to us, therefore, that the case against the six appellants in Appeal No. 639 of 1949 was amply established, but as against the three respondents in the Government appeal it was not satisfactorily established.

(17) The learned Sessions Judge acquitted the three respondents in the Government appeal on the ground that they were named only by two reliable witnesses. The learned Sessions Judge, it seems, applied the formula that those of the accused who were named by three or more witnesses could alone be convicted. In our opinion, the formula adopted by the learned Sessions Judge cannot be said to be based upon any sound principle. In law there is no bar for the Court from convicting a person upon the testimony of a single witness. The Court may convict a person if it implicitly believes a solitary witness. It is not the quantity of evidence but the quality that weighs with the Court. Ordinarily the courts have often held that the statement of one witness is not enough for the conviction of a person. No hard and fast rule can be laid down as to how many witnesses would be sufficient for the purpose. In some cases, not less than three witnesses have been held to be sufficient. In others, statements of only two witnesses have been considered to be enough.

(18) In our opinion, in a case like the present the testimony of two reliable witnesses would be quite enough for the conviction of a person. In the present case, having regard to the fact that two of the witnesses, Jaddu and Shiam Lal, are tenants of the deceased and only one of the other two witnesses mentioned the names of the respondents in the Government appeal, we think that the learned Sessions was right in acquitting them.

(19) We. therefore, dismiss both the appeals.

(20) If Rambali, Jogi and Pirthi are in custody, they will be released forthwith unless required in connection with some other case.

B/R.G.D. Appeals dismissed.

A.I.R. 1953 ALLAHABAD 165 (Vol. 40, C.N. 72)

MALIK C. J. AND V. BHARGAVA J.

Bishan Chand, Applicant v. Commissioner of Income-tax, U.P., Lucknow, Respondent.

Misc. Civil Case No. 127 of 1949, D/- 2-9-1952.

Excess Profits Tax Act (1940), Ss. 7 and 8(1) — "Change in persons" — Interpretation of — Business carried by Hindu undivided family — Disruption — Kartas of branches entering into partnership — New business — Set off for deficiency of previous year cannot be granted.

The question whether the assessee carrying on business was the same depends on the interpretation of Ss. 7 and 8 of the Excess Profits Tax Act, without any reference to the Indian Partnership Act or to the question whether a Hindu undivided family as such can or cannot enter into a partnership. Under the Excess Profits Tax Act, if a Hindu undivided family is carrying on business and has made profits, exceeding the standard profits, the Excess Profits Tax Officer is entitled to realise the tax made from the assets of the business and, therefore, the liability of the members of the Hindu undivided family, whether minors or majors and whether they were as Kartas or as adult members of the joint family or were merely sleeping members, is the same. The Hindu undivided family being recognised as a unit, for purposes of the Excess Profits Tax Act the "person" who was carrying on the business under S. 8(1) was the Hindu undivided family before the partition. Where, therefore, as a result of the partition a Hindu undivided family was broken up into two undivided families and the business was afterwards being carried on not by the Hindu undivided family that had existed before the partition, but by a partnership firm consisting of the two representatives of the two Hindu undivided families which had come into existence as a result of the partition under a partnership deed.

Held, that the business was no longer carried on by the Hindu undivided family that was in existence before the partition but was carried by entirely different persons as representing their families. The other members of the family belonging to the two branches represented by them might be bound by their actions and might be entitled to the benefits of the business carried on by them, but it could not be said that they were carrying on the business as members of the new partnership firm. The business carried on by the partnership firm must therefore be deemed to be a new business within the meaning of S. 8 of the Excess Profits Tax Act. It is not, therefore, entitled to claim the set off of the deficiency to profits provided by S. 7. AIR 1953 All 150, Expl. and Disting. (Paras 8, 9)

Anno: E. P. T. Act, S. 8, N. 1.

N. P. Asthana, for Applicant; Gopal Behari, for Respondent.

REFERENCE ..... /Para

('52) Misc Case No 371 of 1948:
(AIR 1953 All 150) 6, 8

MALIK C. J.: This is a reference under S. 21 of the Excess Profits Tax Act read with S. 66(1) of the Income-tax Act. The questions referred to us for answer are as follows:

"1. Whether there is any change in the person carrying on a business within the meaning of S. 8(1) of the E. P. T. Act 1940 when the business which was previously carried on and owned by a Hindu undivided family is on disruption of the family, carried on and owned by a partnership composed of the members of the quandum family?

2. Whether the succeeding partnership is entitled to claim the set off of the deficiencies of

profits of the chargeable accounting periods when the business was owned by the family?

(2) From the facts set out in the statement of the case, it appears that Kalicharan and Chotey Lal were two brothers. Kalicharan had two sons Bishan Chandra and Triloki Nath, while Chotey Lal had one son Shiva Prasad. Bishan Chandra, Triloki Nath and Shiva Prasad were all members of a joint Hindu family. Upto 29th September 1941, they carried on business and were assessed to Excess Profits Tax as a Hindu undivided family. On 29th September 1941, there was a disruption in the family and Seth Bishan Chandra and Seth Shiva Prasad, representing the two branches of Kalicharan and Chotey Lal, entered into a partnership. From the statement of the case it appears that the joint family broke up into two parts, Seth Shiva Prasad and his sons remaining joint as one unit and Kali Charan's two sons and their descendants forming the other unit. The partnership thus became a partnership between Seth Bishan Chandra as karta representing his branch and Seth Shiva Prasad as karta representing his branch. Who the karta of the joint family was while the family was still joint does not appear from the statement of the case. The profits made by this joint Hindu family during the year immediately previous to the partition were below the standard profits and the question arose whether this deficiency could be carried forward and could be set off against the profits made by the partnership consisting of Seth Bishan Chandra and Seth Shiva Prasad representing their respective families.

(3) The Tribunal held that there had been a change in the personnel, that the case was covered by S. 8(1) of the Excess Profits Tax Act and that the deficiency in the previous year could not be set off against the profits of the assessment year.

(4) Section 7 of the Excess Profits Tax Act deals with question of granting relief on occurrence of deficiency of profits and S. 8 lays down in what circumstances such deficiency cannot be set off against the profits made in subsequent years.

(5) We are only concerned with sub-s. (1) of S. 8 which is as follows:

> "As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced."

(6) Learned counsel has urged that the persons who were carrying on the business while the family was joint are still the same even after the partition and there has been no change as no outsider was admitted into the partnership. Learned counsel has pointed out that in sub-s. (1) of S. 8 of the Excess Profits Tax Act the word "persons" has been used in plural while in some of the other sub-sections of the same section the word 'person' has been used in singular. The argument is that the word "person" in this sub-section must be deemed to include natural persons and not juristic persons. It is urged that though the word 'person' is defined in S. 2, sub-s. (17) of the Act as including 'a Hindu undivided family', this can be the meaning assigned only so long as there is nothing repugnant in the subject or context and in this case the language of S. 8 rules out such an interpretation. In short it is urged that if the same set of persons who were carrying on the business continue to carry it on, then the mere fact that there was a change in their status or in the shares held by them would not necessarily result in the business being called a new business. Reliance has been placed on a case decided by us on 29th August 1952 — 'Ramkumar Ramnivas v. Commissioner of Income-tax, U.P.,' Misc. Case No. 371 of 1948 (All), where we held that a joint Hindu family as such cannot be a partner except through its karta or such of the adult male members who enter into the partnership and the partnership must be deemed to be with them, though they may be representing the joint family.

(7) Learned counsel has urged that a Hindu undivided family is not a person distinct and separate from its members like a company incorporated under the Indian Companies Act or a corporate body which has its existence distinct and separate from that of the members constituting it and, therefore, though the Hindu undivided family might have been taxed as such it was really the individual members of the Hindu undivided family who had been taxed and if there was no change in the membership, the mere fact that the joint status had been broken and instead of coparceners they had become co-owners, it could not be said that the persons carrying on the business were different so as to make it a new business. By way of illustration, learned counsel has mentioned a case where three adult members of a joint Hindu family were carrying on a business as a joint Hindu family and after breaking up of the joint status they continue to carry on the same business, as co-owners and not as coparceners, it is urged that the Excess Profits Tax Officer cannot claim that there has been a change in persons carrying on the business and the business is, therefore a new business so that the deficiency in the previous year cannot be set off against the profits made in the year in question.

(8) In — 'Ramkumar Ramnivas' case (Misc. Case No. 371 of 1948 All.) the question arose whether a Hindu undivided family as such could be a partner in a partnership firm. It was suggested that a Hindu undivided family was a person as defined under the Indian Income-tax Act and it can therefore enter into a partnership. We were however, of the opinion that the question, whether a Hindu undivided family could be a partner in a partnership firm, must depend on the provisions of the Indian Partnership Act, and held that partnership was a result of a contract and only the karta or the adult members of the joint Hindu family, who had entered into the agreement, could be deemed to be partners while the other members of the family might be entitled to the benefits of the partnership and be liable for the losses thereof, but, except through those who had entered into partnership on their behalf, they could not exercise the rights of a partner, nor could they be made liable for the personal obligations of the partnership. We had further pointed out that where the karta or the adult male members had acted within their rights in entering into the partnership the joint family property might be made liable for the debts of the partnership, just as the joint family would be entitled to the benefits thereof. That decision cannot be of any assistance in this case where the question has to be decided not in accordance with the

Indian Partnership Act but in accordance with the Indian Income-tax Act or the Excess Profits Tax Act. In these Acts a joint Hindu family is treated as a unit for purposes of taxation.

For the decision of the question, therefore, whether the assessee carrying on the business was the same, the question must depend on the interpretation of Ss. 7 and 8 of the Excess Profits Tax Act, without any reference to the Indian Partnership Act or to the question whether a Hindu undivided family as such can or cannot enter into a partnership. Under the Excess Profits Tax Act if a Hindu undivided family is carrying on business and has made profits, exceeding the standard profits, the Excess Profits Tax Officer is entitled to realise the tax made from the assets of the business and, therefore, the liability of the members of the Hindu undivided family, whether minors or majors and whether they were as kartas or as adult members of the joint family carrying on the business or were merely sleeping members, if we may use the term, of the Hindu undivided family is the same. Under the general law, however, the karta or such other adult members who were carrying on the business are not only liable to the extent of the joint family property but are also personally liable for the losses of the business. The Hindu undivided family being recognised as a unit, for purposes of the Excess Profits Tax Act the "person" who was carrying on the business under S. 8(1) was the Hindu undivided family before the partition on 29th September 1941. As a result of the partition that Hindu undivided family ceased to exist and it was broken up into two Hindu undivided families and the business was now being carried on not by the Hindu undivided family that had existed before 29th September 1941, but by a partnership firm consisting of the two representatives of the two Hindu undivided families which had come into existence as a result of the partition under a partnership deed dated 29th September 1941. The business is, therefore, no longer being carried on by the Hindu undivided family that was in existence before September 1941 but by entirely different persons, i.e., Seth Bishan Chandra as representing the Hindu undivided family of which he is the karta and Seth Shiva Prasad representing the Hindu undivided family of which he is the karta. In other words, it is now being carried on by a firm consisting of two persons, Seth Bishan Chandra and Seth Shiva Prasad, as representing their families.

(9) There is another way of looking at the case. It is admitted that, before the partition, the business was being carried on by the Hindu undivided family. Whether this is understood to mean that the business was being carried on by the Hindu undivided family as a suit or, as urged by learned counsel for the assessee, by all the members of the joint family, is immaterial because after the partition the business was being carried on by Seth Bishan Chandra and Seth Shiva Prasad only. They were the two persons who entered into the partnership. The other members of the family belonging to the two branches represented by them might be bound by their actions and might be entitled to the benefits of the business carried on by them, but it cannot be said that they are carrying on the business as members of the new partnership firm. It is, of course, obvious that it cannot be held that the new partnership firm is being carried on by the old Hindu undivided family as a unit. It must, therefore, be held that on any interpretation the business now carried on by the partnership firm must be deemed to be a new business within the meaning of S. 8 of the Excess Profits Tax Act.

(10) The result, therefore, is that our answer to the first question is in the affirmative and the second question is in the negative.

(11) The assessee must pay the cost of the other side which we assess at Rs. 300/-.

B/H.G.P. Reference answered.

A.I.R. 1953 ALLAHABAD 167 (Vol. 40, C.N. 73)

SAPRU J.

Zahid Husain, Defendant-Appellant v. M. Hamid Uddin and another, Plaintiffs-Respondents.

Second Appeal No. 1832 of 1950, D/- 21-4-1952.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 22 (1) — Additional Commissioner — Jurisdiction to hear election petition.

Where there is nothing before the Court to show that the Additional Commissioner was not a person or tribunal appointed by Government by rule in that behalf, and no objection is taken by the party to the hearing of the election petition by the Additional Commissioner at the time when the election petition came to be disposed of by him and where it could be fairly assumed that, had there been no rule appointing the Additional Commissioner to hear election petitions, the party would have taken such objection;

Held, on facts, that the Additional Commissioner had jurisdiction to hear the election petition. (Para 7)

(b) Municipalities — U. P. Municipalities Act (2 of 1916), S. 28 — Election — Committing corrupt practice what is — Held, on facts that party committed corrupt practice indirectly — Principle of natural justice — Applicability.

Section 28 is very widely worded and according to it a person is deemed to have committed a corrupt practice if he, directly or indirectly, by himself or by any other person commits any one of the acts mentioned in clauses (i), (ii), (iii) and (iv). It is essential to preserve in a democratic country fairness in elections. Courts are justified in taking a strong view where corruption, directly or indirectly, is proved in any election.

In an election petition against A it was found that A and B were working together for election from a double member ward, that B was thoroughly unscrupulous person, that there were three cases of false personification and that A was conniving at the corrupt practices used by B and his agents;

Held that A was also guilty of committing corrupt practices though indirectly.

Further that the principle of natural justice that a person is responsible for what he does and not for what some other person has done does not apply to the case as A was not free from blame inasmuch as he gave his passive support to the misdeed of B and his agent. (Paras 10, 11)

(c) Civil P. C. (1908), S. 9 — Special Tribunal—Decisions of—Jurisdiction to Civil Court — Extent of — (Special Tribunal) — (Muni-

cipalities — U. P. Municipalities Act (II (2) of 1916), S. 22).

Undoubtedly, it is for the civil Court to see that an election tribunal or for the matter of that any special tribunal set up under any Act of the legislature acts within the jurisdiction allotted to it by the legislature. If such a tribunal does anything which it is not warranted by law to do, its proceedings can be questioned successfully in a civil Court. But where the tribunal acts within its jurisdiction, it is not for the Court to weigh evidence on which it has acted, with nicety. AIR 1949 All 50, Rel. on. (Para 12)

Anno: C.P.C., S. 9 N. 53.

M. H. Beg, for Appellant; Gyanendra Kumar, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('24) 51 Ind App 241: (AIR 1924 PC 175) 5
('49) AIR 1949 All 50: ILR (1949) All 13) 4

JUDGMENT: This appeal has been presented to this Court by Shri Zahid Husain who was one of the defendants in the suit for a declaration that the order and judgment dated 25th May 1946 of the Additional Commissioner, Bareilly Division, and all the proceedings in connection with the election petition so far as they relate to the plaintiff were 'ultra vires' and null and void. Included in the reliefs prayed for in the suit was a prayer for an injunction to restrain the defendants from executing the decree awarded by the election tribunal. The plaintiff, Shri Hamid Uddin, is a pleader practising in Moradabad. In 1945 municipal elections were held in that city. For the two Muslim seats in Ward No. 4 about a dozen candidates offered themselves for election. Of those candidates, the plaintiff and Ahmad Ullah were declared successful. Thereafter, the defeated candidates, namely, Shri Pir Bux and Shri Zahid Husain, presented a joint election petition against the plaintiff and Ahmad Ullah to the Commissioner of the division in which the Municipal Board was situate. This election petition was transferred for disposal by the Commissioner to the Additional Commissioner, Bareilly Division. The election of the plaintiff was set aside by the Additional Commissioner and he was debarred from seeking election for a period of five years. On an application for review of his order, the Additional Commissioner set aside the order disqualifying him for five years. In other respects the order was maintained. After the review application had been disposed of, the plaintiff filed the suit out of which this appeal has arisen. This suit, as has been stated before, was one for a declaration that the order and judgment of the Additional Commissioner, Bareilly Division and all the proceedings in connection with the election petition were null and void so far as the plaintiff was concerned.

(2) The learned munsif in a careful judgment held that he had no jurisdiction to entertain the suit as the allegation of the plaintiff that the Additional Commissioner had not followed a correct procedure had not been established by him. On an appeal to the lower appellate Court, the decree of the learned munsif was set aside. The learned Civil Judge allowed the appeal and decreed the suit by declaring that the decision of the Additional Commissioner referred to above and subsequently modified by the order passed in review on 18th September 1946 was not binding on Hamid Uddin, plaintiff. He further declared that he had not ceased to be a member of the Municipal Board and that the defendant, Zahid Husain, was not a duly elected member of the Municipal Board. He further held that, in view of his order, the plaintiff was not bound to pay the costs awarded by the election tribunal. Aggrieved by this order of the learned Civil Judge, the appellant has come up to this Court in appeal.

(3) The question for consideration is whether the order of the learned Civil Judge is one which can be upheld in this case. In the careful argument which has been addressed to this Court by Mr. Gyanendra Kumar on behalf of the respondents, three points have been urged. In the first place, Mr. Kumar's argument is that the civil Court has jurisdiction under S. 9, Civil P. C. to adjudicate upon a matter decided by an election tribunal where the tribunal acts without jurisdiction. In the second place, his contention is that the special tribunal in this particular case had acted in contravention of the mandatory provisions of the Municipalities Act and the procedure prescribed thereunder. In the third place, Mr. Kumar's argument is that the order of the special tribunal is contrary to the principles of natural justice and, as such, liable to be set aside by this Court. I shall deal with these arguments 'seriatim'.

(4) The exact extent to which Courts can interfere with the verdict of election tribunals was considered in the case of — 'Mani Ram v. Bhagwat Sarup', AIR 1949 All 50, and it may be useful to refer to what Malik C. J. had to say on the question which has been raised by Mr. Kumar. I quote Malik C. J.:

"Section 9, Civil P. C., is the section that gives jurisdiction to the civil Courts to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The cognizance of the civil Court to hear an election petition under the U. P. Municipalities Act or to give any relief in the nature thereof is clearly impliedly barred under the provisions of the Municipalities Act, but the question whether there has been a legal adjudication by the Commissioner in accordance with the provisions of the Municipalities Act is not a question excluded from the cognizance of the civil Court. If the adjudication is illegal and the order of the Court (the Commissioner as the Election Tribunal) is 'ultra vires' of the provisions of the Act it may be said to have resulted in a civil wrong cognizable by the civil Court on the general principles underlying S. 9, Civil P. C. Where a special tribunal is provided by law to try civil rights of a certain nature the legislature must be deemed to have intended that the jurisdiction of the civil Courts would be excluded only if the special tribunal has acted within the authority given by that law."

(5) With respect I would say that I entirely agree with the observations of Malik C. J. which indeed are supported by the observations of the Judicial Committee of the Privy Council in the case of — 'Secretary of State v. Jatindra Nath', 51 Ind App 241 (PC). This case has been referred to by Malik C. J. in his judgment. It is unnecessary to deal with this question any further as there is a full discussion of it in the judgment of Malik C. J. with which I am in complete agreement.

(6) Mr. Gyanendra Kumar's argument is that the Additional Commissioner had no jurisdiction in this particular case to entertain the election petition which was presented by Shri Zahid Husain to the Commissioner of the Bareilly Division. Under S. 22(1) of the U. P. Municipalities Act (Act 2 of 1916) an election petition has to be heard by the Commissioner of the Division within which the municipality concerned is situated, unless some other person or tribunal has been appointed by rule in this behalf, and at a place in the district within which such municipality is situated. Mr. Kumar's contention is that the Commissioner is a 'persona designata' under this section and that this section does not cover the case of an Additional Commissioner. An Additional Commissioner has not been defined in the Municipalities Act, nor is there any definition of an Additional Commissioner in the U. P. General Clauses Act which was passed in 1904. Under S. 4(11) of the General Clauses Act a Commissioner has been defined as the chief officer in charge of the revenue administration of a division. Section 4 (8) of the Land Revenue Act defines a revenue Court as meaning all or any of the following authorities (that is to say), the Board and all members thereof, Commissioners, Additional Commissioners, Collectors, Additional Collectors etc. etc. Under S. 13(1) of the Act the Provincial Government has the power to appoint an Additional Commissioner in a division and under Clause (3) of S. 13 an Additional Commissioner can exercise such powers and discharge such duties of a Commissioner in such cases or classes of cases as the Provincial Government, or in the absence of orders from the Provincial Government the Commissioner concerned, may direct. Clause (4) of S. 13 is important and may be quoted below:

"This Act and every other law for the time being applicable to a Commissioner shall apply to the Additional Commissioner, when exercising any powers or discharging any duties under sub-s. (3), as if he were the Commissioner of the division."

(7) The argument that has been advanced on behalf of the respondent is that the powers and duties referred to in Cls. (3) and (4) of S. 13 are of a revenue nature only. They cannot and were not designed to give to the Additional Commissioner the administrative powers which the Commissioner of a division possesses. Actually it is not in his administrative capacity that the commissioner or the Additional Commissioner has acted in this case. The Additional Commissioner has acted as an election tribunal. Whatever may be the exact position of the Additional Commissioner 'vis-a-vis' the administration of the division, the real question in this case is whether the election petition in this particular case could be heard by the Additional Commissioner or not. As I have pointed out before, S. 22(1) of the Municipalities Act authorises the Commissioner of the division within which the municipality is situate to hear an election petition, unless some other person or tribunal has been appointed by rule in this behalf, and at a place in the district within which such municipality is situated. There is nothing before me to show that the Additional Commissioner was not a person or tribunal appointed by Government by rule in this behalf. No objection was taken by the respondent to the hearing of the election petition by the Additional Commissioner at the time when the election petition came to be disposed of by him. It is only fair to assume that, had there been no rule appointing the Additional Commissioner to hear election petitions, the respondent would have taken such objection to the election petition being heard by the Additional Commissioner at the time when it came up before him for hearing. I am satisfied, therefore, on the facts before me that the Additional Commissioner had jurisdiction to hear the election petition.

(8) I now come to the second part of the argument which has been addressed by learned counsel for the respondent. It appears that the plaintiff-respondent Hamid Uddin, and Ahmad Ullah were working together for purposes of their election. The ward was a double member ward. Now, in the petition which was filed against Hamid Uddin and Ahmad Ullah it was established that there had been three cases of false personation. It is necessary on this part of the case to understand clearly what the findings of the Additional Commissioner on the part played by the plaintiff so far as these false personations are concerned. In deciding the question of personation, the Additional Commissioner kept in mind two factors, namely, (1) whether the persons other than those entitled to vote voted for the respondents and (2) whether this personation was done with a corrupt mind and was within the knowledge of the respondents themselves, their agents or identifiers. The Additional Commissioner was driven to the irresistible conclusion that the application, Ex. P-14, which contained the list of election agents was presented by the respondents before the presiding officer and the persons named in that document did act as agents on their behalf. On this basis, he came to the very sound conclusion that both the respondents in the election petition before him were bound by the act of their agents. He further came to the finding that the agents mentioned in Ex. P-14 presented by the respondents before him had identified voters whom he had held to be impersonating others. The Additional Commissioner was, therefore, driven to the conclusion that the respondents were let down by their agents. They did not produce their agents to explain whether they committed a mistake under the 'bona fide' belief that they were identifying correct voters. Further, they did not offer themselves as witnesses. The conclusion arrived at by him was that both respondents in the election petition before him and not only one of them had obtained false votes.

(9) It must be remembered that the respondent before me was collaborating for purposes of election with Ahmad Ullah in this case. The Additional Commissioner has passed severe strictures against Ahmad Ullah. He considers him to be the more guilty of the two persons. From what he has written, it is however clear that he looks upon Hamid Uddin as a person who has connived at what was done by Ahmad Ullah or his agent on their joint behalf. It is, therefore, important to bear in mind the provisions of S. 28 of the Municipalities Act. That section runs as follows:

"A person shall be deemed to have committed a corrupt practice who, directly or indirectly, by himself or by any other person (i) induces, or attempts to induce, by fraud, intentional misrepresentation, coercion or threat of injury, any voter to give or to refrain from

giving a vote in favour of any candidate; (ii) with a view to inducing any voter to give or to refrain from giving a vote in favour of any candidate, offers or gives any money, or valuable consideration or any place or employment, or holds out any promise of individual advantage or profit to any person; (iii) gives or procures the giving of a vote in the name of a voter who is not the person giving such vote; (iv) abets (within the meaning of the Indian Penal Code) the doing of any of the acts specified in clauses (i), (ii) and (iii)."

(10) It will be observed that the section is very widely worded and that according to it a person is deemed to have committed a corrupt practice if he, directly or indirectly, by himself or by any other person commits any one of the acts mentioned in clauses (i), (ii), (iii) and (iv). It has been strenuously contended by learned counsel for the respondent that his client was, according to the finding of the learned Civil Judge, neither directly nor indirectly involved in the alleged corrupt practices, if any, committed by Ahmad Ullah or his agents. On a correct reading of the report of the Additional Commissioner, I am unable to agree with this argument. The plaintiff must blame himself for associating for election purposes with a man whom the Additional Commissioner describes as 'a thoroughly unscruplous person'. He was collaborating, i.e. co-operating with him. Both Ahmad Ullah and Hamid Ullah had according to the findings of the Additional Commissioner, agents who were co-operating with one another. On these facts, the inference is irresistible that the plaintiff-respondent was conniving at the corrupt practices used by Ahmad Ullah and his agents. His attitude was one of complete indifference as to whether what was being done by these agents was right or wrong. The thing that mattered, so far as he was concerned, was success in the election. It was unfortunately this excessive desire to see himself elected as a municipal commissioner that led him to associate himself — it may be indirectly — with the corrupt practices used by his colleague, Ahmad Ullah, and his agents. I cannot, in these circumstances, say that the Additional Commissioner has taken a wrong view of the law applicable to the case. It is essential to preserve in a democratic country fairness in elections. Courts are justified in taking a strong view where corruption, directly or indirectly is proved in any election. On a fair reading of the Additional Commissioner's judgment, I have come to the conclusion that, while he thinks that the part played by the plaintiff-respondent was of a comparatively minor character, he was not entirely free from blame. For this reason, the order passed by him was, in the circumstances of the case, particularly after he had reviewed it, a completely just one.

(11) I now come to the third part of the argument which has been addressed by Mr. Kumar. His contention is that it is contrary to the principles of natural justice to hold a person responsible for 'not what he but some other person has done'. The principle, as enunciated by him, is of an unexceptional character. Undoubtedly, it would be monstrous to make a person who has been clean himself to suffer for the wrongs committed by a colleague about whose character and antecedents he had no reason to be suspicious. In this particular case, however, that principle has no application for the simple reason that the finding of the Additional Commissioner is that the plaintiff-respondent cannot be said to be entirely free from blame inasmuch as he gave his passive support to the misdeeds of Ahmad Ullah and his agent. The active person in this unholy affair was undoubtedly Ahmad Ullah; but the respondent willingly led himself to be dragged into the mire by the unscrupulous methods which were employed by his colleague.

(12) An error into which the learned Civil Judge has fallen in this particular case is that he looked upon himself as a sort of appellate tribunal in an election matter. Undoubtedly, as has been emphasised by Malik C. J., it is for the civil Court to see that an election tribunal or for the matter of that any special tribunal set up under any act of the legislature acts within the jurisdiction allotted to it by the Legislature. If such a tribunal does anything which it is not warranted by law to do, its proceedings can be questioned successfully in a civil Court. But where the tribunal acts within its jurisdiction, it is not for the Court to weigh evidence on which it has acted with nicety. The approach of the learned Civil Judge was, in my opinion, incorrect.

(13) Before I conclude, I must notice another argument which was addressed by learned counsel for the respondent. This argument is that the Additional Commissioner who tried the two cases at the same time did not separate the two petitions properly. This, it is urged, he was bound to do under S. 23 of the Municipalities Act. The short answer to this argument is that, on a fair reading of the Additional Commissioner's order, it is clear that the two cases were kept, as far as possible, separate and that the universal character of the rule is not affected by the words "so far as is consistent with such joint trial or hearing." I do not think that the Additional Commissioner has made any error in his approach so far as this part of the case is concerned. I am unable to interfere with the order regarding costs as that was a discretionary matter with the election tribunal.

(14) For the reasons given above, this appeal must be allowed. I set aside the decree of the learned Civil Judge, restore that of the learned munsif and dismiss the plaintiff's suit with costs throughout.

(15) Leave to appeal to a Division Bench is refused.

B/D.R.R. Appeal allowed.

A.I.R. 1953 ALLAHABAD 170 (Vol. 40, C.N. 74)

MALIK C. J. AND V. BHARGAVA J.

Hari Kailash and Co., Applicant v. Commissioner of Income-tax, U. P., C. P. and Berar, Lucknow, Respondent.

Misc. Case No. 119 of 1946, D/- 10-1-1952.

Income-tax Act (1922), S. 4(3) (vii) — Income from business — Contract directed to regulate conditions under which trade is to be carried on — Termination of — Compensation for discontinuance of business is not revenue receipt and not taxable.

There is a difference between compensation or damages paid or received for non-performance of a contract entered into in the course of business and compensation or damages paid for discontinuance of the business itself. The former may be

treated as income but the amount paid for terminating a business cannot, ordinarily, be deemed to be income from that business taxable under the Income-tax Act. (Para 5)

The assessee firm entered into a contract with another company, under which the assessee agreed to finance the business of the latter company. The agreement was to run for 5 years. It was to regulate the conditions under which the assessee firm was to carry on the trade or business. It acquired, under this agreement, certain rights and was not put under certain liabilities. Before the expiry of the period the parties agreed to terminate the agreement. By the Cancellation Agreement all these congeries of rights that it had acquired under the first agreement were terminated for a certain consideration.

Held that the compensation paid for termination of those rights was not taxable income and income-tax could not be charged on that sum. AIR 1932 PC 138, Rel. on; Case law discussed. (Para 7)

Anno: I. T. Act, S. 4 N. 26.

G. S. Pathak and R. S. Pathak, for Applicant; S. C. Das, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('32) 6 ITC 178: 1932 All LJ 588: (AIR 1932 PC 138) 3, 4, 6
(1939) 8 ITR Sup 36: (108 LJKB 801) 4
(1928) 12 Tax Cas 955: (136 LT 689) 4
(1938) 21 Tax Cas 608: (1938 SC 238) 6

MALIK C. J.: The assessee-firm entered into an agreement with Messrs. E. Sefton and Company, Ltd., which company was incorporated under the Indian Companies Act with its Head Office at Mirzapur. The assessee-firm agreed to finance the business of Messrs. E. Sefton & Company, Ltd., for purchasing raw wool and other manufacturing expenses etc. at a rate of interest mentioned in the agreement, dated 9th April 1940. The agreement further provided that this contract was to remain in force for a period of five years, that the assessee-firm and Messrs. E. Sefton and Company, Ltd., were to put up a Weaving and Finishing Plant to make blankets and blanketting at Mirzapur or at any other place which may be mutually agreed upon, that the two parties would work with the object of executing Government and private contracts for the supply of blankets, blanketting and yarn or for any other woollen products which, in the opinion of both the parties, could be profitably handled and that, during the period of five years that the business was to run, the profits were to be shared between them in the proportion of 40 per cent and 60 per cent, that is, the assessee-firm getting 60 per cent of the profits. It was further provided that, during the period of five years, the assessee-firm or Messrs. E. Sefton and Company, Ltd., were not to undertake directly or indirectly a similar business without their mutual consent obtained in writing. There were other terms in this agreement, Ex.T-A, a copy of which is included in the paper book. It is not necessary for us to set out those terms. In short, the assessee-firm and Messrs E. Sefton and Company, Ltd., entered into a partnership to carry on business on certain terms and to share profits and losses, the assessee-firm further undertaking to finance the concern on certain terms mentioned in the document.

The business was carried on for a period of more than one year but on 22nd Nov., 1941, the parties mutually agreed to terminate the agreement. A sum of Rs. 25,962/-, (wrongly mentioned by the Tribunal for Rs. 25,942) was already in the hands of the assessee-firm. Under the Cancellation Agreement, dated 22nd November, 1941, it was agreed that a further sum of Rs. 25,000/- would be paid to them "in lieu of all their claims as regards damages, etc. and share of profits during the period of 'co-operation and future' ". Paragraph 10 of this agreement runs as follows:

"10. That this agreement has been entered into by the parties in a friendly spirit and leaves no malice on either side and that Mr. Shiva Lall of Messrs. S. Laul & Co. will continue to assist the "Manufacturers" (Messrs. E. Sefton & Co., Ltd.) in the matter of continuing the contracts obtained from the Government of India, as and when opportunity arises, except undertaking any pecuniary liability."

The Income-tax Officer claimed that the whole of this amount of Rs. 50,962/-, was taxable income which had accrued to the assessee for the financial year ending with 31st March, 1942, which was the relevant account period for the year of assessment with which we are concerned. The assessee-firm had divided the sum of Rs. 50,962/- into two parts. He claimed Rs. 13,694/- as share of profits and Rs. 37,248/- as compensation for the termination of the contract. There was thus no dispute as regards Rs. 13,694/- and as regards Rs. 37,248/-, the matter went up to the Income-tax Appellate Tribunal which held on 16th January 1945, that

"this amount will, therefore, be liable to income-tax as they are of the same nature as the profits that will accrue from time to time. The appellants have no justification to urge that they received any amount as damages after obtaining a sum for future profits also. We find that amounts received by the appellants were for the accrued as well as for the future profits."

(2) The assessee-firm made an application under S. 66(1), Income-tax Act and formulated four questions for reference to this Court. The Income-tax Appellate Tribunal was of the opinion that the question formulated by it covered all the four questions formulated by the assessee-firm. The question referred to us is to the following effect: "Whether, on the facts and circumstances of the case, the receipt of Rs. 37,248/- is of the nature of a revenue receipt?"

(3) In the statement of the case, the findings of fact have not been clearly set out. The way, in which the Tribunal has expressed itself, is as follows:

"On the findings of fact arrived at by the Tribunal that the entire sum including Rs. 37,248/- in dispute was paid to the applicant in the joint venture account by which the company was to provide materials for the manufacturing of blankets and yarn and the applicant was to provide the finances by virtue of the fact of the earlier termination in not allowing the full period of five years to run and the fact that there was an agreement by which the applicant was not at liberty to do any business, the payment received was trading receipt."

It is difficult to understand what it actually means; but probably the Tribunal meant that the entire sum of Rs. 50,962/- including Rs. 37,248/- was received by reason of the earlier termination of the agreement which was

to run for a period of five years and which included a clause to the effect that the assessee-firm was not at liberty to do any business during that period. If the whole of this amount was received as compensation for the earlier termination of the contract, the contract being directed to regulate the conditions under which the assessee-firm was to carry on this partnership business, the decision in — 'Commr. of Income-tax, Bengal v. Shaw, Wallace & Co.', 6 ITC 178: 1932 All LJ 588 (PC), would apply and no part of the amount would be 'income' within the meaning of that term in the Indian Income-tax Act. In the statement of the case, however, the Tribunal has apparently made a mistake as the assessee firm had admitted that the sum of Rs. 23,684/- was share of profits already earned and was not a compensation for the early termination of the contract. It is for this reason that Mr. Das has urged that we must divide the sum of Rs. 37,248/- into various components and hold that only that part of this amount, which was paid as compensation for the earlier termination of the agreement, was not taxable while the rest of it, that is, any portion of it which included the profits that had already been earned, or the interest that had already accrued, or any other sum that might have been received as actual profits for work done in accordance with the provisions of para. 10 of the Cancellation Agreement of 22nd November 1941, was taxable income. It is not possible for us to go into the question as to which part of this sum of Rs. 37,248/- was paid to the assessee-firm as compensation for the earlier termination of the agreement of 9th April 1940.

(4) A large number of cases have been cited and discussed before us but, in the view that we have taken, it is not probably necessary to discuss them in any detail. The Tribunal, in the statement of the case, has expressed the opinion that the decision of their Lordships of the Privy Council in the case of — 'Shaw, Wallace & Co.', (6 ITC 178: 1932 All LJ 588 PC), should not be relied on in determining the question which has arisen in the case before us and have relied on the decision in — 'Bush, Beach and Gent, Ltd. v. Road', (1939) 8 ITR Sup 36. They say that the decision in — 'Shaw Wallace's case' was under the English Income-tax Act and is not relevant. This is clearly wrong. — 'Shaw Wallace's case' had been decided by the Calcutta High Court and the Privy Council decided it in appeal, while the jugment in — 'Bush, Beach's case' was delivered by Lawrance J. in the King's Bench Division. The Tribunal was governed by the decision in — 'Shaw, Wallace's case' while the decision in — 'Bush, Beach's case' was not really relevant. Their Lordships of the Judicial Committee had pointed out in — 'Shaw Wallace's case' that

> "the Indian Act is not in 'pari materia'; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other."

Sri S. C. Das for the Department has contended that the amount received should be treated as income from business. He has relied on the case of — 'Short Brothers Ltd. v. Commissioner of Inland Revenue', (1928) 12 Tax Cas 955. In that case Short Brothers Ltd., had contracted in February and March, 1920, to build two steamers for the Hindustan Steam Shipping Co., Ltd. In November of that year they agreed to the cancellation of the contract in consideration of the payment of the sum £ 100,000 which was paid to them on 26th November 1920. For the assessee it was urged by Sir John Simon that it was a sum which was received by the assessee in return for which they ceased to engage in the trade or business of producing these two steam-ships. It was urged that the assessee were not carrying on their trade, which was to build ships, but they were being paid compensation for not carrying on the trade of building these two ships. This contention was not upheld and it was held that the sum of £ 100,000 was taxable income. Lawrence L. J. pointed out that

> "where a contract has been entered into in the ordinary course of business, a sum received for the cancellation of that contract is a sum which would go into the ordinary trading receipts of the company for the year in which it was received or in which it became payable, just as, if the company here had paid a sum for the cancellation of an onerous contract, they would have entered into the debits for the year the sum so paid."

Lord Hanworth M. R. said:

> "It is not denied that Messrs. Short Brothers, Limited, carry on a business of building ships, and in the course of carrying on their business they must enter into a great number of contracts, some of which are fulfilled, possibly, some of which are broken, some of which, possibly, are terminated; but in all such matters it is not argued that Messrs. Short Bros., Limited, have less power than other business firms to determine whether or not they will bring to an end, upon terms which they are disposed to agree, contracts which they have entered into, contracts which, for one reason or another, are to be terminated in the interests of one party or the other to the contract. Once one sees that a contract may be determined in the course of business, it appears to me that we have the answer to the problem which is put before us."

His Lordship held

> "It seems to be simply the sum paid in order that, as a matter of business, the responsibility and liability under the contract should be terminated and the business should be free to to engage in others."

(5) From the above observations it is clear that there is a difference between compensation or damages paid or received for non-performance of a contract entered into in the course of business and compensation or damages paid for discontinuance of the business itself. The former may be treated as income but the amount paid for terminating a business cannot, ordinarily, be deemed to be income from that business taxable under the Indian Income-tax Act.

(6) Reliance is also placed on the decision in —'Kelsall Parsons & Co. v. Commissioner of Inland Revenue', (1938) 21 Tax Cas 608, in which the assessee-firm carried on business as agents on a commission basis for the sale in Scotland of the products of various manufacturers and entered into agency agreements for that purpose. At the instance of the manufacturer concerned one of the agreements, which was for a period of three years, was terminated at the end of the second year in consideration of payment to the appellants of the sum of £ 1,500 as compensation. The question was whether this amount was a taxable profit or it was a capital receipt. The Lord President (Normand) said:

"That was a contract incidental to the normal course of the appellants' business. Their business, indeed, was to obtain as many contracts of this kind as they could and their profits were gained by rendering services in fulfilment of such contracts..... It was a normal incident of a business such as that of the appellants that the contracts might be modified, altered or discharged from time to time, and it was quite normal that the business carried on oy the appellants should be adjustable to variations in the number and importance of the agencies held by them, and to modifications of the agency agreements including modifications of their duration, which might be made from time to time..... In parting with the benefit of the contract, moreover, the appellants were not parting with something which could be described as an enduring asset of the business. The contract would have been terminated in any event as at 30th Sept., 1935..... The agreement by which the agency contract was terminated at September 1934, therefore effected a surrender of one year's benefit, and in return for this surrender the appellants received compensation. ..... The sum paid in this case is really and substantially a surrogatum for one year's profits."

And in the end the Lord President remarked:

"In my opinion the agency agreements entered into by the appellants, so far from being a fixed framework, are rather to be regarded as temporary and variable elements of the appellants' profit-making enterprise."

These observations and the observations made by Lord Moncrieff clearly bring out the difference pointed out by us above. Lord Moncrieff divided two classes of cases of compensation paid for termination of contracts as follows:

"(1) a contract may be made by a trader which is merely directed to result in trading profits being made;

(2) a contract may be made by a trader which is directed to regulate the conditions under which he is to carry on his trade."

In the first class of cases, if the contract is terminated or a breach thereof is made and compensation or damages are received it might be treated as trading profits. In the second class of cases, compensation received for the termination of a business cannot be treated as trading profits as it was paid for the termination of the trade or business. The amount received in such a case would ordinarily fall within the rule laid down in — 'Shaw Wallace's case' (6 ITC 178: 1932 All LJ 588 PC) and would not be taxable. In one case, one gives up the source from which the income arises; in the other one merely gives up anticipated profits, which would have accrued to him if the contract had not been discontinued or terminated, for cash payment.

(7) In the case before us, there was a contract entered into by the assessee firm on 9th April 1940, which was to run for a period of five years. It was to regulate the conditions under which the assessee firm was to carry on the trade or business. It acquired, under this agreement, certain rights and was not put under certain liabilities. By the Cancellation Agreement of 22nd November 1941, all these congeries of rights that it had acquired under the first agreement were terminated for a certain consideration. The compensation paid for termination of those rights is not taxable income and income-tax cannot be charged on that sum. The amount of Rs. 37,248 cannot, therefore, be said to be a revenue receipt. This is our answer to the question formulated by the Tribunal. The assessee-firm is entitled to its costs which we assess at Rs. 400.

B/V.B.B. Reference answered.

A.I.R. 1953 ALLAHABAD 173 (Vol. 40, C.N. 75)

(FULL BENCH)

SHANKAR SARAN, BIND BASNI PRASAD AND KAUL JJ.

Abdul Hamid and others, Appellants v. Mst. Asghari Begum, Respondent.

Second Appeal No. 1726 of 1945, D/- 3-11-1952.

Civil P. C. (1908), O. 21, R. 57 — Attachment before judgment.

The provisions of O. 21, R. 57 do not apply to attachments effected before judgment. Consequently, on the dismissal of an execution application for default of the decree-holder, the attachment before judgment does not cease. 46 All 894 Approved; AIR 1924 Mad 494 FB Dissent.

(Paras 6, 9 and 10)

Anno: C.P.C., O. 21 R. 57 N. 8.

S. M. Salman, for Appellants; Ishaq Ahmad, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('24) 46 All 894: (AIR 1924 All 860) 2, 3, 4, 5, 7, 10

('29) 56 Cal 416: (AIR 1929 Cal 465) 8

('19) 42 Mad 1: (AIR 1919 Mad 752) 3, 4

('24) 47 Mad 483: (AIR 1924 Mad 494 (FB)) 3, 9

KAUL J.: This second appeal originally came up for hearing before a Division Bench consisting of Wanchoo and Bhargava JJ. For reasons to be stated presently they referred it to a Full Bench.

(2) The facts so far as they are material are as follows:

In a suit brought by one Mt. Asghari Begum against Abdul Hamid and others some property belonging to the defendants was attached before judgment under O. 38, R. 6, Civil P. C. The claim was ultimately decreed and Asghari Begum put in an application for execution of her decree. She prayed that the property attached before judgment be sold for satisfaction of her debt. This application was dismissed for default. Thereupon Asghari Begum put in another application for execution which was also dismissed in 1935. The last application for execution was made by her on the 30th April 1938 and therein the prayer for sale of the property attached before judgment was repeated. In due course the decree was transferred for execution to the Collector under S. 68, Civil P. C. At this stage the judgment-debtors preferred an objection to the execution of the decree under S. 47, Civil P. C. It was contended on their behalf that, inasmuch as, the two previous applications for execution had been dismissed for default of the decree-holder, the attachment which was effected before judgment ceased to subsist in view of the provisions of Order 21, Rule 57, Civil P. C. In reply, the decree-holder relied on the decision of this Court in — 'Akhey Ram v. Basant Lal', 46 All 894 and contended that Order 21, Rule 57 did not apply to attachments effected before judgment. The objections were thrown but. Accordingly the judgment-debtor went in appeal before the Additional Civil Judge of

Bulandshahr, but were unsuccessful. Hence this second appeal.

(3) When the case came up for hearing before a Division Bench in this court, it was argued that the learned Judges who decided — 'Akhey Ram's case', (46 All 894) had for the view taken by them relied on the decision of the Madras High Court in — 'Venkatasubbiah v. Venkata Seshaiya', 42 Mad 1 which was subsequently overruled by the Full Bench decision of the same court in — 'Meyappa Chettiar v. Chidambaram Chettiar', 47 Mad 483 (FB). It was further pointed out that there was a sharp cleavage of judicial opinion on this point. Our own Court and the High Courts of Calcutta and Patna had taken one view, while the view taken in 47 Mad 483 (FB) was followed in Bombay, Sind and Nagpur. Thereupon the Division Bench referred this appeal to a Full Bench because (1) reliance in — 'Akhey Ram's case' was placed on the decision of Madras High Court in — 'Venkatasubbiah's case', 42 Mad 1 which was later overruled by a Full Bench decision of the same court; (2) there was difference of opinion among various High Courts on the true scope of Order 21, Rule 57 Civil P. C. and (3) the general importance of the question raised by the objectors.

(4) It will be noticed that even at the time when the decision in — 'Akhey Ram's case' (46 All 894) was given there was no unanimity of judicial opinion on the question raised in the present case. But a Division Bench of this court (Sulaiman and Kanhaiya Lal JJ.) on a consideration of the provisions of Order 21, Rule 57 Civil P. C. and of the various provisions contained in Order 38, Civil P. C. came to the conclusion that Order 21, Rule 57 did not apply to attachments effected before judgment, but that its operation was limited to attachments effected in execution of a decree. It is noteworthy that they came to this conclusion independently of the decisions of other Courts. It is true that having arrived at that conclusion on a consideration and careful examination of the provisions of the Code they further observed: "There are several cases in support of the view which we have taken", and then mentioned a number of cases including the case of — 'Venkatasubbiah', 42 Mad 1 which was later overruled by a Full Bench of the same court.

(5) The decision in — 'Akhey Ram's case' (46 All 894) has been considered good law in this State for the last 28 years and unless there are strong reasons for us to hold that the view taken by the Division Bench in that case was wrong, we would not be justified in dissenting from that decision merely because some other High Courts have taken a different view.

(6) To begin with, I find that there is no ambiguity either in the language of Order 21, Rule 57, Civil P. C. or in that of Order 38, Rule 11, Civil P. C. Accordingly the provisions of these rules should be given the meaning which their language would ordinarily bear. The expression "attachment in execution of decree" has a definite and well settled connotation. Under the scheme of our Code of Civil Procedure "Execution of decrees" is a definite stage in the process of litigation, well marked off from proceedings which terminate in the passing of a decree. The last mentioned relate to the determination of the rights of the parties, while the former is concerned with the enforcement of those rights after they have been judicially determined. If the legislature in enacting Order 21, Rule 57, Civil P. C. used the expression "in execution of decree" which has a definite and well settled connotation, we should not in the absence of very strong reasons, extend the provisions of that rule to cover attachments effected before judgment, which is certainly not a proceeding in execution of decree. With the greatest respect I am unable to accept the view taken by some High Courts that the words "any property attached in execution of a decree" should be construed as meaning "where property has been in a state of attachment in execution." To put such a forced and artificial construction upon the plain language of the statute is wholly without justification.

(7) It appears that the cases in which a view different from that taken by this court in — 'Akhey Ram's case' (46 All 894) has been taken the essential difference between an attachment before judgment and one effected after the judgment is passed and the decree is put in execution, has been overlooked. It is true that in both cases the mode of effecting the attachment is the same. The claims of third parties to the property attached are to be investigated in the same manner, and in both an alienation of the property attached whether by sale, gift or otherwise is ineffective against claims enforceable under the attachment. Nonetheless an attachment effected before judgment is different from one effected after judgment in execution of decree, not only in its origin but also in its purpose.

(8) An attachment before judgment under Order 38, Rule 6, Civil P. C. is effected only if the Court is satisfied that the defendant with a view to prevent or delay the execution of any decree that might be passed against him, intends to remove his property from the jurisdiction of the Court in which the suit is pending, and having being given an opportunity to furnish security in such sum as may be specified in the order of the Court fails to do so. Obviously the purpose of such an attachment is to prevent the party concerned with removing his property out of the jurisdiction of the Court in which a suit against him is pending. On the other hand the purpose of an attachment effected in execution of a decree is to put some property of the judgment-debtor in 'custodia legis' to prevent its alienation so that it might be sold or otherwise made available for satisfaction of an existing decree which is being executed. Thus there is an essential difference between the two kinds of attachment — one effected before judgment and the other effected in execution of a decree. As pointed out in — 'Shibnath Singh v. Saberuddin Ahmad', 56 Cal 416, Order 21, Rule 57, Civil P. C. was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default. As the decree-holder has been in default, the rule deprives him of the advantage which he could have derived on account of the attachment which was made on his application for execution of his decree. It is doubtful whether the Courts would be justified in penalising a party who got an attachment before judgment, not for some thing which he did during the progress of the suit before his decree was obtained, but for some default in prosecution of an execution application which he might make subsequently. The Code does not say so, and I do not think the

Courts by giving an altogether artificial and extended meaning to the provisions of Order 21, Rule 57, Civil P. C. would be justified in introducing such a penal provision in our law of procedure.

(9) I refrain from examining in detail all the grounds mentioned in the various judgments of the Madras High Court in 47 Mad 483, because in view of the plain and unambiguous language of Order 21, Rule 57 and of Order 38, Rule 11, Civil P. C., there is hardly room for any speculation as to the intention of the legislature. I will, however, before bringing this judgment to a close say a few words about one of the grounds mentioned by Ramesam J. in his elaborate judgment in — 'Meyappa Chettiar v. Chidambaram Chettiar', 47 Mad 483 in support of his view. His argument was that it would be inconsistent to apply S. 63, Civil P. C. and Art. 11, Limitation Act, to attachments effected before judgment, as had been done in many cases, and to hold simultaneously that the provisions of Order 21, Rule 57, Civil P. C. do not apply to such attachments. He pointed out that in all these provisions the expression "in execution of decree" are used, and it is wholly without justification to hold that though S. 63, Civil P. C. and Art. 11, Limitation Act apply to attachments effected before judgment, but provisions of Order 21, Rule 57, do not apply. I am not prepared in the present case to commit myself to the view that Art. 11, Limitation Act necessarily applies to claims arising out of attachments before judgment. So far as the applicability of S. 63, Civil P. C. is concerned this can be fully supported in view of the provisions of Order 38, Rule 8, Civil P. C. In my opinion, there is no justification for putting a forced and artificial interpretation upon the plain language of Order 21, Rule 57, Civil P. C. on the grounds mentioned by the learned Judge.

(10) I am satisfied that there are no good grounds to hold that the view taken in — 'Akhey Ram's case' (46 All 894) was erroneous. I would dismiss the appeal with costs.

(11) BIND BASNI PRASAD J.: I concur.

(12) SHANKAR SARAN J.: I agree and have nothing to add.

(13) BY THE COURT: The appeal is dismissed with costs.

A/G.M.J. Appeal dismissed.

A.I.R 1953 ALLAHABAD 175 (Vol. 40, C.N. 76)

DESAI J.

M/s. Agarwal and Co., Applicant v. City Board, Dehradun, Opposite Party.

Civil Revn. No. 1142 of 1952, D/- 13-10-1952.

Houses and Rents — U.P. Temporary Control of Rent and Eviction Act (3 of 1947), Ss. 5(4) and 6 — Fair rent — Transaction must be fair — Shop let out to highest bidder in public auction — Rent much above fair and reasonable rent — No concealment or misrepresentation — Highest bid by partnership firm — Transaction held fair, though rent was much above reasonable rent — Application for reduction of rent, rejected.

The court has jurisdiction to vary the rent only if the transaction was unfair. It is necessary to emphasise that what is required to be unfair is the transaction and not the rent. A great injustice would be caused if the distinction between the transaction and the rent were not kept in mind. A court would not be justified in fixing rent on the ground that the agreed rent was unfair. It must consider the transaction, that is, the negotiations resulting in the agreement about rent. If there is nothing unfair in those negotiations, the transaction cannot be held to be unfair merely because the rent appears to be exorbitant. (Para 8)

The fact that the agreed rent is higher than the reasonable annual rent is absolutely immaterial. The agreed rent has got to be higher; otherwise the tenant would have no cause of action to go to court under S. 5. The law requires that not only must the agreed rent be higher than the reasonable annual rent, but also the transaction must be unfair. The two requirements are distinct from each other and one must not be inferred from the other. It is not open to court to lay down that if the agreed rent exceeds the reasonable annual rent by more than a certain percentage, the transaction automatically becomes unfair. That is obviously a legislative function which cannot be performed by a court. (Consideration in determining reasonable annual rent pointed out.) (Para 9)

The applicant under S. 5(4) who wants the rent to be fixed on the ground of unfairness of the transaction, is not to be debarred on the ground that he had voluntarily agreed to pay the agreed rent. But the fact that he voluntarily agreed to pay it is certainly one of the facts to be considered by the Court in deciding whether that transaction was unfair or not. (Para 4)

Where there was no allegation of any pressure, due or undue, or of any fraud of any kind against the landlord, the transaction was above-board the parties being at arms-length from each other and there was no concealment or misrepresentation, inasmuch as the shop was given to the highest bidder in open auction, it could not be said that the transaction in giving shop to the highest bidder which was a firm at a rent much above the fair rent, was unfair. (Para 5)

Even if the highest bidder which was a partnership firm, were forced by circumstances to bid at that figure, that would not make the transaction unfair. Circumstances might have compelled the firm to take the shop on such a high rate of rent, but the owner was not bound by any law to let out the shop to it at a certain price; when it has not shown that it knew of the circumstances and took undue advantage of them, it was impossible to say that it acted unfairly towards the firm. (Para 6)

Moreover a human being may have to live, but not a partnership or firm. It is impossible to lay down as a proposition of law that it is so much incumbent upon even a natural person to carry on business in a shop that the owner of a building suitable to be used as a shop is bound to let it out to him at not more than a certain price. There is connection between the pressure on the person to have the shop and the liability of the owner to let it out to him at not more than a certain rent. The owner of the shop has such a property in it as to entitle him to let it out

at any rent that he likes, in the absence of law fixing a limit to the rent. There is no law which fixes any limit to the rent at which a building can be let out. The law does not prohibit the letting out of any building at more than a certain rent. Even the U.P. Temporary Rent Control Act, though it allows the rent to be fixed if the transaction is unfair, does not make the letting out at more than a certain rent illegal. English Case Law Ref. (Para 6)

A. P. Pandey, for Applicant.

REFERENCES: Courtwise/Chronological/ Paras

('51) 1951 All LJ 263: (1951 All WR (HC) 209)	9
70 CLR 459	9
(1902) 46 Law Ed 366: 183 US 642	6
(1917) 61 Law Ed 480: 242 US 539	7
(1917) 62 Law Ed 149: 245 US 60	6
(1920) 64 Law Ed 993: 253 US 421	9
(1922) 66 Law Ed 307: 257 US 441	9
(1923) 67 Law Ed 746: 261 US 463	9
(1927) 71 Law Ed 718: 273 US 418	6
(1929) 73 Law Ed 647: 279 US 151	9
(1935) 79 Law Ed 1570: 295 US 495	9
(1893) 2 QB 201: (62 LJQB 623)	8

ORDER: This is an application by a plaintiff whose application under S. 5(4) of the Temporary Control of Rent and Eviction Act for the fixation of rent of a shop has been dismissed by a Munsif on the ground that the transaction was not unfair.

(2) There is no dispute about the facts which are as follows: The opposite party, the City Board of Dehradun, constructed some shops after 1-7-1946, on an open piece of land owned by it by the side of Saharanpur road near the railway station of Dehradun. They were constructed with the object of letting them out to tenants. Offers were invited for the shops, which were open for inspection by the public and were let out to the highest bidders. The shop in dispute is one of them. Several persons applied to the opposite party for it, making their own offers. One man offered Rs. 60/- per month as rent, another Rs. 75/- and a third Rs. 80/-. The applicant appeared on the scene and presented an application to the opposite party offering Rs. 85/- per month. Not only did it voluntarily offer this rent, but it went further and offered to give security for the payment of the rent. More offers came for Rs. 86/- and Rs. 87/- per month and the applicant, within five days of its above offer, made another offer raising the rent to Rs. 90/- per month. Another competitor offered Rs. 92/- and the applicant then offered Rs. 106/-. All these offers were made in the space of seven days. Nobody offered more than Rs. 106/- per month and the opposite party accepted the offer and let out the shop to the applicant.

(3) As the shop had been constructed after 1-7-46 its reasonable annual rent could be determined only by the District Magistrate. The applicant made an application to the District Magistrate for fixing it and the District Magistrate fixed it at Rs. 204/-. Then the applicant started proceedings under S. 5(4) of the Act for fixation of rent, claiming that the agreed rent of Rs. 1272/- p.a. was more than the reasonable annual rent of Rs. 204/- and alleging that the transaction was unfair. The learned Munsif held that there was nothing unfair in the transaction and dismissed his application.

(4) The learned Munsif rightly fixed the responsibility upon the applicant to prove that the transaction was unfair. He also rightly held that the mere fact that the agreed rent was so much higher than the reasonable annual rent, did not by itself make the transaction unfair. It is pleasing to note that the learned Munsif withstood the temptation to declare the transaction as unfair in spite of the great disparity between the two rents. There is no foundation for the argument of Mr. A. P. Pandey that the learned Munsif non-suited the applicant on the ground that it had voluntarily agreed to pay Rs. 106/- per month. Though the learned Munsif has said in his order that "It does not lie in the mouth of the plaintiff", and that "He cannot be allowed to say that the agreement was obtained by undue force", he did not at all mean to apply the doctrine of estoppel against it and not to entertain its plea of unfairness of the transaction but only meant that in view of what it had done there was no substance in its plea. He certainly entertained the plea and discussed its merits and rejected it on merits and not on the technical ground that it could not be raised. Certainly an applicant under S. 5(4) who wants the rent to be fixed on the ground of unfairness of the transaction, is not to be debarred on the ground that he had voluntarily agreed to pay the agreed rent. But the fact that he voluntarily agreed to pay it is certainly one of the facts to be considered by the Court in deciding whether the transaction was unfair or not.

(5) No allegtaion of any pressure, due or undue, or of any fraud of any kind has been made against the opposite party. The transaction was above-board and the parties were at arms-length from each other. Nothing was concealed by the opposite party and nothing was falsely represented. The opposite party did not even take the first initiative in the matter. It was the applicant who persistently went on writing to the opposite party offering more and more rent. If there is anything unfair, in my opinion it is in the attempt of the applicant to get the rent fixed at a much lower rate after having beaten down all the competitors in the field and taken the shop as the highest bidder. It appears to me that it agreed to pay Rs. 106/- p.m. to the opposite party fully knowing that it had no intention of paying so much rent for the shop and expecting to have the rent reduced under S. 5(4) of the Rent Control Act. It acted unfairly in concealing from the opposite party its intention of not paying the stipulated rent. It was the applicant who tried to overreach the opposite party. It cannot take advantage of its own unfairness and say that on account of the unfairness rent should be fixed by the court. The unfairness of the transaction which justifies fixation of rent is the unfairness as against the applicant and not the unfairness practised by it.

(6) The usual argument was advanced that the applicant was forced by circumstances to agree to pay so much rent. Even if it were forced by circumstances, that would not make the transaction unfair. Circumstances might have compelled it to take the shop on such a high rate of rent, but the opposite party was not bound by any law to let out the shop to it at a certain price. When it is not shown that it knew of the circumstances and took undue advantage of them, it is impossible to say that it acted unfairly towards the applicant. The applicant has not even proved what were the exact circumstances which pressed it. It is to be

noted that it is styled as a Company and is certainly a firm. I cannot imagine such pressing circumstances as would compel it to take the shop on rent of Rs. 106/- per month, even if it were unable to pay so much rent. As it existed up till now without the shop, it could exist in future also without the shop and it was not compelled to take it on rent. If it could not exist with a shop, it could be dissolved. A human being may have to live, but not a partnership or firm. It is impossible to lay down as a proposition of law that it is so much incumbent upon even a natural person to carry on business in a shop that the owner of a building suitable to be used as a shop is bound to let it out to him at not more than a certain price. There is no connection between the pressure on the person to have the shop and the liability of the owner to let it out to him at not more than a certain rent. The owner of the shop has such a property in it as to entitle him to let it out at any rent that he likes, in the absence of law fixing a limit to the rent. There is no law which fixes any limit to the rent at which a building can be let out. The law does not prohibit the letting out of any building at more than a certain rent. Even the U. P. Temporary Rent Control Act, though it allows the rent to be fixed if the transaction is unfair, does not make the letting out at more than a certain rent illegal. In — 'Sun Printing and Publishing Association v. Moore', (1902) 46 Law Ed 366: 183 U S 642, White, J. said at page 382:

"The law does not limit an owner of property, in his dealings with private individuals respecting such property, from affixing his own estimate of its value upon a sale thereof, or, on being solicited, to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would be buyer or lessee is of the opinion that the value affixed to the property is exorbitant, he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract, and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce the agreed value to a sum which others may deem is the actual value."

Sutherland, J. observed in — 'Tyson & Brother v. Banton', (1927) 71 Law Ed 718: 273 U S 418 at p. 722:

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself."

According to Day, J. in — 'Buchanan v. Warley', (1917) 62 Law Ed 149 at p. 161: 245 U S 60:

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it."

(7) This is also Mokenna, J.'s concept of property in — 'Hall v. Geiger-Jones Co.', (1917) 61 Law Ed 480: 242 U S 539. Therefore, the opposite party had every right to let out the shop at any rent that it likes; it simply exercised its right of property by doing so. In the absence of anything in the relationship that existed between it and the applicant or any law on account of which it should not have charged more than a certain amount of rent, it cannot be accused of having acted unfairly in fixing the rent that it did. If it was exorbitant or beyond the applicant's capacity to pay, it was open to the applicant not to take the shop on rent.

(8) The court has jurisdiction to vary the rent only if the transaction was unfair. It is necessary to emphasise that what is required to be unfair is the transaction and not the rent. A great injustice would be caused if the distinction between the transaction and the rent were not kept in mind. A court would not be justified in fixing rent on the ground that the agreed rent was unfair. It must consider the transaction, that is, the negotiations resulting in the agreement about rent. If there is nothing unfair in those negotiations, the transaction cannot be held to be unfair merely because the rent appears to be exorbitant. Under S. 9 of the English Attorneys and Solicitor's Act 1870, if an agreement between a client and an attorney was in all respects fair, (and reasonable) to the parties, it could be enforced by the court. In dealing with an agreement alleged to be unfair, Lord Esher, M. R. said at page 204:

"With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfied the requirement as to fairness."

See — In re Stuart: Ex parte Cathcart', (1893) 2 Q B 201. According to this test, there was nothing unfair in the transaction between the applicant and the opposite party.

(9) The fact that the agreed rent is higher than the reasonable annual rent is absolutely immaterial. The agreed rent has got to be higher; otherwise the tenant would have no cause of action to go to court under S. 5. The law requires that not only must the agreed rent be higher than the reasonable annual rent, but also the transaction must be unfair. The two requirements are distinct from each other and one must not be inferred from the other. It is not open to court to lay down that if the agreed rent exceeds the reasonable annual rent by more than a certain percentage, the transaction automatically becomes unfair. That is obviously a legislative function which cannot be performed by a court. The court cannot fix an arbitrary limit beyond which a landlord cannot go. It follows that a court cannot denounce a transaction as unfair on the ground that the agreed rent exceeds the reasonable annual rent by more than a certain percentage.

(9a) I am not perturbed at all by the great disparity between the agreed rent and the reasonable annual rent, though S. 6(a) of the Act requires that in determining the reasonable annual rent, the District Magistrate should take into the account the costs of the construction and of maintenance and the repairs of accommodation, its situation and any other matter which may be thought material, it leaves a large scope for the exercise of discretion by the District Magistrate. It has left entirely at his discretion to decide what percentage the reasonable annual rent should bear to the costs of construction and of maintenance and repairs. Owing to so much being left at his discretion, the reasonable annual rent fixed by him may vary considerably from the market value of the rent. I am, therefore, not prepared to attach any sanctity to the reasonable

annual rent fixed by the District Magistrate. Its sole functions are to supply a cause of action for an application under S. 5(4) and to set a limit to the enhancement which can be effected by a landlord through notice. In event the reasonable annual rent is the rent to be paid by the tenant to the landlord. If there is an agreement about the rent, that is the rent payable, unless it is varied under S. 5 or enhanced by the landlord if not, the rent payable can be fixed by the landlord through a notice. The reasonable annual rent is not even to be considered by the court while fixing rent under S. 5; what it has to consider is mentioned in S. 6. Having regard to the sole functions of the fixing of reasonable annual rent it would be quite illegal to declare a transaction or even an agreed rent, as unfair merely because it exceeds it considerably. The court, when deciding whether the transaction was unfair or not, must bear in mind that fixing of reasonable annual rent was not intended to supply a measure for deciding upon the fairness or otherwise of the agreed rent, and a fortiori of the transaction. The agreed rent appears to be in the neighbourhood of the market rental value of the shop.

Market value is "the amount which would be paid by a willing buyer to a not unwilling but not anxious-to-sell vendor." Latham, C. J. in — Minister of State for the Army v. Parbury Henty and Co.', 70 C. L. R. 459. The opposite party was anxious to let out the shops; as a matter of fact it had constructed them only for letting them out on rent. Still so many people were prepared to pay more than Rs. 720/- p.a. as rent. This was much more than the reasonable annual rent of Rs. 240/- . It is not known what were the circumstances which forced the other competitors to offer rent upto Rs. 1100/- p.a. If they were not forced by pressing circumstances, and consequently the transaction as against them could not be assailed as unfair, there is no justification for assailing the transaction entered into with the applicant as unfair, just because it might have been forced by circumstances to take the shop. The agreed rent reached the figure of Rs. 1272/- p.a. because of great demand for the shop. "The value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market": Holmes, J. in — 'Ithaca Trust Co. v. U. S. A.', (1929) 73 Law Ed 647: 279 U S 151. The word 'unfair' is not defined in the Act. Misra, J. discussed its meaning in — 'Basarmal v. Durga Pershad', 1951 All L J 263. He relied upon the dictionary meanings.

I respectfully agree with him that the fundamental conception underlying the word is that the transaction has nothing underhand in it, that it is honest, just, equitable and upright and that the other party has not taken undue advantage. There is nothing inequitable or unjust in the transaction between the parties nor has the opposite party taken any undue advantage. Whatever advantage it has taken was such as it was entitled to take as an owner exercising his right of property. The words "unfair methods of competition" have been discussed in a number of cases by the Supreme Court of the U. S. A. 'Federal Trade Commission v. Anderson Gratz', (1920) 64 Law Ed 993: 253 U S 421; — 'Federal Trade Commission v. Sinclair Refining Co.', (1923) 67 Law Ed 746: 261 U S 463; — 'Federal Trade Commission v. Beech-Nut Packing Co.', (1922) 66 Law Ed 307: 257 U S 441 and — 'Schechter Poultry Corporation v. U. S. A.', (1935) 79 Law Ed 1570: 295 U S 495 etc. In the case of — 'Gratz' (1920) 64 Law Ed 993, McReynold, J. said at p. 996:

> "The words are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

In the case of — 'Sinclair Refining Co.', (1923) 67 Law Ed 746 the contract open and fair upon its face and not opposed to good morals because of deception, bad faith, fraud or oppression, was held to be not unfair. In the case of — 'Beechnut Packing Co.', (1922) 66 Law Ed 307 Holmes, J. dissenting said at page 315:

> "I cannot see how it is unfair competition to say to those to whom the respondent sells and to the world, 'you can have my goods only on the terms that I propose'."

In the case of — 'Schechter', (1935) 79 Law Ed 1570 Huges, C. J. said at page 1581:

> 'Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion or conduct otherwise prohibited by law."

If the alleged unfairness in the transaction was judged in the same manner in which the alleged unfairness of the means of competition was judged in the above cases, it would be found that there was nothing unfair in the transaction.

(10) I agree with the learned Munsif that the transaction was not unfair.

(11) There is no force in this application and it is dismissed.

B/R.G.D. Application dismissed.

A.I.R. 1953 ALLAHABAD 178 (Vol. 40, C.N. 77)

V. BHARGAVA AND CHATURVEDI JJ.

Kulsum Bibi, Applicant v. District Magistrate, Kanpur and another, Opposite Party.

Misc. Writ No. 7856 of 1951, D/- 6-11-1952.

Constitution of India, Arts. 7 and 8 — Children migrating to Pakistan along with father — They cease to be citizens of India — Their return to India along with father does not revive their Indian citizenship, unless they return under a permit for re-settlement or permanent return issued by or under authority of law or unless they get themselves registered under Art. 8 with Diplomatic or Consular representative of India in any foreign country.

(Para 1)

S. B. Johari, for Applicant; Sri Gopalji Mehrotra, Senior Standing Counsel, for Respondent.

V. BHARGAVA J.: This is a petition under Art. 226 of the Constitution for issue of a writ of mandamus directing the District Magistrate and the Superintendent of Police of Kanpur to refrain from removing two minor children, Quraisha Begum aged about six years and Mohammad Elias aged about five years, from the lawful custody of the applicant and from taking them out of India to Pakistan. The facts of this case were given in detail in the order dated 12th September 1951, passed by a Bench of this Court and we need not repeat those

facts. It was held in that order that the father of the minor children had migrated to Pakistan in March 1948, and had, therefore, lost his Indian domicile. It was further held that the children had also lost their Indian domicile when they were taken by their father to Pakistan a little later. After this finding the Bench left open for decision only one question, viz. whether the act of the father in bringing the two children back to India subsequently had the effect of reviving their original Indian domicile. Time was granted to the petitioner to file a supplementary affidavit to show the circumstances and the intention of the father at the time when he brought the children back to India. The affidavit has been filed but we find that there are no facts given in it which would give Indian domicile to the children under the provisions of Art. 7 or 8 of the Constitution.

Under Art. 7, the children ceased to be Indian citizens on migration in the year 1948 after the 1st day of that month. They could, however, become Indian citizens if they had returned to the territory of India under a permit for re-settlement or permanent return issued by or under the authority of any law. There is no contention that the children returned under a permit for re-settlement or permanent return. The Indian citizenship would also have been maintained by the children had they got themselves registered under Art. 8 with the Diplomatic or Consular representative of India in any foreign country. The affidavit does not disclose that there was any such registration with the High Commissioner of India in Pakistan. Consequently the children are not Indian citizens and their Indian citizenship has not been revived. In these circumstances there can be no ground for issuing directions to the District Magistrate and the Superintendent of Police, Kanpur, to refrain from taking steps to remove the minors to the country of their domicile.

(2) The petition fails and is dismissed with costs.

A/R.G.D. Petition dismissed.

A.I.R. 1953 ALLAHABAD 179 (Vol. 40, C.N. 78)

BEG J.

Harbans Singh and others, Appellants v. The State.

Criminal Ref. No. 195 of 1951, D/- 9-10-1952.

U.P. Private Forests Protection Act (6 of 1949), S. 15 — Provision for trial of offences only by second class Magistrate — Trial by first class Magistrate is ultra vires — General and special provision — Criminal P. C. (1898), S. 5.

The third part of Sch. III, Criminal P. C. no doubt in item 1 shows that the ordinary powers of a Magistrate of the 1st class include the ordinary powers of a Magistrate of the 2nd Class. But by virtue of S. 5(2) the powers conferred under the general provisions of the Code of Criminal Procedure are subject to any special provisions that might be made with regard to the exercise or regulation of those powers by any special Act. (Paras 3, 4)

Section 15(1) of the U.P. Private Forests Act, 1949, is a creation of a special Act which has made the particular offences committed under that Act triable by particular courts specified therein. The Legislature has in S. 15(2) deliberately excluded the Magistrates of the 1st Class from the category of courts which are competent to try offences of this nature. Hence S. 15(2) should not be so read as to empower a Magistrate of the 1st class to try cases mentioned in S. 15(1) and if a trial is made by a Magistrate of the 1st Class, it is ultra vires and bad in law. (Paras 2, 5)

Anno: Cr. P. C., S. 5 N. 6.

Surendra Narain Singh, for Applicant; S. C. Asthana, for D. G. A., for the State.

ORDER: This is a reference made by the learned Sessions Judge, Mirzapur, recommending that the order of conviction of Harbans Singh and three others passed by Sri A. P. Dikshit, Magistrate 1st Class, Mirzapur, be set aside. The accused were tried by Sri A. P. Dikshit Magistrate 1st Class, Mirzapur, under S. 15 (1) of the U. P. Private Forests Act (Act No. 6 of 1949). They were convicted of an offence under the said section and sentenced to pay a fine of Rs. 50/- or in default to undergo three months' simple imprisonment. They preferred a revision before the learned Sessions Judge, Mirzapur, who has made a reference to this Court recommending that the aforesaid conviction be set aside.

(2) Having heard the learned counsel for the parties I am of opinion that the recommendation of the learned Sessions Judge must be accepted. Under S. 15 (1) of the U. P. Private Forests Act any person who contravenes the provisions of Chapter II of the said Act is liable to be punished with fine not exceeding one hundred rupees for the first offence and with fine not exceeding one thousand rupees or simple imprisonment not exceeding three months or both for the second or any subsequent offence. Section 15 (2) of the Act runs as follows:

"Offence under this section shall be triable by a Magistrate of the second or third class".

It is, therefore, clear that the offence under S. 15 (1) is a creation of a special Act which has made the particular offences committed under that Act triable by particular courts specified therein. The Legislature, for reasons best known to it, has deliberately excluded the Magistrates of the 1st Class from the category of courts which are competent to try offences of this nature.

(3) On behalf of the State reliance has been placed on Sch. III, Criminal P. C. which defines the ordinary powers of Magistrates of various classes. My attention has been invited to the third part of Sch. III, item I which shows that the ordinary powers of a Magistrate of the 1st Class include the ordinary powers of a Magistrate of the 2nd Class. Similarly item I of part II of Sch. III shows that the ordinary powers of a Magistrate of the 2nd Class include the ordinary powers of a Magistrate of the 3rd Class. It is thus argued that a Magistrate of the 1st Class possesses powers of a Magistrate of the 2nd Class as well as of a Magistrate of the 3rd Class, & the trial of the said offence by a Magistrate of the 1st Class was not bad in law. I am, however, unable to accept this contention. It is to be remembered that. as mentioned above the offence in question is the creation of a special Act. The Schedule in question merely refers to the "ordinary powers of various classes of Magistrates". Section 5, Criminal P. C. lays down as follows:

"5. (1) All offences under the Indian Penal Code, shall be investigated, inquired into,

tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences".

(4) It is, therefore, clear that the powers conferred under the general provisions of the Code of Criminal Procedure are subject to any special provisions that might be made with regard to the exercise or regulation of those powers by any special Act. The special Act having made such provisions with regard to the offences under the said Act must be deemed to supersede the provisions of the general Act.

(5) Further there may be a good reason why the Legislature wanted that the trial of offences under the said Act be held by the Magistrates possessing only 2nd or 3rd Class powers. It would appear that under the amended provisions of the Criminal Procedure Code any person convicted on trial held by a Magistrate of the 2nd or 3rd Class would have a right of appeal to the court of session. This is not so in cases triable by a 1st Class Magistrate. If a Magistrate of the 1st Class imposes a sentence of fine not exceeding Rs. 50/- or if he tries the case summarily and imposes a fine not exceeding Rs. 200/- there would be no appeal, and a very valuable right of the accused would be lost. I am, therefore, of opinion that S. 15 (2) should not be so read as to empower a Magistrate of the 1st Class to try cases of this description, and the trial of the aforesaid case by a Magistrate of the 1st Class, was ultra vires and bad in law.

(6) I accordingly accept the recommendation, allow the reference and quash the conviction of the applicants. The lower court has further recommended that the file of the case be sent to the District Magistrate for transferring it to any 2nd or 3rd Class Magistrate. In view of the long time that has elapsed since the conviction of the accused and the petty nature of the offence I do not think that it would be proper to allow a retrial of the case. The fine, if paid by the applicants, shall be refunded.

B/V.S.B. Conviction quashed.

A.I.R. 1953 ALLAHABAD 180 (Vol. 40, C. N. 79)

DESAI J.

Kameshwara Singh, Plaintiff-Applicant v. Bharat Koeri and another, Opposite Party.

Misc. Case No. 201 of 1952, D/- 29-10-1952.

U. P. Panchayat Raj Act (26 of 1947), Ss. 85 and 49(4) — Order of Panchayati Adalat illegal — Quashing by Sub-divisional Officer — Restoration by High Court — (Constitution of India, Art 227.)

The applicant who was resident of Bihar State started proceedings under the Land Revenue Act for correction of village records. The Sub Divisional Officer then transferred the case to the Panchayati Adalat. The case was heard by five Panchas (including the Sarpanch) in the Panchayati Adalat. On the date of judgment the Sarpanch invited opinions of the four Panchas. Two of them did not give their opinions while the other two gave their opinion in favour of the applicant. The Sarpanch agreed with the opinion of the latter two Panchas and wrote out the judgment which was signed by the two Panchas. The other two Panchas did not sign the judgment, but they wrote a dissenting judgment and handed it over to the Sarpanch who kept it on the record.

Held (1) that the Sub-Divisional Officer could quash the order passed by the Panchayati Adalat only on the ground that there had been a miscarriage of justice, but not on the ground that all the five Panchas had not discussed the merits of the case with one another and that two of them had not given their opinions. Clearly he acted without jurisdiction in quashing the order.

(2) As one of the Panchas was a resident of a place not governed by the Act, the proceeding started by the applicant ought to have been heard by a Special Bench constituted by the Sub-Divisional Officer under R. 84 read with S. 49(4). The initial lack of jurisdiction could not be made good by either party's failure to challenge jurisdiction in time and he could raise the plea before the High Court. The order of the Panchayati Adalat being null and void for want of jurisdiction deserved to be quashed by the Sub-Divisional Officer. When it was quashed by the Sub-Divisional Officer, though on another and erroneous ground, it would not be proper for the High Court, specially when acting in the exercise of its power of superintendence, to restore it.

(3) Other adequate remedies being open to the applicant against the order of the Sub-Divisional Officer, the High Court would not act under Art. 227 of the Constitution. (Paras 2, 5, 6, 7, 8)

A. P. Pandey, for Applicant; S. N. Divedi, for Respondent.

ORDER: This is an application under Art. 227 of the Constitution for the setting aside of an order passed by the Sub-Divisional Officer of Banaras in revision against an order of a Panchayati Adalat in a case for correction of papers. The applicant started proceedings under the Land Revenue Act for correction of village records in a Tahsildar's Court. The matter being a contested one went before the Sub-Divisional Officer who examined some witnesses and then transferred the case to the Panchayati Adalat of Nagwa. The case was heard by five Panchas (including the Sarpanch) in the Panchayati Adalat. The Panchayati Adalat fixed 25th February 1951, for judgment. On that date all the five Panchas were present and the Sarpanch invited opinions of the four Panchas. Two of them, namely Sarwashri Baijnath Prasad and Nageshwar Ram did not give their opinions while the other two (Sarvashri Alopi Nath and Sri Nath Singh) gave their opinion in favour of the applicant. The Sarpanch agreed with the opinion of the latter two Panchas and wrote out the judgment which was signed by Sarvasri Alopi Nath and Sri Nath Singh. The other two Panchas, who belong to village Bhagwanpur where the opposite party resides, did not sign the judgment, but on 4th March 1951, they wrote a dissenting judgment and handed it over to the Sarpanch who kept it on the record. The opposite party applied in revision against the majority judgment of the Panchayati Adalat and the Sub-Divisional Officer allowed the revision and set aside the judgment of the Panchayati Adalat as null and void. It is contended by the applicant that the

order of the Sub-Divisional Officer was null and void.

(2) Under S. 85 of the Panchayat Raj Act, if there has been a miscarriage of justice in any proceeding under the Land Revenue Act the Sub-Divisional Officer may, for reasons to be recorded in writing, quash the order passed by the Panchayati Adalat. It is further laid down in the section that, except as aforesaid, an order passed by a Panchayati Adalat shall be final and not be open to appeal or revision in any court. This is the only provision under which a Sub-Divisional Officer can quash an order of a Panchayati Adalat in a proceeding under the Land Revenue Act. The proceeding started by the applicant for the correction of village records was a proceeding under the Land Revenue Act. Therefore, the Sub-Divisional Officer could quash the order passed by the Panchayati Adalat only on the ground that there had been a miscarriage of justice. He had no jurisdiction to quash it on any other ground; for instance, he had no jurisdiction to quash it on the ground of any illegality or irregularity not causing a miscarriage of justice. The Sub-Divisional Officer quashed the order not on the ground of any miscarriage of justice but simply on the ground that all the five Panchas had not discussed the merits of the case with one another and that two of them had not given their opinions. The Sub-Divisional Officer did not at all consider whether there resulted any miscarriage of justice.

Though he quashed the order on the ground that all the Panchas had not discussed the matter with one another and that two of them had not given their opinions, he did not discuss whether, or hold that, it amounted to a miscarriage of justice. Apparently whether the case resulted in a miscarriage of justice or not did not enter into the mind of the Sub-Divisional Officer at all and he quasned the order simply on the ground of a supposed irregularity or illegality. Clearly he acted without jurisdiction in quashing the order. The Panchas were not required by any law to hold a discussion among themselves about the judgment to be passed. The case was heard by all and at the end the Sarpanch had to take the opinions of the other four Panchas and that was done. If two of the Panchas did not give their opinions, it did not matter, because the passing of the judgment could not be stayed on that ground. It is to be noted that those Panchas did not say that they wanted further time to consider over the matter; they simply refused to give their opinions. By refusing to give their opinions they could not prevent the judgment being passed in the case and the remaining Panchas had every right to pass a judgment as they did. The Sub-Divisional Officer thought, without any justification, that all the five Panchas should have discussed the case and then the judgment should have been written out. The other two Panchas were not bound to write out a dissenting judgment. It was at their option to write it out. They could write it out immediately after the majority judgment was written. If they could write it out, say two minutes later, they could also write it out a week later. In any case, the delay with which they wrote it out would have no effect on the validity of the majority judgment. It was not at all essential that the two judgments were written on the same day.

(3) I find that there was no miscarriage of justice and that the Sub-Divisional Officer has not found out that there was any miscarriage of justice. His order of 19th April 1952, was illegal.

(4) In reply to this application it was urged on behalf of the opposite party that even if the order of the Sub-Divisional Officer was illegal this Court should not, in exercise of its powers of superintendence, set it aside because, (1) the order of the Panchayati Adalat itself was without jurisdiction, and no injustice was caused to the applicant by its being set aside even on an erroneous ground, (2) alternative adequate remedies were open to the applicant and (3) no question of jurisdiction is involved in the order of the Sub-Divisional Officer.

(5) Under S. 49 of the Panchayat Raj Act the Sarpanch has to form a Bench of five Panchas for the trial of every proceeding and every Bench has to include one Panch who resides in the area of the Gaon Sabha in which the plaintiff resides and three Panchas who reside in the area of the Gaon Sabha in which neither party resides. The applicant is a resident of Darbhanga in Bihar State. The Panchayat Raj Act cannot and does not apply in Bihar State. Therefore, it was not possible for the Sarpanch to form a Bench as laid down under S. 49. To meet such contingencies there is a provision in S. 49 empowering the State Government to prescribe the constitution of Special Benches for determining disputes arising between parties of different circles. Rule 84 deals with constitution of special Benches. According to it when a proceeding is between parties, any one of which is a resident of a place not governed by the Act, the Sub-Divisional Officer should constitute a special Bench. So the proceeding started by the applicant ought to have been heard by a Special Bench constituted by the Sub-Divisional Officer under R. 84 read with S. 49(4). But this was not done. No special Bench was constituted and the proceeding was disposed of by an ordinary Bench constituted by the Sarpanch purporting to act under S. 49. The five Panchas who disposed of the proceeding had no jurisdiction to dispose it of. They had no more power than any other five men in the country to dispose of the case and pass the order. Nobody but a Special Bench constituted by the Sub-Divisional Officer had jurisdiction to dispose it of. I, therefore, agree with Mr. Dwivedi that the order of the Panchayati Adalat itself was without jurisdiction and of no effect.

(6) The opposite party pleaded before the Sub-Divisional Officer, during the hearing of the revision application, that the order of the Panchayati Adalat was null and void on account of the above defect of jurisdiction but curiously enough the Sub-Divisional Officer paid no attention to that plea. As regards the Panchayati Adalat itself neither the applicant nor the opposite party questioned its jurisdiction to dispose of the proceedings. Mr. A. P. Pandey urged that when the opposite party failed to plead before the Panchayati Adalat that it had no jurisdiction to dispose of the proceedings he should not be heard now. I consider that the opposite party is not debarred from raising the plea here. The Panchayati Adalat which disposed of the proceedings had absolutely no jurisdiction and no jurisdiction could be conferred upon it by consent of the parties. It is not that it had jurisdiction but it committed an illegality in the exercise of its jurisdiction. The fact is that the five Panchas had no jurisdiction to take cognizance of the proceedings at all. The cognizance of the proceedings could be

taken only by a special Bench constituted by the Sub-Divisional Officer. The initial lack of jurisdiction could not be made good by either party's failure to challenge its jurisdiction in time.

(7) I find that the order of the Panchayati Adalat was null and void for want of jurisdiction. Consequently it deserved to be quashed by the Sub-Divisional Officer. When it was quashed by the Sub-Divisional Officer, though on another and erroneous ground, it would not be proper for this Court, specially when acting in the exercise of its power of superintendence, to restore it. Just as a respondent in an appeal can support the order under appeal on other grounds so also can the opposite party support the order of the Sub-Divisional Officer on other grounds.

(8) I also agree with Mr. Dwivedi that other adequate remedies are open to the applicant. He can file a regular suit for declaration. The same dispute is proceeding before a Magistrate under S. 145, Cr. P. C. and the applicant can have his remedy from the Magistrate's Court. Moreover, as the order of the Panchayati Adalat has been quashed, it is open to the applicant to file a regular proceeding under the Land Revenue Act in the Court of the Sub-Divisional Officer. When these remedies are open I do not think I should act under Art. 227 of the Constitution.

(9) In the result, I dismiss the application. In view of the facts stated above I make no order about costs.

A/D.H. Application dismissed.

***A.I.R. 1953 ALL. 182 (Vol. 40, C. N. 80)**

AGARWALA AND CHATURVEDI JJ.

Brij Nath Sarin, Applicant v. Uttar Pradesh Government and another, Opposite Party.

Misc. Writ No. 7878 of 1951, D/- 27-10-1952.

(a) Land Acquisition Act (1894), S. 5-A and S. 48 (1) — Effect of withdrawal of notification on objections raised under S. 5-A.

Mere withdrawal under S. 48 (1), of an earlier notification issued under S. 4 does not amount to a decision of objections raised under S. 5-A in favour of the applicant whose land is sought to be acquired. (Para 5)

Anno: Land Acq. Act, S. 5-A N. 1.

(b) Land Acquisition Act (1894), S. 4 — Power of Government to issue second notification after withdrawal of first.

The Government is entitled to reconsider its previous decision withdrawing the earlier notification under S. 4 and restart acqusition proceedings with respect to the same land in view of different considerations prevailing at the time. (Para 5)

Anno: Land Acq. Act, S. 4 N. 1.

(c) Land Acquisition Act (1894), S. 4 — Public library.

Acquisition of land for the purpose of building a public library is acquisition for a public purpose. (Para 6)

Anno: Land Acq. Act, S. 4 N. 1.

* **(d) Land Acquisition Act (1894), S. 6 (3) — Validity — Act saved by cl. (5) from Art. 31 (2), Constitution of India — Purpose of acquisition not justiciable — (Constitution of India, Art. 31(2) and (5)).**

The Land Acquisition Act having been enacted in 1894 is not governed by cl. (6) of Art. 31. It is an existing law as defined in Art. 363. From the operation of cl. (2) of Art. 31 "existing laws" even though contrary to the provisions of that clause, have been exempted by virtue of cl. (5). Hence, S. 6(3), Land Acquisition Act has not been rendered void or invalid by Art. 13.

Section 6(3), Land Acquisition Act makes a declaration of the State Government declaring a particular acquisition to be for a public purpose conclusive and the courts are debarred from going into the question whether the purpose of the acquisition was public or not. AIR 1952 Cal 554 and AIR 1952 S C 252, Disting. (Paras 8, 9)

Anno: Land Acq. Act, S. 6 N. 6.

N. P. Asthana, for Applicant; Jagnandan Lal and Standing Counsel, for Opposite Party (Nos. 2 and 1 respectively).

REFERENCES: Courtwise/Chronological/ Paras
('52) AIR 1952 SC 252: (65 Mad LW 527) 11
('52) AIR 1952 Cal 554 10

AGARWALA J.: This is an application praying that a writ of mandamus or certiorari restraining the opposite party from proceeding with the acquisition of the applicant's land may be issued and the proceedings may be quashed as being 'ultra vires', without jurisdiction and an abuse of the provisions of the Land Acquisition Act.

(2) The dispute in the case relates to a dilapidated house (or as the opposite party alleges a vacant piece of land) bearing old assessment No. 767 and present assessment No. 802 situate in Satghara Chatta Bazar, in the city of Mathura. The opposite party No. 2, the Provincial Arya Pratinidhi Sabha, wanted to acquire the disputed property to commemorate the memory of Swami Birja Nand, the Guru of Swami Daya Nand, the founder of the Arya Samaj, by building a library and a Yagyashala. On 4th October 1948 a notification was issued by the Local Government under S. 4, Land Acquisition Act, 1894, inviting objections under S. 5-A of the said Act. The notification mentioned the fact that the land was needed for a company and the purpose specified was for "constructing a public library and a Yagyashala by the Provincial Arya Pratinidhi Sabha." The applicant filed objections under S. 5-A, Land Acquisition Act stating that the land was not needed for any public purpose and that it was being acquired for the purpose of propaganda of Arya Samaj in a purely Sanatan Dharma locality where there were many Sanatan Dharmi temples. It appears that thereafter the Provincial Government, by a notification dated 27th April 1950, withdrew the notification which they had issued earlier under S. 4, Land Acquisition Act. It stated:

"Whereas the land designated below was needed for a public purpose and a notification No. C-3967/XV-609-47, dated 4th October 1948, was issued to that effect under S. 4(1), Land Acquisition Act, 1894, for its acquisition;

And whereas the aforesaid land is no more needed for a public purpose;

Now therefore the Governor of the Uttar Pradesh is in exercise of the powers conferred by sub-s. (1) of S. 48 of the said Act, pleased to withdraw from the acquisition and is further pleased to cancel the aforesaid notification."

(3) It appears that later the opposite party No. 2 through one Sri Karan Singh Chonkar, a Municipal Commissioner of Mathura, applied to

the Government to reconsider its decision withdrawing the previous notification under S. 4. This time the purpose for which the land was sought to be acquired was restricted merely to its being utilised for the building of a public library. The use of the land for the construction of a Yagyashala, as was mentioned in the previous application, was given up. The Collector, no doubt, reported to the Government that in his opinion the acquisition was not for a public purpose but was for a sectarian purpose, namely, that of the Arya Samaj. The Government, however, seems to have reconsidered the matter and under instructions from the Government the Collector wrote to the applicant either to come to some mutual agreement with the Arya Pratinidhi Sabha within a week or ten days in connection with the sale of the land or else the Government would be compelled to restart proceedings for the acquisition of the land under the Land Acquisition Act. The applicant not having agreed to the suggestion of the Collector, the Government of Uttar Pradesh restarted acquisition proceedings and issued a fresh notification under S. 4, Land Acquisition Act on 23rd June 1951 which is published in the U. P. Gazette dated 30th June 1951. An objection was again raised by the applicant to the acquisition. It was, however, decided against him and ultimately under S. 6, Land Acquisition Act a notification was issued declaring that the land was needed for a public purpose. This was on 19th January 1952.

(4) The applicant filed a suit in the court of the Civil Judge of Mathura for a permanent injunction restraining the Government from proceeding to acquire the land. He also made an application for the issue of a temporary injunction restraining the Government from acquiring the land. That application having been rejected, he has made the present application for the issue of writs as already stated.

(5) Three points have been raised by learned counsel for the applicant. It has been urged, in the first place, that the State Government having decided under S. 5-A that the land was not needed for a public purpose by its notification dated 27th April 1950, which has been quoted above, it was not open to the State Government to restart acquisition proceedings for the land in question. This contention has no force. In the first place, the notification of 27th April 1950 does not purport to decide objections under S. 5-A in favour of the applicant. It merely withdraws the notification that had been issued under S. 4, Land Acquisition Act by virtue of the power vested in it under S. 48(1) of the Act. Indeed, so far as the notification under S. 4 is concerned, the notification of 27th April asserts that the land in dispute was "needed for a public purpose". But it says that it is "no more needed" for such purpose and for that reason the notification was being withdrawn. We do not read the notification of 27th April as a decision in favour of the applicant on the contention raised by him that the land which was sought to be acquired in the notification issued under S. 4 was not, in fact, needed for a public purpose.

(6) In the second place, it is open to the Government to restart acquisition proceedings in view of different considerations prevailing at the time. As already stated, the first application of the Arya Pratinidhi Sabha was to acquire the land not only for the purpose of building a public library but also for a Yagyashala. It is not necessary for us to decide whether the acquisition of land for a Yagyashala is or is not for a public purpose. The second application made by the Arya Pratinidhi Sabha was for acquisition of the land for the purpose of building a public library alone. This, it has been conceded before us, no doubt, would be a public purpose. It was obvious, therefore, that the Government was entitled to reconsider its previous decision withdrawing the earlier notification under S. 4. We do not think that the State Government was in any way debarred from restarting the land acquisition proceedings after the notification of 27th April had been issued by them.

(7) It was next contended that the acquisition was really not for the building of a public library but for the purpose of propagating the tenets of the Arya Samajist faith and that this was not a public purpose. It was further contended that the second application of the Arya Pratinidhi Sabha was merely a camouflage, that the object of building a Yagyashala which had been set forth in the first application had not really been given up, and that the State Government also had not acted bona fide in the matter. We have no evidence before us on the basis of which we can hold that the Arya Pratinidhi Sabha did not intend to do what they stated in the second application, nor have we any evidence on the record to show that the Government was moved by non-bona fide motives.

(8) Lastly, it was contended that this Court can go into the question whether the land was being, in fact, acquired for a public purpose or not. It was urged that the declaration of the State Government under S. 6 was not conclusive because S. 6(3) which makes the order conclusive has now become invalid or void in view of Art. 13 read with Art. 31(2) of the Constitution. In our opinion, this contention has no force. Section 6(3), Land Acquisition Act makes a declaration of the State Government declaring a particular acquisition to be for a public purpose conclusive and if the section is valid, the Courts are debarred from going into the question whether the purpose of the acquisition was public or not. Article 13, no doubt, makes all existing laws invalid in so far as they contravene any of the provisions of Part III of the Constitution. Article 31(1) lays down:

> "No person shall be deprived of his property save by authority of law."

Sub-clause (2) then lays down:

> "No property, moveable or immoveable including any interest in, or in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

If this clause had stood alone, it would certainly make the purpose of the acquisition justiciable and the Courts would be entitled to go into the question whether the acquisition was for a public purpose or not. Any law to the contrary would, by virtue of Art. 13, be void to the extent to which it was contrary to the provisions of Art. 31(2). But there is an exception to cl. (2) of Art. 31 and this exception is contained in cl. (5) of the same Article, which lays down:

"Nothing in cl. (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of cl. (6) apply."

Clause (6) applies to laws which were enacted not more than 18 months before the commencement of the Constitution. The Land Acquisition Act having been enacted in 1894 is not governed by cl. (6). It is no doubt an existing law as defined in Art. 363. From the operation of cl. (2) of Art. 31 "existing laws" even though contrary to the provisions of that clause, have been exempted by virtue of cl. (5).

(9) The result, therefore, is that S. 6(3), Land Acquisition Act still retains its full vigour and vitality and has not been rendered void or invalid by Art. 13.

(10) In support of his contention learned counsel referred us to a decision of the Calcutta High Court in — 'West Bengal Settlement Kanungoe Co-operative Credit Society Ltd. v. Mrs. Bella Banerji', AIR 1952 Cal 554. That was a case which related to an Act which had been passed within 18 months of the commencement of the Constitution and, therefore, fell within the purview of cl. (6) of Art. 31. Clause (5) did not apply to that case and was, therefore, not considered by the Court.

(11) Reference was next made to a recent decision of the Supreme Court in — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252. This case also refers to Acts which were all passed after the commencement of the Constitution.

(12) The result, therefore, is that there is no force in this application and we dismiss it with costs to both the opposite parties. The stay order dated 19th February 1952 is discharged.

A/V.S.B. Application dismissed.

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(LUCKNOW BENCH)

KAUL AND GURTU JJ.

Prabhunath, Appellant v. Mst. Khadijatul Kubra and others, Respondents.

First Appeals Nos. 15 and 16 of 1946, D/- 25-10-1952.

Court-Fees Act (1870), Ss. 10, 13, 14, 15 and 19A — Appeal competent when filed — Automatic dismissal under S. 336 (2) of U. P. Zamindari Abolition and Land Reforms Act, on coming into force of Act, when appeal was taken up finally for hearing — Court-fees held could not be refunded — (Civil P. C. (1908), S. 151) — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 336(2).)

When the pre-emption appeal was filed the appeal was competent. Court-fee was payable on the appeal. No excess court-fee was paid but the correct amount was paid. The appeal came up for hearing on two days even prior to 21st January 1951, when the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force. If the appeal had been heard on either of these two days, the appeal would have been proceeded with and could have been disposed of on the merits. But when the appeal was taken up on 16th October 1952, the U. P. Zamindari Abolition and Land Reforms Act was in full force and by virtue of S. 336(2), the appeal stood dismissed. All that the section did was that it prevented the hearing on merits and brought the appeal to an automatic termination by dismissing it. The net result of the section was that the appellant was no longer in a position to obtain the relief which he sought in the suit. The appellant put in an oral application for the refund of Court-fees:

Held that the consequence which flowed from the dismissal of appeal was not the result of any act of the Court or of the appellants. The prayer of the appellant could not be granted under any of the provisions of Court-fees Act nor could it be granted ex debito justitiae. AIR 1940 Mad 451, Rel. on; AIR 1934 Cal 615, Dissented from; Case law referred. (Paras 13, 14)

(Principles under which refund of court-fee is granted, indicated.) (Paras 4-5, 7)

Anno: Court-fees Act, S. 13 N. 2; S. 14, N. 1; S. 15, N. 1; S. 19A, N. 1; Civil P. C., S. 151, N. 4.

Hyder Husain and H. N. Misra, for Appellant; R. K. Agnihotri and Akhtar Husain, for Respondents (Nos. 1 and 3 respectively) B. K. Dhaon, and B. N. Roy, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('34) AIR 1934 Cal 615: (152 Ind Cas 215) 10, 11
('35) AIR 1935 Cal 707: (159 Ind Cas 443) 11
('34) AIR 1934 Mad 566: (57 Mad 1028) 11
('40) AIR 1940 Mad 451: (186 Ind Cas 770) 12
('24) 11 Oudh LJ 148: (AIR 1925 Oudh 39) 10
('32) 7 Luck 588: (AIR 1933 Oudh 170(1)) 10
('45) 1945 Oudh WN 329: (AIR 1946 Oudh 9) 10

GURTU J.: This is a Court-fee matter which arises in this way. The superior proprietary rights in a village were sold. Three suits for pre-emption were thereafter filed being numbered 4, 5 and 13 of 1945. Suit No. 5 of 1945 was decreed. The other two suits were dismissed. Prabhu Nath, the appellant in the present appeals preferred an appeal to this Court from the decree passed in suit No. 5 of 1945. This is first Civil Appeal No. 15 of 1946. Likewise he filed an appeal against the dismissal of Suit No. 13 of 1945. This is First Civil Appeal No. 16 of 1946. On these two first appeals, a consolidated Court-fee of Rs. 1269/- was paid. They came up for final hearing on two dates before the Uttar Pradesh Zemindari Abolition and Land Reforms Act (U. P. Act I of 1950) came into force. These appeals were also listed on several dates for hearing in the year 1951. On 1st July 1952, the vesting order under that Act was made. Thereafter these appeals were again listed for disposal. Keeping in view S. 336 of the Act the learned counsel for the appellant in both the appeals admitted that they could not but end in dismissals. Section 336, sub-s. (2) states as follows:

"All suits for pre-emption pending in respect of any such property in any Court whether of the first instance or appeal or revision shall stand dismissed but award of the costs incurred in any such suit shall be in the discretion of the Court."

In view of this section, an order was passed dismissing the two appeals.

(2) At a penultimate stage learned counsel had already made an oral application that in the circumstances, a refund should be ordered of the Court-fee paid on these appeals. At the time of dismissal of the appeals, learned counsel were heard in regard to their oral request. The orders in respect of that prayer were reserved.

(3) The contention of learned counsel was that this was a fit case in which in the interests of justice, this Court should order a refund. It was not contended that any order for refund of the Court-fees could be passed under S. 336(2) of the U. P. Zemindari Abolition and Land Reforms Act. That section deals only with the award of cost incurred. It was also conceded that the refund prayed for could not be granted under any of the relevant sections of the Court-Fees Act. It was conceded that neither Ss. 10, 13, 14, 15 or 19A gave the Court power to order a refund of Court-Fees which had been correctly levied on an appeal which was competent on the date on which it was filed.

(4-5) Briefly the position under the Court-Fees Act is as follows:

The charging S. 6 makes Court-Fees leviable on documents mentioned in the first or second schedules. The section enjoins that no such documents shall be filed, exhibited or recorded in any Court of justice or shall be received or furnished by any public officer unless in respect of such document a fee of an amount indicated in the said schedules has been paid. Section 7 indicates how the fee is to be computed. It is clear that a court-fee is only exigible in the case of such documents etc. as are indicated in the schedule and is only payable according to the computation indicated in S. 7. Section 10 makes provision for refund where there has been an error in computation owing to a miscalculation of the net profits or market value. On the other hand, it also provides for the situation where there has been an underestimation. Section 13 provides for a refund of fee paid on a memorandum of appeal in a case where a suit is remanded in appeal on any of the grounds mentioned in O. 41, R. 23 of the first schedule of Civil P. C. for a second decision by the lower Court. This section recognizes the equity of a person not being called upon to pay Court-fee twice over for an appeal in regard to the same matter. A remand order under O. 41, R. 23 involves a second decision and a fresh appeal after the said decision. Section 14 deals with a refund of fee on an application for review of judgment. Likewise S. 15 provides for a refund where the Court reverses or modifies a former decision on grounds of mistake. Section 19A provides for relief where too high a Court-fee has been paid on applications for probate or for letters of administration.

(6) Apart from the refunds which can be obtained expressly under the Court-fees Act, Courts have granted a refund under their inherent jurisdiction also. Cases where such refunds have been granted are cases where an excess Court-fee has been paid by mistake of parties or as a result of a mistaken demand by the Court itself. In addition refunds have also been ordered in cases where Courts have remanded cases under their inherent powers and not under the provisions of O. 41 R. 23 of the first schedule of the Code. Many such cases were mentioned and some were also cited at the Bar; it is not necessary to mention these but it may be stated at once that the grounds upon which refunds have been ordered in cases where an excess payment has been made are that it would be unjust not to allow a party, who has under a mistaken belief or under the orders of the Court paid an excessive amount of Court-fee, to obtain a refund thereof. It appears clear that when an amount of Court-fee is paid either by a party suo motu or on demand by the Court it is not exigible under the Court-Fees Act then the payment is really not under the Court-Fees Act at all. A Court-fee which is not payable under the Act, if paid, is in fact gratuitously paid, or demanded without warrant of law. In such cases it is obvious that no provisions under the Court-Fees Act are necessary for the purpose of supporting an order for refund.

(7) So far as the refund ordered in cases where the Court has remanded a case under its inherent jurisdiction are concerned, the payment on the memorandum of appeal in which the order of remand is made cannot be characterized as a payment not under the Act. The Court-fee paid on the memorandum of appeal in such a case is certainly exigible under the Court-Fees Act. Therefore, the refund of it would in a sense amount to circumventing the Act if there is no express provision empowering such a refund or there is nothing in the Act to indicate that such a refund is not contrary at least to the spirit of the Act. It is clear that S. 13 of the Court-Fees Act recognizes the justice of returning the Court-fee paid on the memorandum of appeal where in consequence of a remand order under O. 41 R. 23 of the first schedule of the Code of second decision by the lower Court becomes necessary. As the section appears to concede that it is just to refund the fee in a case where a remand is made under O. 41, R. 23, it would appear that it concedes the principle that upon a remand, the Court-fee should be returned. It is true that S. 13 does not in terms empower a refund in a case where the remand is under the inherent powers of the Court but it would appear that the application of the rule, which is applicable to orders of remand under O. 41, R. 23, to the case of remand under the inherent powers of the Court would not be out of tune with the section read as a whole. At the time when the Court-Fees Act was passed, it is possible that it was not realized that ultimately Courts would assume jurisdiction to themselves of remanding a case under their inherent powers also and so no provision was made for such a contingency. Therefore, though a refund in the case of remand under the Court's inherent powers cannot be in terms granted under S. 13, it may well be granted on the basis that such a refund would be in accordance with the spirit of S. 13. It is to be noted that there is no express prohibition against a refund being granted in a case where a remand is ordered under the inherent powers of the Court.

(8) Many cases were cited as already stated at the Bar in support of the proposition that a refund could be ordered in cases where excess payment of Court-Fees had been made or obtained. Though there is some slight divergence of judicial opinion on this matter, it may be taken now to be fairly well settled that such a refund may be ordered. This has been recognised by practically all the High Courts.

(9) Refunds have also been ordered as already indicated in cases where a remand had been made under the inherent powers of the Court.

(10) Learned counsel has, however, cited other cases in which refunds have been claimed, and, in some instances allowed in quite

different circumstances. In — 'Swami Dayal v. Mohd. Sher Khan', 11 Oudh LJ 148, the facts were that an appeal had been preferred against a preliminary decree. A further appeal was later preferred against the final decree. The appeal against the preliminary decree having succeeded, the appeal from the final decree became unnecessary. Under the circumstances a refund of court-fee relative to the appeal from the final decree was ordered. Again in — 'Mohd. Sadiq Ali v. Ali Abbas', 7 Luck 588, a refund of Court-fee was allowed upon withdrawal of an appeal. Again in — 'J. C. Galstaun v. Janaki Nath', AIR 1934 Cal 615, the facts were these: The petitioner had filed an appeal along with his application for extension of time under S. 5, Limitation Act and obtained a rule which was eventually discharged. He then applied under S. 151, Civil P. C. for a certificate authorising a refund and was successful. In — 'Mohd. Azim Khan v. Saadat Ali Khan', 1945 Oudh WN 329, an unnecessary appeal had been preferred but was not prosecuted and was dismissed, but here a refund was disallowed.

(11) In the first three cases mentioned above, a refund could not have been ordered under any of the sections of the Court-fees Act, and in none of them could it be said that an excess of Court-fee had been paid or had been demanded and paid when the appeal was presented. It is difficult, therefore, to appreciate the basis of these decisions. The result in each of allowing a refund undoubtedly was that there was a refund of the exigible fees paid. In other words, the net result was that the documents which could only be taken into consideration upon payment of Court-fees were taken into consideration without such payment.

The case reported in — 'J. C. Galstaun v. Janaki Nath', AIR 1934 Cal 615, was expressly dissented from in a later case of the Calcutta High Court reported in — 'Indu Bhusan Roy v. Secretary of State', AIR 1935 Cal 707. The facts of this latter case were as follows: An insufficiently stamped plaint was presented and after several adjournments had been granted in order to enable the plaintiff to pay the deficit, the plaint was rejected. Thereafter an application for permission to pay up the deficit court-fee was made and five days were granted for this purpose. The suit was restored upon the deficit in court-fee having been paid. Upon this a rule was obtained from the High Court which was eventually made absolute, it being held that the Judge's order was without jurisdiction. It was accordingly set aside. Upon this the petitioner asked for a certificate authorising him to receive back from the Collector the whole sum which was paid on account of Court-fee.

Henderson J. observed as follows:

"In the present case we are asked to grant relief to a litigant who failed because he did not follow the correct procedure. If we were to do that, it would be difficult to refuse relief to a litigant who failed on any preliminary ground. It would then be difficult to resist the conclusion that mere failure was in itself a sufficient ground for a refund."

Nasim Ali J. observed as follows:

"But where a litigant has paid fees which he was bound to pay under the law for his plaint or memorandum of appeal, the Court by ordering refund under the inherent power cannot indirectly exempt him from the obligation imposed upon him by the Statute and thereby nullify the provisions of S. 6 of the Court-Fees Act."

As indicated above, both the learned Judges thus disagreed with the case reported in — 'J. C. Galstaun v. Janaki Nath', AIR 1934 Cal 615.

The case reported in — 'AIR 1934 Cal 615', also came up for consideration in — 'Chindambaram Chettiar in re', AIR 1934 Mad 566. The learned Judges remarked:

"Once a case like — 'AIR 1934 Cal 615, is recognised we ought to permit refund in all cases where appeals are dismissed on the ground of limitation. We are not prepared to go so far. The fact that the delay in — 'AIR 1934 Cal 615', is due to the fault of the legal adviser has no bearing on the right of the Crown to the court-fee paid."

Refund was accordingly refused.

(12) In — 'Secretary of State v. Veerayya Vandayar', AIR 1940 Mad 451, the facts were these: The respondent, as inamdar, in 1934 filed a number of suits in the court of the District Munsif of Tanjore for the ejectment of tenants. He claimed that he was the owner of the Kudiwaram rights and that the defendants had refused to surrender to him possession of the lands which they were cultivating. At the time the suits were filed, the respondent was entitled in law to institute the suits in the District Munsif's Court and there to substantiate his claim that he possessed Kudiwaram rights. During the pendency of the suit, the Legislature amended the Estates Land Act, 1908, and the amendment had the effect of making the respondent's inam an estate within the meaning of the Act which meant that the amendment took away the right of the civil Court to grant a decree for ejectment. The only course left to the respondent was to apply to the revenue Court for an order of compensation for loss of the Kudiwaram rights, if he possessed them. The District Munsif returned the plaint to the respondent whereupon the respondent applied for refund of Court-fee. The District Munsif thought that he had inherent power to grant a certificate for the purpose of enabling the respondent to obtain refund from the Collector and accordingly issued a certificate. The District Munsif's order was attacked in revision. It was said that the District Munsif should have refused to grant a certificate as his proper course was to dismiss the suit, the argument being that the Legislature had not said that the suits could not be filed but had merely taken away the right of the Court to grant a decree. This argument prevailed. The learned Judges observed as follows:

"Therefore the position is that the Act does not take away the jurisdiction of the civil Court to receive plaints of the nature of those filed by the respondent but as a result of the amendment the relief sought cannot be granted. The suit having been properly filed in the civil Court but in the meantime the Legislature having taken away the right to the relief claimed, the proper course for the District Munsif to adopt was to dismiss the suits. In these circumstances the Courts cannot invoke its inherent powers to order a

refund of the Court-fee or to grant a certificate under the Court-fees Act."

This last mentioned case may well provide the basis for the decision of the matter in hand. There can be no doubt when the two pre-emption appeals were filed, the appeals were competent. There can also be no doubt that Court-fee was payable on these appeals and that an excess of Court-fee was not paid but the correct amount was paid. These appeals came up for hearing on two days even prior to 21st January 1951 when the Uttar Pradesh Zemindari Abolition and Land Reforms Act came into force. If these appeals had been heard on either of these two days, there can be no doubt that the appeals could have been proceeded with and could have been disposed of on the merits. As already stated when these appeals were taken up on 16th October 1952, the U. P. Zemindari Abolition and Land Reforms Act was in full force. Section 336(2) of the said Act does not state that all suits for pre-emption pending in respect of any such property in any Court whether of the first instance or of appeal were not properly pending. It only says that they would stand dismissed. The section in no way made the filing of the said appeals or their prosecution illegal. All that the section does is that it prevents the hearing on merits and brings the appeals to an automatic termination by dismissing them. The net result of the section is that the appellant is no longer in a position to obtain the relief which he sought in the suit. Moreover the Court's jurisdiction in regard to costs still remains intact. It is still empowered to award these at its discretion.

(13) It is true that as a result of this Act the appellant cannot get his relief. Therefore, he has in effect been forced to throw away the expenses incurred by him in payment of Court-fees and in prosecuting the suit. This consequence, however, flows not from any act of the Court nor indeed from any act of his own; the consequence flows from legislation which denies to him the relief which he sought. It is difficult to see how the Court can exercise its inherent powers in the interest of justice when no injustice has been suffered as a result of any act of a party or of the Court.

(14) The oral prayer of the appellant cannot be granted under any section of the Court-Fees Act nor can it be granted ex debito justitiae. It is not necessary to elaborate on the differences of approach in regard to the Court's power to grant a refund in cases where a remand has been made under its inherent jurisdiction or in regard to a refund where excess Court-fee has been paid in error. The request of the learned counsel in the present case goes far beyond what has hitherto been conceded or claimed and cannot be sustained, either in principle or in statutory law. Accordingly the oral request for refund of the Court-fee is refused. It is not necessary to consider the form in which this Court would have couched its order in case it had decided to accede to the oral prayer.

(15) Counsel for the State appeared on the court issuing notice to oppose the oral application. In the circumstances of the case, parties including the State will bear their own costs of this application.

(16) KAUL J.: I agree and have nothing to add.

(17) BY THE COURT: The prayer for refund of Court-fee is refused.

A/R.G.D. Order accordingly.

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(LUCKNOW BENCH)

MISRA J.

Sripal Singh and another, Applicants v. The State.

Criminal Revn. No. 309 of 1951, D/- 23-4-52.

Criminal P. C. (1898), Ss. 499 and 514 — Bond by person released not signed — Bond by surety — Forfeiture — Liability of surety can be enforced.

A bail bond by the surety and a personal bond by the accused under S. 499, Criminal P. C. are contracts independent of each other and the fact that the person released on bail did not himself sign the bond for his attendance when called upon to do so does not make the bond executed by the surety invalid. Hence on forfeiture of the bond the liability of the surety can be enforced under S. 514. AIR 1946 All 116; AIR 1945 All 389 and AIR 1934 All 1046, Foll.; Case law referred. (Para 2)

Anno: Cr. P. C., S. 499 N. 4; S. 514 N. 5.

Shankar Sahai, for Applicants; P. N. Chaudhari, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('27) 49 All 825: (AIR 1927 All 831: 28 Cri LJ 586) 2

('34) AIR 1934 All 1046: (36 Cri LJ 297) 2

('39) ILR (1939) All 924: (AIR 1939 All 682: 41 Cri LJ 85) 2

('45) ILR (1945) All 639: (AIR 1945 All 389: 47 Cri LJ 209) 2

('46) ILR (1946) All 238: (AIR 1946 All 116: 47 Cri LJ 528) 2

('28) AIR 1928 Lah 318: (29 Cri LJ 491) 2

('36) AIR 1936 Nag 243: (38 Cri LJ 100) 2

('47) AIR 1947 Pat 58: (48 Cri LJ 324) 2

ORDER: The applicants Sripal Singh and Shankar Singh stood surety for one Aughar Nath against whom along with others an inquiry under Ss. 419, 342 and 170, I. P. C. was proceeding in the Court of the Judicial Magistrate III, Hardoi. Each of the aforenamed sureties executed a bail bond for Rs. 1500/- on 30th October 1950, but no personal bond was taken from Aughar Nath in pursuance of S. 499, Criminal P. C. It appears that a form purporting to be a bond under that section was filled in but it was not signed. Aughar Nath attended Court thereafter on seven different days on which the hearing of his case took place. He, however, absented himself on 13th February 1951, and the Magistrate thereupon issued a warrant of arrest against him and called upon the sureties to show cause why their bonds should not be forfeited. In answer to the notice issued to them, these persons filed a written statement on 11th July 1951, averring that Aughar Nath was dead. On the date of evidence, however, they failed to prove that fact and the learned Magistrate called upon the sureties by his order dated 20th August 1951, to pay a penalty of Rs. 1000/- each. Sripal Singh and Shankar Singh went up in appeal against the aforesaid order to the Court of the Sessions Judge, Hardoi, but they failed to obtain any redress there.

(2) In support of the revision the learned counsel for Sripal Singh and Shankar Singh has urged that the omission to get a bond execu-

ted by Aughar Nath in pursuance of S. 499, Criminal P. C. rendered the surety bond executed by applicants invalid and infructuous and the order imposing penalty on them under S. 514, Criminal P. C. was unwarranted. — 'Wadhawa Singh v. Emperor', AIR 1928 Lah 318, — 'Emperor v. Chintaram', AIR 1936 Nag 243, — 'Brahma Nand v. Emperor', ILR (1939) All 924 and — 'Baidyanath Misra v. Emperor', AIR 1947 Pat 58 are cited in support of the contention.

There are a number of decisions of this Court, however, to the contrary. In —'Emperor v. Prabhu Dayal', 49 All 825, it was held that under the terms of bail bond a joint surety was responsible for the production of the accused notwithstanding the failure of the accused to sign the requisite bond under S. 499 (1), Criminal P. C. The case reported in — 'Brahma Nand Misra v. Emperor', ILR (1939) All 924 was examined and distinguished by a Division Bench of this Court in — 'Emperor v. Abdul Aziz', ILR (1946) All 238 and it was held that under S. 499 Criminal P. C. the surety does not guarantee payment of any sum of money by the person accused who is released on bail but guarantees the attendance of that person. He is a surety for attendance and not a surety for payment of money. The learned Judges observed that his contract and the contract of the person released on bail are independent of each other and the fact that the person released on bail did not himself sign the bond for his attendance when called upon to do so does not make the bond executed by the surety invalid. Reliance for this view was placed on some earlier cases to the same effect: — 'Reoti Prasad v. Emperor', AIR 1934 All 1046 and — 'Nisar Ahmad v. Emperor', ILR (1945) All 639. I not only respectfully agree with the decision of the Division Bench but sitting singly I am also bound by it. The contention raised on behalf of the applicant must, therefore, be overruled.

(3) The applicant's learned counsel also urged that the penalty imposed upon his client was a heavy one and it should be reduced. I am unable to agree. The surety bonds were for Rs. 1500/- each and the learned Magistrate was considerate in demanding a penalty of Rs. 1000/- only from each of the applicants.

(4) No other point was urged in support of the application. I affirm the order of the Courts below and reject the revision application.

B/K.S. Revision dismissed.

A.I.R. 1953 ALLAHABAD 188 (Vol. 40, C.N. 83)
(LUCKNOW BENCH)

KIDWAI J.

Gokaran, Applicant v. The State.

Criminal Ref. No. 40 and Cri. Revn. No. 252 of 1951, D/- 9-4-1952.

(a) U. P. Panchayat Raj Act (26 of 1947) S. 59(a) — Scope — Relates to whole offence and not to any particular individual.

What is excluded from the jurisdiction of the Panchayati Adalat by S. 9(a) is the cognizance of the offence not against any particular individual but of the whole offence.

Where, therefore, the allegation is that four persons jointly committed the offence of theft and one of those persons had been sentenced to more than three years' imprisonment on a previous conviction, the Panchayati Adalat has no jurisdiction to take cognizance of the offence at all and cannot hold the trial. (Para 3)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 56 — One of several accused a previous convict — Judicial Magistrate finding him not guilty — No transfer to Panchayati Adalat as regards others.

Where in a case tried by a Judicial Magistrate, because one of the accused was a previously convicted person, the Magistrate comes to a conclusion that that person is not guilty, he cannot stay his hand and transfer the case to Panchayati Adalat for trial against other accused, as to hold that the particular accused was not guilty, the Magistrate had to deliver that judgment in the case disposing of the whole case and could not decide it piecemeal. It was only after judgment had been delivered acquitting that accused that it could be said that there was no person accused of an offence who had been previously convicted. When the judgment has been delivered, the proceedings are at an end and there is nothing to transfer. AIR 1951 All 554; AIR 1952 All 831 and AIR 1952 All 833. Disting. (Para 7)

H. N. Misra for Applicant; Deputy Govt. Advocate, for the State; R. N. Misra, for Complainants.

REFERENCES: Courtwise/Chronological/ Paras
('50) 1950 All WR (HC) 679: (AIR 1951 All 554: 52 Cri LJ 206) 4
('51) 1951 All WR (HC) 519: (AIR 1952 All 831: 1952 Cri. LJ 1476) 4
('52) AIR 1952 All 833: (1952 Cri. LJ 1507) 4

ORDER: This is a reference made by the learned Sessions Judge of Sitapur for setting aside the conviction of Gokaran who has been convicted under S. 379, I. P. C. and sentenced to a fine of Rs. 20/- for the theft of a 'razai'.

(2) Birbal, Gokaran, Sahu and Bhallar were the four persons originally charged. All except Gokaran have been acquitted. The learned Magistrate tried the case because according to him Bhallar had been previously convicted and consequently by reason of S. 59 of the U. P. Panchayat Raj Act the offence was not triable by a Panchayati Adalat. The learned Sessions Judge was of the opinion that the trial was not beyond the cognizance of the Panchayati Adalat because only one of the accused persons was a previous convict at the most and even with regard to him there was no evidence on the record to show that he was in fact a person who had been convicted to three years or more imprisonment. He was also of the opinion that once the Court had come to the conclusion that that person, namely, Bhallar was not guilty, it should have held its hand and transferred the case to the Panchayati Adalat because at least without the presence of Bhallar among the accused the Panchayati Adalat had jurisdiction.

(3) Section 59 of the U. P. Panchayat Raj Act excludes from the jurisdiction of Panchayati Adalats any offence in which the accused "(a) has been previously convicted of an offence with imprisonment of either description for a term of three years or more". What is excluded from the jurisdiction of the Panchayati Adalat is the cognizance of the offence not against any particular individual but of the whole offence. In the present case the allegation was that four persons jointly committed the offence of theft. One of those persons has been sentenced on a previous conviction to more than 3 years' imprisonment as is proved

by an affidavit filed in this Court which is not challenged by the learned counsel for the applicant. The Panchayati Adalat had, therefore, no jurisdiction to take cognizance of the offence at all and could not hold the trial.

(4) The next question is whether when the Judicial Magistrate had arrived at the conclusion that Bhallar was not guilty he should have held his hand and transferred the case under the provisions of S. 56 of the U. P. Panchayat Raj Act to the Panchayati Adalat. In support of the view of the learned Sessions Judge reliance has been placed upon — 'Ramdin v. State', 1950 All WR (HC) 679; 'Sheo Dayal v. State', 1951 All WR (HC) 519 and — 'Shankar Singh v. State', Criminal Ref. No. 51 of 1951.

(5) In these cases it was held that even if at the last moment before the judgment is delivered, the Court is satisfied that no offence beyond the cognizance of the Panchayati Adalat is proved the Court is to hold its hand and to transfer the case to the Panchayati Adalat for disposal.

(6) The last of the cases mentioned above is a Bench case by which I would be bound if it is applicable to the facts of the present case. I find, however, that it has no application to the facts of this case. What has been laid down in that decision is that the Court must stay its hand when it comes to the conclusion that no offence beyond the jurisdiction of the Panchayati Adalat has been established and must order a transfer to the Panchayati Adalat. It also lays down that the proceedings end with the judgment and that consequently before judgment is delivered, the power of transfer exists. In that case the charge was under Ss. 147 and 323, I. P. C. The Court came to the conclusion that the offence under S. 147, I. P. C. was not proved but proceeded to convict under S. 323, I. P. C. This order of the trial Court was set aside and 'de novo' trial was ordered by the Panchayati Adalat.

(7) In the present case judgment must be delivered and the Court cannot stay its hand because Bhallar is also an accused person and so long as he continues to be an accused, the Panchayati Adalat has no jurisdiction over the case. He can only cease to be an accused if judgment is delivered acquitting or discharging him. Thus, in the present case it was not possible for the Magistrate to hold its hand once he had come to the conclusion that Bhallar was not guilty. If the Magistrate had to deliver judgment, he could not deliver piecemeal judgment but had to dispose of the whole case. It is not possible for one Court to have jurisdiction over a part of the case and another Court to have jurisdiction over another part of the case when the offence is the same and depends upon the same facts and' is said to be jointly committed by all the accused. In the present case, it was only after judgment had been delivered acquitting Bhallar that it could be said that there was no person accused of an offence who had been previously convicted. When the judgment has been delivered, the proceedings are at an end and there is nothing to transfer. Thus in the present case the order of the Magistrate was not beyond jurisdiction and cannot be set aside on that ground.

(8) It was contended that at any rate the evidence produced on behalf of the prosecution is unsatisfactory and that the witnesses were on hostile terms with the accused. Having considered the judgment of the trial Court I find that the Court has given good reasons for holding that no enmity is proved to have existed between the witnesses for the prosecution and the accused-applicant. In these circumstances I do not see any reason to interfere with the merits of the case.

(9) I accordingly reject the reference and uphold the conviction of Gokaran and the sentence passed upon him.

(10) On the last hearing because I thought that the three persons who have been acquitted, namely, Birbal, Sahu and Bhallar might be affected by my decision if I were to hold that the Magistrate had no jurisdiction to dispose of the case since in that eventuality the order of acquittal of those three persons would also be 'ultra vires' I issued notice to them to show cause why the order of the Magistrate should not be set aside. For the reasons that I have given above, I have come to the conclusion that the order of the Magistrate was not without jurisdiction. In these circumstances the acquittal of the three persons mentioned cannot be set aside and I discharge the notice that I issued.

B/D.R.R. Reference rejected.

A.I.R. 1953 ALLAHABAD 189 (Vol. 40, C.N. 84)

AGARWALA AND CHATURVEDI JJ.

Badri and others, Appellants v. State.

Cri. App. No. 900 and Cri Revn. No. 1443 of 1951, D/- 5-9-1952.

(a) Penal Code (1860), S. 300 — Death of person — Case when falls under cl. (1) or cl. (3).

Where injuries are inflicted by a number of persons with the intention of killing a person and death ensues as a result of the injuries, it is a case of murder falling under cl. (1) of S. 300. Even if the common object of the assembly is not to kill that person still the case will fall under cl. (3) of S. 300, if the injuries actually inflicted show that they are sufficient in the ordinary course of nature to cause death. The persons who cause such injuries must be held to have inflicted them intentionally. (Para 12)

Anno: Penal Code, S. 300 N. 6.

(b) Penal Code (1860), S. 304 — Conviction when should be under Para I and not under Para II.

Where the injuries inflicted on a person are not such as are sufficient in the ordinary course of nature to cause death, but are merely injuries which are likely to cause death, then the accused are guilty under section 304 Para I and not under Para II. (Para 12)

Anno: Penal Code, S. 304 N. 1.

S. K. Varma, for Appellants; Sri Ram, D. G. A., for the State.

AGARWALA J.: This is an appeal by 14 persons, namely, Badri, Moti, Munshi, Ram Lal, Gopi, Nathu, Ram Singh, Shaitan, Badshah Bhupal, Gajju, Sripal, Maharaj Singh and Chhadami, against their conviction under S. 147, S. 304 Para II, read with S. 149, I. P. C. and S. 323 read with S. 149, I. P. C. All the appellants have been sentenced to 1 year's R. I. under S. 147, I. P. C.; each of the appellants 10 to 14 have been sentenced to 5 years' R. I. under S. 304 Para II read with S. 149, I. P. C.; each of the appellants 1 to 9

have been sentenced to 4 years' R. I. under S. 304 Para II read with S. 149, I. P. C.; and all the appellants have been sentenced to 1 year's R. I. under S. 323 read with S. 149, I.P.C. The sentences have been made to run concurrently.

(2) The prosecution case in brief was that the appellants with two others, namely, Balwant and Babu, who have been acquitted by the court below, entered the Thaar of Kehri deceased and inflicted injuries with lathis on Kehri, his brother Ram Singh and his son Hira Lal, with the result that Kehri died in the evening and the other two who received simple injuries had to remain in hospital for a number of days. According to the prosecution the incident happened on 11th September 1950 at about 7 o'clock in the morning. The motive for the crime as alleged by the prosecution was that for a number of years litigation was going on between Kehri deceased on the one hand and Bhupal, appellant 10, on the other for the partition of a holding. Bhupal had won in the trial court and in the court of the Commissioner. Kehri had filed an appeal in the Board of Revenue which was pending at the time of the incident. The prosecution alleged that Bhupal had been threatening Kehri to withdraw his appeal or he would lose his life and that since Kehri did not mind the threat he was done to death in the manner already stated.

(3) The first information report of the incident was sent by post both to the police station Eka and to the Superintendent of Police on 14th September 1950. The police station received it on 16th September and recorded it in the general diary on that date. Obviously the report was sent by post after a long time. An explanation for the delay was given by Roshan in whose name the report was sent. He stated that after his father, his uncle and his brother had been beaten, he took them to the dispensary at Jasrana which was 10 miles from the village, that Kehri died in the evening of the 11th and the other two injured persons had to remain in hospital, that he had to take the body of the deceased for post mortem examination to the district headquarters at Mainpuri which is 30 miles away, that he reached there with the dead body in the morning of the 12th and returned to his village after the post mortem examination on the 13th, on which date he heard that his brother Hira was lying unconscious in the hospital and was about to die, that on hearing this he rushed to the hospital but found that his brother was alive and was not dying, and that he then sent the report on the 14th.

(4) The post mortem report revealed that the deceased Kehri was brutally injured. He had 12 injuries on his person: three contused wounds on the head, three contusions in the area of the chest and the scapula and injuries in the region of the spleen. The 11th, 10th, 9th, 8th, 7th and 6th ribs were fractured and the kidney and the spleen were ruptured. In the opinion of the doctor death was due to shock and haemorrhage following the rupture of the spleen and kidney and multiple injuries and fractures of the ribs. From the nature of the injuries it is apparent that the injuries were sufficient in the ordinary course of nature to cause death.

(5) The injuries to Ram Singh and Hira were also examined. Ram Singh had received six injuries, all simple. Hira had received one contused wound on the head and 21 other injuries on various parts of the body. All the injuries were, however, simple.

(6) Badri appellant lodged a first information report of an incident which he alleged had taken place on 11th September in the morning at about 7, the date and time at which the prosecution alleged that the beating was given to Kehri, Ram Singh and Hira. According to Badri's report, Kehri, Ram Singh, Hira and Roshan attempted to take away their cattle which had strayed into the field of Bhupal and which Badri was taking to the cattle pound, and when Badri protested the four persons Kehri, Ram Singh, Roshan and Hira, beat him with lathis. He did not mention any injuries having been inflicted by him on any of these four persons. In the court of the magistrate he did not mention the injuries which Kehri, Ram Singh and Hira had received. In the Sessions Court, however, he stated that he had wielded his lathi in self-defence and thereby injured Kehri, Ram Singh and Hira in the incident which happened in connection with the cattle, as stated by him in his report to the police. He, however, did not admit the occurrence of the marpit in the Thaar of Kehri.

(7) The defence of the other accused was a denial of their participation in the offence.

(8) In support of the prosecution case five eye witnesses were produced, namely, Roshan, Ram Singh, Hira, Ganga Singh and Ram Charan Singh.

(9) Roshan supported his first information report. His story was that when the beating took place he was sleeping on the roof of the Thaar, that on hearing the noise he got up and saw the occurrence from behind a wall and that he came down into the courtyard where Kehri, Ram Singh and Hira were being beaten after the assailants had gone away. He named all the 16 accused as the assailants. We are not impressed by the statement of Roshan. He has been changing his version from time to time. (After discussing the evidence given by Ram Singh, Hira, Ganga Singh and Ram Charan Singh, his Lordship concluded.) It appears to us that the evidence against Maharaj Singh, Bhupal, Chhadami, Sripal and Gajju is sufficient for their conviction, but the same cannot be said about the remaining nine appellants. They may have been there, but there is a doubt in our minds about their participation in the crime. They are entitled to the benefit of the doubt.

(10) It was strongly urged by the learned Deputy Government Advocate that Badri, who attempted to inflict injuries on Kehri, Ram Singh and Hira in self-defence, should also be held guilty. We have given careful thought to this matter and we have come to the conclusion that in a case of this kind it is not possible to take advantage of the so-called admission made by Badri. Badri's statement refers to another incident altogether which, according to him, happened in a field in connection with the rescuing by the deceased Kehri, Ram Singh and Hira, of certain cattle which had strayed in Bhupal's field. This incident, in our opinion, never happened at the time and place mentioned by Badri. In the circumstances, we cannot take advantage of his admission that he had inflicted injuries in self-defence on Kehri, Ram Singh and Hira. The truth of the matter seems to be that Badri was beaten the previous evening, i.e. on 10th September 1950, most probably by Kehri, Ram Singh and Hira in connection with some dispute, but not the

dispute as stated by Badri. The assault on Kehri, Ram Singh and Hira was carried out in revenge for this beating which Badri had received, by Badri, Bhupal, his partner in cultivation, and the four other persons, namely, Gajju, Sripal, Maharaj Singh and Chhadami, with or without the help of certain other persons. The real motive for the crime in the present case appears to be revenge for the assault on Badri rather than a desire on the part of Bhupal for the withdrawal of the appeal by Kehri.

(11) Notice was issued by a learned Judge of this Court for the enhancement of sentence as against all the appellants. The learned Sessions Judge convicted the appellants under S. 304, Para II read with S. 149, I. P. C. His opinion may be quoted in his own words:

"The actual assailants who made use of their lathis in order to inflict the injuries upon the person of Kehri, Ram Singh and Hira were the accused Bhupal, Gajju, Sripal, Maharaj Singh and Chhadami. The remaining nine accused entered the courtyard of that thaar of Kehri armed with lathis along with the aforementioned five accused in prosecution of their common object to kill Kehri and to beat others with him in that Thaar that morning ..... The nature and the number of injuries inflicted warrant the conviction that even though the fourteen accused entered the courtyard of that Thaar with the common object of killing Kehri they did not while the lathi assault was made intend his death or intend causing such bodily injury as was likely to cause his death. At the most it would be possible to declare with confidence that the lathi assault was made by those five accused with the knowledge that it was likely to cause such bodily injury as could very likely result in the death of Kehri. The case would thus be covered by Para II of S. 304 read with S. 149, I. P. C."

(12) The learned Sessions Judge's reasoning is curious indeed. After having held that the common object of the assembly was "of killing Kehri", the learned Judge did not hold the accused guilty under S. 302, when death ensued as a result for their action. Where injuries are inflicted with the intention of killing a person and death ensues as a result of the injuries, it is a clear case of murder falling under cl. (1) of S. 300. This proposition is so elementary that we are surprised that the learned Sessions Judge should have made a mistake about it. Even if the common object of the assembly was not to kill Kehri, the case would have fallen under cl. (3) of S. 300, because the injuries actually inflicted showed that they were sufficient in the ordinary course of nature to cause death. It will be noticed that six ribs were broken, the spleen and the kidney were ruptured and there were injuries on other parts of the body as well. Such injuries are expected in the ordinary course of nature to cause death. A person who causes such severe injuries must be held to have inflicted them intentionally. If the injuries inflicted were intentional and they were of such a nature as would cause death in the ordinary course of nature, the case clearly falls under cl. (3) of S. 300. This was a case which clearly fell under S. 300 and not under S. 304 Para II. Indeed, if the learned Judge thought that the injuries were not such as were sufficient in the ordinary course of nature to cause death, but were merely injuries which were likely to cause death, he should have held the accused guilty at least under S. 304 Para I, which applies to the case of inflicting injuries which are likely to cause death. He did not convict the accused even under S. 304 Para I. As in exercise of the powers of revision we are unable to convert a finding of acquittal into one of conviction, we cannot ourselves convict the accused of an offence either under S. 302 or under S. 304 Para I. We do not think that this is a fit case in which we should order a retrial. We, therefore, propose to impose the maximum penalty provided by law for the offence of which they have been convicted by the learned Sessions Judge.

(13) The result, therefore, is that we allow the appeals of Badri, Moti, Munshi, Ram Lal, Gopi, Nathu, Ram Singh, Shaitan and Badshah and acquit them of all offences. They are on bail and need not surrender. We dismiss the appeal of Bhupal, Gajju, Sripal, Maharaj Singh and Chhadami and while upholding their conviction under S. 304 Para II read with S. 149, I. P. C. we enhance the sentences of each of them from 5 years to 10 years' R. I. We confirm their convictions and sentences under the other sections.

B/V.S.B. Ordered accordingly.

A.I.R. 1953 ALLAHABAD 191 (Vol. 40, C.N. 85)
(LUCKNOW BENCH)

BEG J.

The State v. Baijnath and others, Accused-Opposite Party.

Criminal Ref. No. 29 of 1952, D/- 29-5-1952.

Criminal P. C. (1898), Ss. 210, 193, 226, 227, and 537 — Order of commitment without framing charge — Competency of Sessions Court to take cognizance not affected — It has power to frame charge — Omission is only irregularity curable under S. 537.

The combined effect of Ss. 226 and 227, Criminal P. C. is to invest the Court with an all-comprehensive power of remedying defects whether they arise out of the framing of a charge or the non-framing of a charge and whether they are discovered at the inception of the trial or at any subsequent stage of it, prior to the pronouncement of judgment or the return of verdict by the jury or the expression of opinion by the assessors. (Para 4)

Hence, where an accused has been committed to the Court of Session by an order of competent Magistrate without framing a charge as required by S. 210, the omission to frame a charge is not a breach of a positive prohibition of a mandatory type but of an affirmative provision of a recommendatory nature and can be condoned under S. 537. In such a case it is open to the Sessions Court to frame a charge under S. 226. The omission to frame a charge cannot affect the competency of the Sessions Judge to take cognizance of the offence under S. 193 (1) because the only condition precedent to the taking of cognizance under that section is that there should be an order of commitment. AIR 1927 PC 96 and 25 Mad 61 (PC), Ref. (Paras 5, 6)

Anno: Criminal P. C., S. 193, N. 4; S. 210 N. 6; S. 226 N. 1, 2 and 3; S. 227 N. 2; S. 537 N. 6, 10 and 18.

P. N. Chaudhri, Dy. Govt. Advocate, for the State; D. N. Hathwal, for Opposite Parties Nos. 1 to 22.

REFERENCES: Courtwise/Chronological/ Paras
('01) 28 Ind App 257: (25 Mad 61 PC) 6
('27) 54 Ind App 96: (AIR 1927 PC 44: 28 Cri LJ 259) 6

ORDER: This is a reference made by the learned Sessions Judge of Bara Banki for quashing the order of commitment made by the Judicial Officer of Fatehpur against twenty-two accused. This reference has been made under the following circumstances:

(2) The twenty-two accused committed to the court of session were initially tried by the committing Magistrate who started proceedings in the case against them not as a court of enquiry but as a trial court. He treated the case as a warrant case. Accordingly he framed a charge on 9th January 1951 under S. 254. After the proceedings had been gone through up to a certain stage it was pointed out to him that one of the offences for which the accused were being tried was that under S. 330 which was exclusively triable by the court of session. Thereupon the court proceeded under S. 347, Criminal P. C. but failed to observe the provisions of Ch. XVIII in so far as he omitted to frame a charge under S. 210, Criminal P. C. He, however, proceeded to pass an order of commitment.

(3) The result of this irregularity of proceeding in the committing Magistrate's court was that the case reached the court of session without a charge. Under section 210, Criminal P. C. it is laid down that

"when upon such evidence being taken and such examination (if any) being made the magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged."

Section 226 provides that

"when any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges."

The learned Sessions Judge was of opinion that S. 226 would apply to a case where some charge had been framed by the committing Magistrate's court but not to the case where no charge had been framed at all. This view is not borne out by the plain reading of the section itself. Section 226 deals not only with the cases of commitment without a charge but also with the cases of commitment with an imperfect or erroneous charge. The last two contingencies cover cases where a charge already exists but is imperfect or erroneous on some ground. The first contingency would cover a case where no charge has been framed at all.

(4) Section 227, Criminal P. C. provides that:

"1. Any Court may alter or add to any charge at any time before judgment is pronounced, or in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed."

The purpose of the Legislature in enacting both the sections seems to be to arm the Sessions Court and the High Court with the power of rectifying all defects relating to a charge. The combined effect of both these sections is to invest the Court with an all-comprehensive power of remedying such defects whether they arise out of the framing of a charge or the non-framing of a charge and whether they are discovered at the inception of the trial or at any subsequent stage of it, prior to the pronouncement of judgment or the return of verdict by the jury or the expression of opinion by the assessors. The above interpretation seems to be more in consonance with the spirit of the statute.

(5) It is to be noticed that the fact that the order of committal has been made without framing a charge would not affect the competency of the Sessions Court to take cognizance of the case. The law relating to the competency of the Sessions Court to take cognizance is laid down under section 193(1), Criminal P. C., which says that

"except as otherwise expressly provided by this Code....., no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

Therefore, the condition precedent for taking cognizance of a case by the court of session is that there should be an order of commitment. Such an order admittedly exists in the present case. Thus there was nothing to bar the Sessions Court from taking cognizance of the case.

(6) The learned counsel for the accused emphasised the use of the word "shall" in S. 210 (i), which according to him indicates that the framing of a charge is mandatory. In my opinion, however, S. 210 has got to be read along with, and in the light of S. 226 which shows that even where a charge has not been framed by the committing Magistrate's Court, it is still open to the sessions court to frame one. The distinction between illegality and irregularity has been obliterated now as a result of the ruling of their Lordships of the Privy Council in — 'Abdul Rahman v. Emperor', 54 Ind App 96 (PC). In this case their Lordships were dealing with a breach of the provisions of S. 360, Criminal P. C. It is significant that the word used in S. 360 also is the word "shall". After referring to the case of — 'Subramania Iyer v. Emperor', 28 Ind App 257 (PC), their Lordships held that the only distinction permissible under the Code of Criminal Procedure is one between a procedure that is positively prohibited and the other which is not prohibited. A perusal of S. 210 in the light of S. 226, Criminal P. C. shows that the omission to frame a charge is not a breach of a positive prohibition of a mandatory type but of an affirmative provision of a recommendatory nature. It could, therefore, be condoned under S. 537, Criminal P. C.

(7) I am, however, of opinion that this reference should be accepted. The proceedings are still at a very initial stage and the trial of the case has not yet begun. The objection is being made on behalf of the accused on the ground that they might be prejudiced as a result of the non-framing of the charge. It is easily possible at this stage to rectify this error and to avoid any subsequent grievance on the part of the accused that they were prejudiced as a result of any such irregularity.

(8) In the interests of justice, therefore, I consider it fit to accept this reference and order that the case should be sent back to the committing Magistrate for framing a proper charge and proceeding according to law.

B/K.S. Case remanded

A.I.R. 1953 ALLAHABAD 193 (Vol. 40, C.N. 86)

V. BHARGAVA AND CHATURVEDI JJ.

Maseh Ullah Shah, Applicant v. Abdul Rehman Sufi and others, Opposite Party.

Writ Appln. No. 7790 of 1951 D/-5-11-1952.

(a) Constitution of India, Art. 226 — Quo warranto — Procedure for making application (High Court Rules (All) (1952), Chap. 22, Rr. 1 and 7).

A motion for a writ of quo warranto can be made at the instance of a private individual without the intervention of the Government or any public authority. Under Rules 1 and 7 of Chapter 22 of the Rules of the Allahabad High Court, 1952, an application for the issue of a writ of this nature has to be made to a Division Bench and by an advocate and not by the party personally. (Para 2)

(b) Municipalities —U. P. Municipalities Act (2 of 1916), S. 9, Proviso — Nomination of person who had failed at general election.

Under proviso to S. 9 nomination of a person as a member of a Municipal Board, who had stood as a candidate in a previous general election and had not been elected, is illegal and must be set aside. (Para 3)

(c) Municipalities — U. P. Municipalities Act (2 of 1916), S. 38 — Membership of Board is an office — Application for writ of quo warranto in respect of membership is maintainable — (Constitution of India, Art. 226) (Para 4).

(d) Constitution of India, Art. 226 — Quo warranto — Application for writ admitted — Parties heard — Court coming to the view that application should be allowed — The argument that application should not be allowed because applicant had another alternative remedy and because of the delay on the part of the applicant and the fact that general elections were drawing near, will not be entertained at such a late stage. (Para 5)

P. M. Verma for Applicant; Jagdish Swarup, Junior Standing Counsel, for the State.

REFERENCE ..... /Para 2
(1916) 1 K.B. 595: (85 LJ KB 630)

BHARGAVA, J.: This is a petition under Art. 226 of the Constitution for the issue of a writ in the nature of 'Quo-warranto' filed by one Masih Ullah Shah, a resident of the Municipal town of Etah directed against one Abdul Rehman Sufi, opposite-party 1, who was nominated as a member of the Municipal Board of Etah by the State Government some time about the end of the year 1950. There are further prayers for issue of direction or order or a writ in the nature of mandamus or prohibition directing opposite-party 3, the State of Uttar Pradesh, to remove opposite-party 1 from membership of the Municipal Board and to restrain opposite-party 1 from acting as a member of the Board and further directing opposite-party 2, the Chairman of the Municipal Board of Etah, not to recognise opposite party 1 as a member of the Board.

(2) When this case came for hearing before us after service or notices on the opposite-parties, learned counsel for opposite parties 1 and 3 raised a preliminary objection that this application for the issue of a writ of 'quo-warranto' could not be entertained by this Court at the instance of the petitioner, Masih Ullah Shah. Learned counsel argued that as the procedure for presentation of application for the issue of a writ of 'quo-warranto' in the High Courts in India has not been prescribed by the Constitution, the procedure that applied in England should be taken into account. His contention was that historically the writ of 'quo-warranto' was originally issued by the king himself and later, when Courts could issue directions for laying an information in the nature of 'quo-warranto', this could only be done if the Courts were moved either by the Attorney General or by the Coroner. He also referred to section IV of 9 Anne C20 (1710) to show that, even after that statute had been passed, a private relater could only file information before the appropriate officer of the Court and the information in the nature of 'quo-warranto' could be exhibited only by that officer of the Court with the leave of the Court. On this ground, he contended that a private individual cannot move a Court for a writ in the nature of 'quo-warranto' and that the move could only be made by the Government, some public servant or officer of the Court, or other appropriate authority.

It does not appear necessary for us to go into the old history of the writ of 'quo-warranto' when it originated in England. The procedure in England has varied from time to time and we are only concerned with the procedure as it was followed in England when the writs or informations in the nature of 'quo-warranto' were last being issued in England. Order 68 Rule 2 of the Rules of the Supreme Court published in the Annual Practice 1935 shows that to writ of 'quo-warranto' the provisions of Order 52 of the Rules of the Court were applicable. Order 52 made provision for the making of motions before the Supreme Court and consequently a motion for a writ of 'quo warranto' could be made in exactly the same manner as any other motion before the Court. The latest case on this question that has been brought to our notice is that of — 'Rex v. Speyer', reported in (1916) 1 KB 595. The judgment of Lord Reading C. J., shows that in that case orders of the Court were made against Sir Edgar Speyer and Sir Ernest Joseph at the instance of Sir George Makgill. The Attorney General was only served with a notice subsequently. This clearly indicates that at least in 1915 when order for laying information in the nature of 'quo warranto' was made, the application had been entertained at the instance of a private individual without the intervention of the Government or any public authority. Under Rules 1 and 7 of Chap. 22 of the Rules of this Court 1952, an application for the issue of a writ of this nature has to be made to a Division Bench and by an advocate and not by the party personally. The present application was presented by an advocate who represented the petitioner before a Division Bench. The application has, therefore, been properly presented and the preliminary objection fails.

(3) On merits we find that this application must succeed. Opposite party 1 was nominated by the State of Uttar Pradesh under the provisions of S. 9, U.P. Municipalities Act, on the occurring of a vacancy in the Board in respect of a seat to which a member had to be nominated. The proviso to S. 9 placed certain limitations on the persons who could be nominated and one of the restrictions was that a person who had stood as a candidate at the previous general election and had not been elected could not be nominated. The petitioner alleged that opposite party 1 was a candidate

at the previous general election of this Municipal Board and had failed in getting elected. This was not denied by the opposite parties. Clearly therefore, under the proviso to S. 9, the nomination of the opposite party was in contravention of the provisions of law and his membership of the Board is, therefore, invalid.

(4) Learned counsel for the opposite parties argued that the membership of a Board is not an office in respect of which a writ of 'quo warranto' can be issued by this Court. This argument has no force in view of the fact that the Municipalities Act, which creates the membership of a Board, itself declares that membership to be an office. In S. 38, U.P. Municipalities Act, there is clear mention of the term of office of a member of Board. In view of the provisions of the U.P. Municipalities Act itself, therefore, the contention that the membership of a Board under that Act is not an office must fail.

(5) Learned counsel also argued that the discretion which we have, to issue the writ of 'quo warranto', should not be exercised in this case when there is an adequate alternative remedy, the remedy is being sought at such a late stage and there is a likelihood that there will be a fresh general election in the near future. At the stage when the application was admitted, this ground could have been taken into consideration. After the application has been admitted and parties have been heard and we have come to the view that opposite party 1 is wrongly exercising the powers of the membership of the Board which office he is not entitled to hold, it does not appear appropriate to refuse the writ asked for and to permit opposite party 1 to continue as a member and exercise all the rights and privileges of that office. We do not think it necessary to go into the question whether the existence of an alternative specific remedy or the delay in moving the Court can be adequate grounds for refusing a writ of 'quo warranto' after the application for the issue of the writ has once been admitted. Even if this be permissible, the present case is one where we think that the writ should be issued.

(6) In the circumstances we allow the application, make the rule absolute and direct opposite party 1 not to exercise or use the rights, liberties, and privileges in respect of the office of a member of the Municipal Board of Etah. The petitioner will be entitled to his costs from opposite party 1.

A/R.G.D. Application allowed.

A.I.R. 1953 ALLAHABAD 194 (Vol. 40, C.N. 87)

MALIK C. J. AND V. BHARGAVA J.

Shudarshan Lal Dwivedi and others, Applicants v. Dean of the Faculty of Science, University of Allahabad and another, Opposite Party.

Civil Misc. Writ No. 465 of 1952, D/- 29-10-1952.

Allahabad University Act (3 of 1921), Ss. 32 (c) and 34(1)(b) — Ordinances and Regulations under Act — Ordinances (1) and (2) of Chap. 36 — Two years' course for B.Sc. Examination — Examination by University at end of two years on completion of course of studies and certain percentage of attendance of lectures — College authorities can detain students on failure at class examination at end of first year — Regulation providing for such examination is not in contravention of Statutes — (Constitution of India, Art. 226).

Ordinance (2) of Chap. 36 does not give a student absolute right to sit for the B.Sc. final examination at the end of two years and it cannot be contended that the University has no right to prescribe a course of study and to hold examinations to see that the student has diligently applied himself to mastering the subjects that he has taken so as to qualify himself for the degree that is going to be conferred on him as a result of the tests held for the purpose. Section 5(2)(a), University Act gives the University the power to grant and confer degrees and other academic distinctions to and on persons who shall have pursued an approved course of study in the University and shall have passed the examination of the University under conditions laid down in the Statutes or Ordinances. The regulations made under the Statutes and Ordinances cannot be said to be in contravention of the said Statutes and Ordinances and the contention that the University has no right to prescribe class examinations has no substance. Consequently detention of students at the end of the first year for failure at the class examination is not illegal and does not contravene the Act. (Para 3)

The High Court is most reluctant to entertain applications under Art. 226 by the students against the University authorities especially as it is extremely desirable that the students should be under the full control and guidance of the University and its staff and, unless the act complained of is clearly beyond the jurisdiction or is clearly against the rules of natural justice, the High Court will not interfere in matters of examinations, which relate to internal working of the University. (Para 4)

Brahma Nath Katju, for Applicants; Gopalji Mehrotra, Senior Standing Counsel, for Opposite Party.

MALIK C. J.: This is an application under Article 226 of the Constitution filed on behalf of thirteen students of the B. Sc. 1st Year class of the Allahabad University. The applicants were admitted to that class in July 1951. At the end of the academic year they sat for the examination in April 1952 and failed. They again sat for the supplementary examination in July 1952 and were declared unsuccessful. There was another supplementary examination later for which they sat and the examiners were not satisfied that they were entitled to get the minimum pass marks and thus they failed again. The applicants were, therefore, not promoted to the 2nd Year and remained in the 1st Year B. Sc. The applicants then moved the university Executive Council but it refused to interfere. It is on these facts that the applicants have come up to this Court and it has been urged on their behalf that there was no power in the University to hold an examination at the end of the 1st Year to determine whether the applicants were fit enough for promotion to the 2nd Year class or detain them if they were found unsuccessful in that examination.

(2) Reference has been made to cl. (c) of S. 32, University Act (3 of 1921) and the Ordinances and Regulations thereunder and it has been urged by learned counsel that once a

student is admitted to the 1st Year class he has a right to appear for the B. Sc. final examination at the end of two years, provided he has maintained the minimum percentage of attendance required under the regulations and the University authorities have no right to hold any examination within the period of two years to satisfy themselves that the student is fit to be allowed to sit for the final examination.

(3) Section 32(c) of the Act on which reliance is placed is as follows:

"32..— Subject to the provisions of this Act and the Statutes the Ordinances may provide for or any of the following matters, namely:
(a) .....
(b) .....
(c) the conditions under which students shall be admitted to the degree or diploma courses and to the examinations of the University, and shall be eligible for degrees and diplomas;"

Section 34(1)(b) of the Act provides that —

"34. (1) The authorities and the Boards may make regulations consistent with this Act, the Statutes and the Ordinances —
(a) .....
(b) providing for all matters which by this Act, the Statutes or the Ordinances are to be prescribed by the Regulations:"

The relevant Ordinance pointed out by learned counsel is Ordinance (2) of Chap 36 which is as follows:

"A candidate who has attended a regular course of study in the University for this degree shall be permitted to appear at the examination."

The words "attended a regular course of study" are defined in General Ordinance No. (1) of Chap. 34 as meaning

"attendance at such percentage of lectures and other teaching in the subject or subjects for the examination at which a candidate intends to appear, and at such other practical work (such as work in a laboratory) as is required by any Ordinance, Regulation or Rule in force for the time being in the University".

The argument is that the University may prescribe two separate University examinations for the 1st Year & the 2nd Year B. Sc. as it has done for the M. Sc. previous and final, but it has no right to hold an examination, which is known as class examination, and as a result thereof detain a student in the 1st Year and so debar him from appearing in the B. Sc. examination after two years as provided for under Ordinance (2) of Chap. 36 quoted above.

It is admitted that the Regulations providing for holding class examinations are clear and they are as follows:

"1. —There shall be an examination before the Winter Vacation, called the First Examination; there shall be another examination before the Summer Vacation called the Second Examination.
2. The marks obtained at both these examinations shall be added up, and taken into account in determining promotion.
3. .....
4. .....
5. In order to pass, a candidate must obtain in the two examinations taken together at least 25 per cent in each subject and 30 per cent of the aggregate of all subjects."

Our attention has also been drawn by learned counsel appearing for the opposite party to Regn. (9) of Chap. 32 which is as follows:

"All students are required to present themselves for the class examinations in the subjects which they have been taking and, if they fail in these examinations, they may be required to repeat their courses of study."

It is urged that these regulations are ultra vires the University.

We are not satisfied that the contention of the learned counsel has any substance. Ordinance (2) of Chap. 36 does not give a student absolute right to sit for the B. Sc. final exam. at the end of two years and it cannot be contended that the University has no right to prescribe a course of study and to hold examinations to see that the student has diligently applied himself to mastering the subjects that he has taken so as to qualify himself for the degree that is going to be conferred on him as a result of the tests held for the purpose. Section 5(2)(a) of the Act gives the University the power to grant and confer degrees and other academic distinctions to and on persons who shall have pursued an approved course of study in the University and shall have passed the examination of the University under conditions laid down in the Statutes or Ordinances. The regulations made under the Statutes and Ordinances cannot be said to be in contravention of the said Statutes and Ordinances and we are not satisfied that the contention of the learned counsel that the University has no right to prescribe class examinations has any substance.

(4) It is a great pity that the applicants, instead of diligently applying themselves to their studies and qualifying themselves for promotion to the B. Sc. 2nd Year class, should have thought it fit to move this Court for a writ or order against the University. This Court is most reluctant to entertain such applications especially as it is extremely desirable that the students should be under the full control & guidance of the University and its staff and, unless the act complained of is clearly beyond the jurisdiction or is clearly against the rules of natural justice, this Court will not interfere in such matters which relate to internal working of the University. We would have directed the applicants to pay the costs of the University, but they appear to be misguided young men who have been led away by the advice given to them. In the circumstances we express our reprobation of the act of the applicants but do not make any order as to costs.

A/R.G.D.

Petition dismissed.

A.I.R. 1953 ALLAHABAD 195 (Vol. 40, C.N. 88)

SAPRU AND V. BHARGAVA JJ.

Dr. Pyare Lal Gahlot and another, Applicants v. The State of Uttar Pradesh, Lucknow and others, Opposite Party.

Civil Misc. Writ Appln. No. 306 of 1952, D/-8-10-1952.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 30 — Supersession of board — Explanation submitted — Opportunity to give evidence need not be given.

Section 30 does not require that the State Government should "give an opportunity to the Board to show cause" against the action proposed to be taken

against it. It is only in cases where the statute casts a duty on the authority passing the order to give an opportunity to show cause that it is necessary to take evidence or to make full enquiries. In a case where the statute only requires the explanation to be considered, it is enough if the authority gives a reasonable opportunity for submission of the explanation and considers that explanation.

Where, therefore, there is no allegation that reasonable opportunity for submission of explanation was not given and the only grievance is that, though an opportunity to give an explanation was given and an explanation was, in fact, submitted, the petitioners were given no opportunity to give evidence in support of their explanation, there is no contravention of S. 30. (Para 2)

Further, when S. 30 itself clearly lays down the procedure which is to be followed in passing the order of supersession and merely requires the consideration of the explanation of the board without an opportunity to give evidence, it cannot be argued that the State Government had to act as a judicial or quasi-judicial body and was bound to give an opportunity to show cause which included the right to give evidence. (Para 4)

(b) Municipalities — U.P. Municipalities Act (2 of 1916), Ss. 30, 35 — Supersession of board — Omission to take action under S. 35 — Effect.

It is not a condition precedent to the Government proceeding under S. 30 that it must first act under S. 35. The mere omission therefore, to take action under S. 35 does not invalidate the order of supersession. (Para 5)

Hari Swarup, for Applicants; Standing Counsel, for Opposite Party.

V. BHARGAVA J.: This is a petition under Art. 226 of the Constitution presented by the Chairman and a member of the Municipal Board of Firozabad which was superseded by a notification issued by the State Government under S. 30, U.P. Municipalities Act. By this petition, the petitioners seek a declaration that the order of supersession was void and want a direction that they may be restored to their positions as Chairman and member of the board and allowed to function as such.

(2) The principal ground, on which this petition has been presented, is that, before the order of supersession was passed, the State Government did not give an opportunity to the petitioners or the board to give evidence to show that the charges, on account of which the board was superseded, were baseless. Learned counsel's contention was that, under S. 30, U.P. Municipalities Act, before superseding any board, the State Government was bound to give an opportunity to the board to give evidence in support of its contention that the charges framed against it were incorrect. Section 30, U.P. Municipalities Act only requires that the State Government, before superseding the Board, should "take into consideration the explanation of the board." There is no requirement under that Section that the State Government should "give an opportunity to the board to show cause" against the action proposed to be taken against it. It is only in cases where the statute casts a duty on the authority passing the order to give an opportunity to show cause that it is necessary to take evidence or to make full enquiries. In a case where the statute only requires the explanation to be considered, it is enough if the authority gives a reasonable opportunity for submission of the explanation and considers that explanation. In the affidavit filed before us on behalf of the petitioners, there is no allegation that reasonable opportunity for submission of explanation was not given. The grievance is that, though an opportunity to give an explanation was given and an explanation was, in fact, submitted, the petitioners were given no opportunity to give evidence in support of their explanation. The contention on the language of S. 30, U.P. Municipalities Act has no force at all.

(3) Learned Counsel argued that, by Act 7 of 1949, the Legislature had introduced a proviso to S. 30 laying down that, before an order of supersession is passed, an opportunity must be given to the President to show cause and though this proviso was repealed by the U.P. Municipalities (Supplementary and Validation) Act, 1951, it must be held that, even after the repeal of the proviso, a similar opportunity to show cause must be given to the board. We are unable to see that there is any force at all in this argument. Even, in the original U.P. Municipalities Act, 1916, the only right, which was given to the board before an order of supersession could be passed, was the right to give an explanation and a duty was cast on the Government to consider that explanation. This provision was maintained even after S. 30 was amended by U.P. Act 7 of 1949. An additional condition was provided in the proviso giving a right to the President to show cause obviously because, after that amendment, the President was not to be elected by the board and was not to be treated as a representative of the board but was to be directly elected by the whole electorate of the municipality. When the amending Act of 1951 was passed, the direct election of the President by the electorate of the municipality was again done away with and, consequently, the proviso became unnecessary. The right, which was granted to the President by virtue of his special position, was, therefore, taken away. The right of the municipal board to give an explanation, which had been maintained after the amendment Act of 1949, was continued even after the amendment Act of 1951. In the present case, since the board was given a reasonable opportunity to give the explanation and the explanation given by the board was considered by the Government, it cannot be said that the order of supersession has not been passed in accordance with the provisions of S. 30, U.P. Municipalities Act.

(4) Learned counsel urged that, in passing the order of supersession under S. 30 of the Act, the State Government had to act as a judicial or quasi-judicial body and was bound to give an opportunity to show cause which included the right to give evidence. We cannot see any force in this argument when S. 30 itself clearly lays down the procedure which is to be followed in passing the order of supersession and merely requires the consideration of the explanation of the board without an opportunity to give evidence.

(5) Learned counsel also urged that, before passing the order of supersession, the State Government had not taken any action under S. 35, U.P. Municipalities Act and, therefore, the order of supersession was invalid. Section 35 provides an alternative procedure which might be adopted by the State Government to ensure that the duties of a board are properly carried out. It is not a condition precedent to the Government proceeding under S. 30 that it must first act under S. 35. This argument, therefore, has no force and the mere omission to take action under S. 35 does not invalidate the order of supersession.

(6) Learned counsel further urged that the provisions of S. 31(b), U.P. Municipalities Act were ultra vires of the U.P. Legislature but we do not think that it is necessary to go into this question in this case as the validity or invalidity of S. 31(b) does not, in any way, affect the reliefs which have been claimed in this petition. Further, this point was not taken as one of the grounds for asking the reliefs prayed for.

(7) There is, consequently, no force in this writ petition and it is dismissed with costs which we assess at Rs. 160/-.

B/D.R.R. Petition dismissed.

A.I.R. 1953 ALLAHABAD 197 (Vol. 40, C.N. 89)

RAGHUBAR DAYAL J.

Munshi Singh, Applicant v. The State.

Criminal Ref. No. 294 of 1952, D/- 10-9-1952.

(a) Criminal trial — Evidence — Filing of documents by prosecution — Accused cannot compel their production — (Criminal P. C. (1898), S. 208 (2)).

When the prosecution is its own judge of the order in which witnesses are to be produced, it follows that documents which require to be proved can lawfully come on the record only when the witnesses who prove those documents are examined, and that therefore the stage for the coming on the record of the provable documents will be in the discretion of the prosecution, and the accused cannot force the prosecution to produce any documents at any stage. (Para 3)

Anno: Cr. P. C., S. 208 N. 7, 8.

(b) Criminal P. C. (1898), S. 208 (3) — Scope — Does not entitle any party to compel other to produce its documents.

Section 208 (3), Criminal P. C. cannot be interpreted to mean that the accused can demand the production of any document whenever he feels the necessity of referring to it. The sub-section empowers the Magistrate to compel the summoning of such witnesses and the production of such documents which the prosecutor or the accused wants to produce before the Court in support of the case. The provision cannot be taken to give a right to either of the parties to compel the other to produce any witness or document on the mere request of the other party. (Para 4)

Anno: Cr. P. C., S. 208 N. 7, 8, 11.

B. C. Saxena, for Applicant; A. G. A., for the State.

ORDER: A preliminary inquiry is in progress in the Court of a Magistrate, First Class, Shahjahanpur against a number of accused. When the first prosecution witness, the complainant, had been examined in chief, the learned counsel for the accused presented an application to the Court requesting for the production of the various post mortem reports, the injury reports, the site plan and the recovery lists by the prosecution so that he be in a position to cross-examine the witnesses effectively. The prosecuting inspector was asked to report on the application. He filed the post mortem and the injury reports and stated that the other documents would be filed at the time of the examination of the witnesses proving those documents. The learned Magistrate then ordered that application to be filed. Against that order the applicant, one of the accused, went in revision to the Sessions Judge of Shahjahanpur. He was of opinion that the accused had a right to have all the exhibits put in for the purpose of enabling them to cross-examine the prosecution witnesses and that the accused would be otherwise prejudiced, particularly in this case where, according to the prosecution, there were three places of occurrence. He, therefore, made a reference to this Court for the setting aside of the order of the learned Magistrate and for ordering the prosecution to file the papers required by the accused.

(2) I have heard the learned counsel for the applicant and for the State and am of opinion that the reference should be rejected.

(3) There is no provision of any law which makes it incumbent on the prosecution to produce the documents on which it relies at the first hearing of the case or to produce them when the other party, that is the accused, desires them to be produced. The prosecution can produce its witnesses in any order it likes, and similarly can produce the documents at any stage of the case it likes. In fact, documents cannot come on the record as mere papers. They come on the record after they are duly proved and a document will be duly proved either when under the provision of law it requires no formal proof or when the witness proving the documents is examined and proves that document. When the prosecution is its own judge of the order in which witnesses are to be produced, it follows that documents which require to be proved can lawfully come on the record only when the witnesses who prove those documents are examined and that therefore the stage for the coming on the record of the provable documents will be in the discretion of the prosecution, and the accused cannot force the prosecution to produce any documents at any stage. In fact, even if a certain document which requires to be proved happens to be among the papers which are before the Court, it would, in my opinion, be the bounden duty of the Court not to refer to that document until it has been duly proved and marked as an exhibit. It is a different matter that such paper on the file, though not proved, might be seen by the accused or his counsel and he may then use the information so obtained for any purpose to which he can put it lawfully. I, therefore, see nothing wrong in the conduct of the prosecuting inspector in not producing the documents or in the order of the learned Magistrate to file the application presented on behalf of the accused.

(4) The learned counsel for the applicant referred to S. 208(3), Cr. P. C. for the proposition that the accused can demand the production of any document whenever he feels the necessity of referring to it. I do not interpret this provision of law in that manner. It is conceded that the accused cannot compel the production of a

witness at any stage he desires and that with regard to the production of a witness the provisions of S. 208(3) cannot be so interpreted. I see no reason why they be differently interpreted with reference to the production of documentary evidence. Section 208(1) provides for the Magistrate's hearing such evidence as be produced by the prosecution or by the accused or be called by the Magistrate. This supposes that the parties bring their own witnesses to the Court and then examine them. Sub-section(2) simply provides for the cross-examination of prosecution witnesses by the accused and for their re-examination by the prosecutor. Sub-section (3) empowers the Magistrate to issue process to compel the attendance of any witness or the production of any document or evidence on the application of the complainant or officer conducting the prosecution or the accused, unless he deems it unnecessary to do so. To my mind, this empowers the Magistrate to compel the summoning of such witnesses and the production of such documents which the prosecutor or the accused wants to produce before the court in support of its case. These provisions cannot be taken to give a right to either of the parties to compel the other to produce any witness or document on the mere request of the other party.

(4a) Apart from this legal position, I am not satisfied that any question of the interests of justice arises in the request for the accused which had been turned down. It may be that in this case or in certain cases it might be necessary to cross-examine a witness with respect to certain matters which could not have been known or foreseen by the cross-examiner and which came to his notice on the production of certain documents or the examination of certain witnesses subsequent to the cross-examination of a particular witness. The cross-examiner is not absolutely at a loss to have an opportunity to cross-examine that particular witness with respect to such matters. He has simply to satisfy the Court that it is necessary to put further questions to certain witnesses and the court will be free to recall those witnesses and to have them cross-examined with respect to those questions. In the present case the Magistrate is simply conducting a preliminary inquiry. The trial of the accused will be in the Sessions Court and by the time of the actual trial all the papers which go to support the prosecution case are bound to be on the record and the accused would have ample opportunity to cross-examine witnesses with respect to those documents. I am really surprised that the turning down of the request which, if granted, might not have affected the prosecution adversely but which appears to have been rejected possibly on the question of principle, should have led to these proceedings which did mean the stay of the preliminary inquiry and consequent delay in the hearing of this case.

(5) In view of the above, I reject the reference.

B/D.R.R. Reference rejected.

A.I.R. 1953 ALLAHABAD 198 (Vol. 40, C.N. 90)

MALIK C. J. AND V. BHARGAVA J.

Bareilly Corporation Bank Ltd., Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

Misc. Case No. 56 of 1949, D/- 9-9-1952.

† **Excess Profits Tax Act (1940), S. 2 (5), Sch. I, R. 4 (2) — Assessee carrying on banking business — Income from investments in shares, securities and immovable property.**

Under R. 4 (2) no question arises whether the business consists wholly or mainly in dealing in or holding of investments. It is only when the business of the assessee does not fall within any of the classes mentioned therein that the Act requires that the business should consist wholly or mainly in dealing in or holding of investments in order to make the income from the investments liable to be included in profits for the purposes of assessment. Where the assessee is carrying on banking business, the profits for the assessment of excess profit tax must in its case include all income received from investments whether the investments are in shares, securities or immovable property. (Para 4)

Anno: E. P. T. Act, S. 2 (5) N. 1, Sch. I, R. 4 N. 1.

G. S. Pathak, for Applicant; J. Swarup, for Respondent.

V. BHARGAVA J.: In this reference under S. 21 of the Excess Profits Tax Act read with S. 66(1) of the Income-tax Act, the following question has been referred to us for decision:

"Whether in the circumstances on the construction of the Articles of Association of the applicant company and in view of the provisions of S. 2(5) of the E.P.T. Act and sub-rule 2 of Rule 4 of Sch. 1 of the E.P.T. Rules the income from investment in shares, securities and immovable property could be legally assessed to E.P.T. ?"

(2) The statement of the case sent by the Income-tax Appellate Tribunal shows that the assessee, Bareilly Corporation Bank Ltd., Bareilly is carrying on banking business as its main business. It also made investments in shares and securities and happened to acquire certain immovable property. The question arises whether the income from the investments in shares and securities and immovable property could be legally assessed to excess profit tax and the Tribunal held that it could be taxed as these investments were only expansion of the banking business and were the assets of such business. On this finding the Tribunal was of the view that the business activities of the company were covered by that part of the definition of the word 'business' as given in S. 2(5) of the E.P.T. Act, which defined 'business' as including any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture and held that under Cl. 2 of Rule 4 of the E. P. T. Rules incorporated in Sch. 1 to E. P. T. Act, the income of the appellant arising from investments made in the course of the banking business and the income derived from the rentals of the immovable properties was chargeable to E. P. T. In coming to this view the Tribunal did not accept the contention of the assessee that the function of the assessee company did not consist wholly and mainly in the holding of investments in the other property.

(3) In our view, the question as to whether the business of the assessee consists wholly or mainly in dealing in or holding of investments does not at all arise in this case. It is the admitted case of the parties that the assessee is carrying on banking business. Rule 4(2) of Sch. 1 of the E. P. T. Rules is as follows:—

"In the case of the business of a building society, or of a moneylending business, banking business

insurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is included in the profits charged under S. 10 of the Income-tax Act, 1922, or is charged under any other section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax."

(4) The rule makes it clear that in the case of (1) a business of building society, (2) a moneylending business, (3) a banking business and (4) an insurance business income received from investments must be included in the profits for the purpose of assessment of excess profit tax and no question arises in such cases whether the business consists wholly or mainly in dealing in or holding of investments. It is only when the business of the assessee does not fall within any of these classes that the Act requires that the business should consist wholly or mainly in dealing in or holding of investments in order to make the income from the investments liable to be included in profits for the purposes of Assessment Act. Since the assessee is carrying on banking business, the profits for the assessment of excess profit tax must in its case include all income received from investments whether the investments are in shares, securities or immovable property.

(5) Consequently our answer to the question referred is in the affirmative. The assessee must pay the costs of the Department which we fix at Rs. 300/-

B/D.H. Answer in the affirmative

A.I.R. 1953 ALLAHABAD 199 (Vol. 40, C.N. 91)

BRIJ MOHAN LALL J.

Bishambhar Rai, Applicant v. State through Mohan, Opposite Party.

Criminal Revn. No. 823 of 1951, D/- 20-8-1952.

Criminal P. C. (1898), S. 517 — Property not in possession of Court or party — No power to pass order under S. 517.

Section 517 presupposes the existence of the property either in the custody of the Court or in the possession of any party to the litigation or a supurdar or any other person who is amenable to the jurisdiction of the Court. But if the property has been disposed of and is no longer available to Court and if its money value is also not in the custody of the Court or supurdar no order about the payment of money can be passed under the explanation to the section. In such a case it is for the aggrieved party to seek his remedy through the civil Court. AIR 1935 Pesh 98 and AIR 1934 Cal 454, Disting. (Paras 3, 4)

Anno: Cr. P. C., S. 517 N. 19 Pt. 9.

B. D. Pande, for Applicant; S. N. Kacker, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras
('34) AIR 1934 Cal 454: (35 Cri LJ 886) 5
('35) AIR 1935 Pesh 98: (36 Cri LJ 1237) 5

ORDER: This is an application in revision by one Bishambhar Rai. He purchased two camels from one Mohan for Rs. 800/-. Mohan gave delivery of the said camels to Bishambhar Rai. There was some dispute about the payment of price. Mohan went to Bishambhar Rai's place during his absence and brought back the camels. He sent them to some other place obviously under the impression that Bishambhar Rai would not find clue to the said camels and would thus be prevented from creating any difficulty. Sometime later the camels disappeared. Mohan filed a complaint under S. 379, I. P. C. against Bishambhar Rai alleging that he had stolen the camels from the place to which they had been sent. The camels were recovered roaming about in a certain village. In other words, they were not recovered from Bishambhar Rai's custody. The criminal complaint filed by Mohan resulted in Bishambhar Rai's discharge. At the time of passing the order of discharge, the learned Magistrate passed an order directing the delivery of camels to Mohan. Against this order Bishambhar Rai preferred an appeal which was dismissed by the learned Sessions Judge. He has now come up in revision.

(2) It may be stated at this stage that Mohan has since sold the said camels. I am informed that the sale had taken place before the notice issued by this Court was served on him. It is now contended by the learned counsel for Bishambhar Rai that this Court should direct Mohan to deposit the price of the two camels in Court and that the said amount should be paid to him (Bishambhar Rai) on his furnishing security; I am afraid this Court is not competent to pass any such order.

(3) Section 517, Criminal P. C. empowers the High Court to pass an order for the disposal of the property in respect of which the offence is said to have been committed. But this section presupposes the existence of the property either in the custody of the Court or in the possession of any party to the litigation or a supurdar or any other person who is amenable to the jurisdiction of the Court. Sub-section (3) contemplates cases where livestock or other property subject to speedy and natural decay, e.g. growing crop, may be ordered by the Court to be sold before the question of disposal thereof is decided by it. In such cases the Court is empowered to pass the order of disposal in respect of the money value of the property. This is contained in the Explanation to the said section.

(4) The learned counsel for the applicant contends that the Explanation empowers this Court to pass, so to say, a money decree against a person who may be deemed to have unlawfully misappropriated the property in question. I am afraid the Explanation does not go to that length. If the property has been disposed of and is no longer available to Court and if its money value is also not in the custody of the Court or supurdar no order about the payment of money can be passed. In such a case it is for the aggrieved party to seek his remedy through the civil Court.

(5) The learned counsel for the applicant has relied on the cases of — 'Shamsundar v. Teja Singh', AIR 1935 Pesh 98 and — 'Nagendra Nath v. Emperor', AIR 1934 Cal 454. These cases are clearly distinguishable. In both these cases the property had been disposed of contrary to the directions issued by the Court. The Court had directed its disposal in a particular manner and in disobedience of that direction one of the parties had disposed of the said property. It was held that the guilty party could be made to deposit

the money value of the property in Court. I am not called upon in this case to express any opinion on that aspect of the question because, in the present case, the facts are entirely different. Mohan had at no stage been directed by any Court not to sell the camels. I am, therefore, of the opinion that no relief can be given to the applicant under Chapter 43, Criminal P. C. His remedy lies in the civil Court.

(6) The application is rejected.

B/V.S.B. Application rejected.

A.I.R. 1953 ALLAHABAD 200 (Vol. 40, C.N. 92)

RAGHUBAR DAYAL J.

State through Deep Narain Singh, Applicant v. Hem Narain Singh, Opposite Party.

Criminal Misc. Case No. 177 of 1952, D/- 10-9-1952.

U. P. Panchayat Raj Act (26 of 1947), Ss. 52, 49 (3) — A served with notice but not appearing before adalat — Trial and conviction of A by Panchayati Adalat under S. 172, I. P. C. — Legality — (Penal Code (1860), S. 172 — Criminal P. C. (1898), S. 195 (1)).

Where on failure of A to appear before the Panchayati Adalat though he was served with notice to do so, the Panchayati Adalat convicted him of the offence under S. 172, I. P. C. and sentenced him to pay fine of Rs. 85/- and A on rejection of the revision against the Order, applied to the High Court under Art. 227 of the Constitution;

Held that (1) as the notice was served on A no offence under S. 172, I. P. C. was made out as the section makes absconding of a person in order to evade being served with a summons or notice an offence and does not make non-appearance of a person served with a summons or notice an offence. (Para 2)

(2) There is nothing in the Panchayat Raj Act which empowers a Panchayati Adalat to convict a person who behaved in that manner with respect to a summons or notice issued by it. At best it is empowered, like any ordinary individual or public servant, to lodge a complaint before a proper Court against the person concerned with respect to his conduct which amounted to an offence. The Panchayat being themselves the complainant could not try the case under S. 49 (3), Panchayat Raj Act. (Para 3)

(3) Even under S. 52, the Adalat can try a complaint for an offence under S. 172 only if it is made by a person other than the Adalat itself. (Para 4)

(4) Further S. 195 (1), Criminal P. C. barred the Adalat from taking cognizance of the offence. Thus the conviction being against law was set aside. (Paras 5, 6)

Anno: I. P. C., S. 172 N. 1.

Chaturbhuj Sahai, for Applicant; Govt. Advocate, for Opposite Party.

ORDER: The Gram Panchayat of Shivapur Karan Chhapra reported to the panchayati Adalat of Kararha Uparwar against the applicant and others in connection with apprehending breach of peace. The Panchayati Adalat issued a notice to the applicant requiring him to appear in Court on a certain date. The notice is alleged to have been served on the applicant. The applicant, however, denies it. The fact is that on the date of hearing the applicant did not appear before the Panchayati Adalat. The Panchayati Adalat being satisfied that the notice had been served convicted the applicant of the offence under S. 172, I. P. C. and ordered him to pay Rs. 85/- fine. The revision filed against that order was rejected by the Sub-Divisional Magistrate who held that under S. 52, Panchayat Raj Act the Panchayati Adalat had jurisdiction to try the offence under S. 172, I. P. C. and that therefore the sentence passed on the applicant could not be held to be illegal or improper. The applicant therefore has filed this application under Art. 227 of the Constitution for setting aside the orders and judgments of the Courts below.

(2) It appears that neither of the Courts below realised what they were doing. The order of the Panchayati Adalat shows that the notice had been served on the applicant and he insolently did not appear before the Court. If the notice had been served on the applicant no offence under S. 172, I. P. C. was made out. Section 172, I. P. C. makes absconding of a person in order to evade being served with a summons or notice an offence and does not make non-appearance of a person served with a summons or notice an offence. It is clear, therefore that the Panchayati Adalat which felt offended immensely on account of insult to its dignity by the non-appearance of the applicant failed to have the judicial mind and without ascertaining the offence committed by the applicant convicted him of the offence and imposed a sentence which by no means is a lenient or a proper sentence in the absence of any aggravating circumstances attending the non-appearance of the party.

(3) The Panchayati Adalat could not have convicted the applicant even if he had committed an offence either under S. 172 or S. 174, I. P. C. with respect to his absconding in order to avoid service of a summons issued by that Court or his not appearing in compliance with the summons issued by that Court. There is nothing in the Panchayat Raj Act which empowers a Panchayati Adalat to convict a person who behaved in that manner with respect to a summons or notice issued by it. At best it is empowered like any ordinary individual or public servant to lodge a complaint against the person concerned with respect to his conduct which amounted to an offence. Such complaint would be lodged before the proper Court and could not be tried by the same Panchayati Adalat. On general principles applicable to the trial of every criminal case the party concerned in the incident leading to the commission of the offence cannot be the judge of that case. In the Panchayat Raj Act S. 49 sub-s. (3) specifically provides that:

"No panch or sarpanch shall take part in any case, suit or proceeding to which he or any near relation, employer, employee or partner in business of his is a party or in which any of them may be personally interested."

The members of the Panchayati Adalat who issued notice to the applicant and who are the real complainants against him are persons interested in this matter and could not have taken part in its decision even if his Panchayati Adalat itself was competent to punish the applicant for this particular offence.

(4) Section 52, Panchayat Raj Act just enumerates the various offences over which a Panchayati Adalat has jurisdiction. Of course, it can try a complaint of an offence under S. 172, I. P. C. if made by a person other than the Panchayati Adalat itself. The Panchayati Adalat and the Sub-Divisional Magistrate failed to see this point which should have been obvious enough.

(5) Section 195 (1), Criminal P. C. bars any Court from taking cognizance of an offence punishable under S. 172, I. P. C. except on the complaint in writing of the public servant concerned or by some other public servant under whom he is subordinate. It follows that this Panchayati Adalat could not have taken cognizance of this offence even though it is competent to try such offences under S. 52, Panchayat Raj Act without there being a formal complaint against the applicant of his committing the offence under S. 172, I. P. C. No such complaint was before this Panchayati Adalat and could not have been. It would be improper that the Panchayati Adalat should have formally lodged a complaint before itself. The complaint would have to be lodged before the Sub-Divisional Magistrate who, in the circumstances, will have to quash the jurisdiction of the Panchayati Adalat with respect to the commission of the offence which took place within its jurisdiction.

(6) In view of the above I allow this application, set aside the conviction of the applicant by the Panchayati Adalat of the offence under S. 172, I. P. C. and also the sentence of Rs. 85/- fine. I further order that the fine, if paid, shall be refunded to the applicant.

B/D.R.R. Application allowed.

A.I.R. 1953 ALLAHABAD 201 (Vol. 40, C.N. 93)

WALI ULLAH J.

Khair Ullah, Appellant v. B. Jai Ram Singh and another, Respondents.

Ex. Second Appeal No. 183 of 1950, D/- 3-3-1952.

Limitation Act (1908), Art. 182 (5) — Proper Court — Abolition and revival of Court passing the decree — Applications for execution to revived Court — Validity — (Civil P. C. (1908), Ss. 37(b), 38) — (Bengal, Agra and Assam Civil Courts Act (1887), S. 17).

A decree was passed in 1936 by an Additional Munsiff's Court which was abolished thereafter in 1937 and its business was transferred to Munsiff's Court. But within three years, the Court was revived with the same jurisdiction and the decree-holder filed first four execution applications in that Court. The fifth was filed in the Munsiff's Court and it was objected to as barred by limitation as first four petitions were not in accordance with law, not having been made to proper Court.

Held that (1) as on the dates of the previous four applications the Additional Munsif's Court was in existence and had the jurisdiction to entertain the suit on those dates, it was the 'Court which passed the decree' within S. 38 read with S. 37 (b), Civil P. C., and as such was the proper Court to entertain the execution applications. They were, therefore, made to proper Court and were in accordance with law. AIR 1929 All 677 and AIR 1938 All 116, Disting.; AIR 1926 Pat 209, Rel. on. (Para 12)

(2) Further that the fact that the business of the Court abolished is transferred to another Court can have no relevancy and cannot affect, in any way, the jurisdiction of the Court which, after having been abolished once, comes into existence again as, S. 17, Civil Courts Act, merely relates to continuance of proceedings which are pending in one Court which is abolished and are later transferred to another Court. (Para 21)

Anno: Lim. Act, Art. 182 (5) N. 87; Civil P. C., S. 37 N. 2, 3.

Shripat Sahai Srivastava, for Appellant; Harnandan Pd., for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('29) AIR 1929 All 677: (118 Ind Cas 670) 9, 14

('38) AIR 1938 All 116: (174 Ind Cas 254) 9, 17

('26) AIR 1926 Pat 209: (4 Pat 688) 10, 19

JUDGMENT: This is an appeal by the judgment-debtor. It arises out of the dismissal of certain objections filed by the appellant.

(2) It appears that a decree for Rs. 1486/- was passed on 7-10-1936, in favour of Suraj Prasad Singh, father of the respondents, against the appellant, Haji Khairullah. It was passed by the Court of the Additional Munsif. That Court appears to have been abolished soon after, namely, on 3-1-1937. It was, however, again revived after sometime and was in existence at the time when the first application for execution was made on 7-10-1939. That application was made to the Court of the Additional Munsif. Eventually, the application was dismissed for want of prosecution on 18-10-1939.

(3) The next application for execution was made on 19-2-1943, which was dismissed on 30-3-1943. A third application for execution was made on 5-4-1943. It was dismissed on 25-5-1943. A fourth application for execution was made on 11-5-1946, and it was dismissed on 18-7-1946.

(4) A fifth application for execution of the decree was made on 17-7-1948. It was made in the Court of the Munsif. It is this application which has given rise to the present appeal.

(5) Objections were filed on behalf of the appellant to the execution of the decree. The main objection urged was that the application was barred by limitation inasmuch as the proceedings in connection with the first, second, third, and fourth applications for execution had not been validly taken. Reliance was placed on Art. 182(5), Limitation Act. Under this provision, three years' period of limitation is to be reckoned from the date of the final order passed 'on an application made in accordance with law to the proper court for execution'.

(6) The Courts below have dismissed the objection and have held that the application was made within time.

(7-8) Learned counsel for the appellant has contended that the application is barred by time. His argument is that the Additional Munsif's Court which passed the decree on 7-10-1936 having been abolished and its business having been transferred to the Munsif's Court, it was the Munsif's Court alone which was competent to execute the decree. That being the position, the four previous applications for execution of the decree filed in the Court of the Additional Munsif were not in accordance with law and consequently did not save limitation.

(9) In support of his contention, learned counsel has relied upon the decision in — 'Maqbul Ahmad v. Pateshri Partab Narain Singh', AIR 1929 All 677 and in the case of — 'Mt. Champi Bai v. Peary Lal', AIR 1938 All 116.

(10) On the other hand, learned counsel for the respondents has relied on the case of — 'Bibi Khodaijatul Kobra v. Harihar Missar', AIR 1926 Pat. 209. This is the ruling on which both the Courts below have also relied. It seems to me quite clear that in the present case, the Courts below have taken a correct view of the law.

(11) Learned counsel for the appellant has invited my attention to Ss. 37, 38 and 150, Civil P. C. Section 37 defines the expression "the Court which passed the decree". Section 38 declares that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The expression, "the Court which passed it" necessarily refers back to S. 37 where the expression has been explained. Section 37(b) deals with a case where the Court of first instance has ceased to exist or to have jurisdiction to execute the decree. In such an event, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. In the present case, on the dates when the first four applications for execution of the decree were made, the Court of the Additional Munsif was in existence. Further that Court on that date would have jurisdiction to entertain the suit if the suit wherein the decree was passed was to be instituted on that date. It follows, therefore, that at the time of the making of the application for execution, on all those four occasions, the Court of the Additional Munsif would be a Court which must be deemed to be a Court which passed the decree within the meaning of that expression as given in S. 37, Civil P. C.

(12) It seems to me, therefore, clear that the Court of the Additional Munsif in which the first four applications for execution were made, was the proper Court to entertain the application. Each one of those applications must, therefore, be considered as an application made in accordance with law to the proper Court, within the meaning of Art. 182 (5), Limitation Act.

(13) Looked at from this point of view, the present application for execution made on 17-7-1948, must be held to be within time.

(14) As mentioned above, learned counsel for the appellant has relied upon the case of — 'Maqbul Ahmed v. Pateshri Partab Narain Singh', AIR 1929 All 677. That case is clearly distinguishable. That was a case in which a preliminary decree for sale had been passed by the Additional Subordinate Judge. Owing to certain defects of form in which the decree had been drawn up, the decree-holder endeavoured to execute his simple money decree. Objections were, however, raised by some of the judgment-debtors that the decree was merely a preliminary decree and a final decree had not yet been passed. The decree was, therefore, not capable of execution. A lot of time elapsed and eventually an application was made for the preparation of a final decree. Objection was raised that the application was barred by time. Limitation was sought to be saved by reference to the provisions of Ss. 4 and 14(2), Limitation Act.

(15) On a consideration of the whole matter, the Division Bench of two learned Judges of this Court held that limitation was not saved in view of the provisions of Ss. 4 and 14(2), Limitation Act. In the course of their judgment, the learned Judges have dealt with the contention raised before them. It was to the effect that the application for preparation of the final decree was properly filed in the Court of the Additional Subordinate Judge at Basti because the decree had been passed by the Addl. Judge and not by the Subordinate Judge. The learned Judges repelled this contention by pointing out that "the Court of the Additional Subordinate Judge which was in existence, when the decree (preliminary decree) was passed, subsequently came to be abolished and all its work was transferred to the Court of the Subordinate Judge. A new Additional Subordinate Judge was subsequently sent to Basti 'but the execution cases which were pending in the Court of the Subordinate Judge were not transferred to the Additional Subordinate Judge's Court.'"

(16) It is clear that the learned Judges in that case were dealing with a case in which only a 'preliminary' decree had been passed but the suit was still pending. Further, it is clear from the judgment that in that case, after the abolition of the Court of the Additional Subordinate Judge, all its work i.e. all pending work before it, was transferred to the Court of the Subordinate Judge.

(17) The next case relied upon by learned counsel is that of — 'Mt. Champi Bai v. Pearey Lal', AIR 1938 All 116. In this case, Allsop, J. had before him the relevant notifications. The learned Judge construed the notifications before him in the light of the provisions of S. 13 (1), Bengal, Agra and Assam Civil Courts Act, 1887. It was then observed:

> "The question whether any particular civil business was cognizable..... would depend upon orders passed by the District Judge subject to any general or special orders passed by this Court."

(18) In the present case, the relevant notifications are not on the record and learned counsel is, therefore, not in a position to refer to any of the notifications from which an inference may be drawn one way or the other with regard to the jurisdiction conferred on the Court of the Additional Munsif when it was revived. It seems to me, therefore, that the provisions of S. 13 can be of no assistance to the appellant.

(19) The view which I have expressed above receives strong support from the Division Bench of the Patna High Court in the case of — 'Bibi Khodaijatul Kobra v. Harihar Missar', A I R 1926 Pat 209. It was held in that case:

> "Where the Court which passes a decree is abolished but is subsequently re-established, it can execute the decree provided it would have jurisdiction to try the suit to which the decree relates if it were instituted at the time of the application for execution."

(20) The learned Judges relied on the provisions of Ss. 37 and 38, C. P. C. With reference to S. 37 (b), it was held:

> "Even if a Court ceases to exist, it can again be revived and if another Court of the same designation is established within the district with the same jurisdiction it can be said that it is the same Court."

(21) In view of the provisions of S. 37 (b), Civil P. C., it seems to me that the Court of the Additional Munsif which was re-established, must be held to have jurisdiction in the matter. There is nothing in the present case to show that the ordinary jurisdiction of that

Court had been curtailed by any order made by the Local Government under S. 13, Bengal, Agra and Assam Civil Courts Act, 1887. Section 17, Civil Courts Act, also, to my mind, gives no assistance to the learned counsel for the appellant. In my view, after the passing of the decree for money, on 7-10-1936, the suit, pending in the Court of the Additional Munsif, terminated. Thereafter, the Court of the Additional Munsif was abolished, but before three years had elapsed from the date of the decree, it was re-established. The first application for execution was made, as already noted, on 7-10-1939. On that date, the Court of the Additional Munsif which had originally passed the decree was again in existence. An application for execution which was made on that date was made actually in the Court which had passed the decree. No proceedings in the nature of execution proceedings were pending at the time when the Court was abolished in the first instance. As a matter of fact, no such proceedings had been started till then; nor were they started during the period that that Court had ceased to exist. In view of these considerations, it seems to me that the fact that the business of the Court abolished is transferred to another Court can have no relevancy and cannot affect, in any way, the jurisdiction of the Court which, after having been abolished once, comes into existence again. In my view, S. 17, Civil Courts Act, merely relates to continuance of proceedings which are pending in one Court which is abolished and are later transferred to another Court.

(22) For the reasons given above, in my judgment, there is no force in this appeal. It is accordingly dismissed with costs.

(23) Learned counsel for the appellant has prayed for leave to appeal to a Division Bench of the Court. The leave prayed for is granted.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 ALLAHABAD 203 (Vol. 40, C.N. 94)

RAGHUBAR DAYAL AND AGARWALA JJ.

Behari and others, Appellants v. State.

Criminal Appeal No. 419 of 1951, D/- 29-4-52.

(a) Penal Code (1860), S. 34 and S. 300 Thirdly and Ss. 302 and 304 — Death by single lathi blow by one of three persons — Person not known — Punishment.

There was an exchange of abuse between the deceased and the three accused persons and the relations between the parties became strained. Shortly afterwards, the three accused went to the choupal of the deceased armed with lathis and started belabouring the deceased. There was only one injury on the head. There were two other injuries on the shoulders and they were caused by the two other accused persons other than the one who caused the injury on the head.

The injury caused on the head was sufficient in the ordinary course of nature to cause death. It was not however clear from the evidence on record as to who caused the fatal injury on the head.

Held that when death is caused by a lathi blow or blows, the nature of the offence committed will depend upon (a) the intention of the accused, or/and (b) the knowledge of the accused, and (c) the nature of the injury caused. Where actual injury caused is sufficient in the ordinary course of nature to cause death and it could not be said that the injury was accidentally or negligently caused a strong presumption arises that the intention was to cause the injury which has been caused and as such the case would fall under cl. 3 of S. 300. It would be particularly so if the attack was premeditated. This presumption may be rebutted. It is not the law that where death is caused by one lathi blow alone the offence will invariably fall under S. 304, I. P. C. In determining the intention other circumstances will also have to be taken into consideration. In the present case the injury was sufficient in the ordinary course of nature to cause death. There was nothing to show that the injury was caused accidentally or negligently. The presumption, therefore, was that the intention was to cause the injury which was actually caused or in other words the intention was to give a smashing blow on the head. The fact that there was one injury only did not destroy the presumption, because the force with which the blow was caused must have been very great. In the absence of any definite evidence that the intention of giving the beating was confined to causing simple hurt or grievous hurt or an injury likely to cause death ('likely' used in the sense of a lower degree of likelihood), the presumption of intention drawn from the nature of the injury actually caused remained unshaken. It must, therefore, be held that the person who actually caused the injury on the head was guilty of murder as defined in cl. (3) of S. 300. (Paras 28, 29)

The same intention must be attributed to the other two persons. Though they inflicted simple injuries all the three were acting in concert and the intention to be inferred must be the intention deducible from the entire act committed by all the three. The entire act included the injury on the head. The intention of the other two persons must be gathered not merely from the two simple injuries which they inflicted but also from the injury on the head. When three persons attack another with lathis, not upon a sudden quarrel but in concert and after previous consultation, they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention. Hence all the three were liable for murder as defined in cl. (3) of S. 300. (Paras 30, 32)

In a case of this nature where only one blow on the head was given and the lathi was an ordinary lathi used by villagers, neither ringed nor extra heavy, and where it was not known who gave the fatal blow, the lesser penalty provided by law (i.e. transportation for life) would meet the ends of justice. (Para 33)

Anno: Penal Code, S. 34 N. 1; S. 300 N. 6; S. 302 N. 3, 12, 16; S. 304 N. 1.

(b) Penal Code (1860), S. 304—Applicability.

Section 304 will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of S. 300 but it is covered by the exceptions to that section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression

"sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause death" & the case does not fall under cl. (2) of S. 300. (iii) when the act is done with the knowledge that death is likely to ensue but there is no intention to cause death or an injury likely to cause death. In such cases there may be either no intention to cause any injury at all, or there may be an intention to cause simple or grievous hurt but not an injury likely to cause death. (Para 23)
Anno: Penal Code, S. 304 N. 1.

(c) Penal Code (1860), S. 300, Secondly — Applicability.

Clause (2) of S. 300 refers to the case of a person with a peculiar physical condition and to the accused having knowledge of that peculiarity. AIR 1949 All 342, 1950 All LJ 75 and AIR 1932 Oudh 186, Not foll. (Para 15)
Anno: Penal Code, S. 300 N. 5.

(d) Penal Code (1860), Ss. 299 and 300 — Scope of.

Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. Section 299 cannot be taken to be the definition of culpable homicide not amounting to murder, as the section clearly speaks of culpable homicide simpliciter. The scheme of the Penal Code is that first the genus 'culpable homicide' is defined and then murder, which is a species of culpable homicide, is defined. What is left out of culpable homicide after the special characteristics of murder have been taken away from it, is culpable homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder. (Para 10)
Anno: Penal Code, S. 299 N. 1; S. 300 N. 1.

Bhagwan Das Gupta, for Appellants; J. R. Bhatt, Asst. Govt. Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('19) 17 All LJ 985: (AIR 1919 All 445: 20 Cri LJ 767) 25
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AGARWALA J.: Behari, Kaddey and Tota, all residents of Aghapur, police station Milakpur, district Rampur, have appealed against their conviction under S. 302, IPC and sentence of death. There is also before us a reference for the confirmation of the sentence of death.

(2) The prosecution case against the appellants was that Tota appellant, aged 20 years, a gardener, was on visiting terms with the deceased Khargi, a barber. For some time past Tota started to associate with Behari and Kaddey, appellants, and severed his connection with Khargi deceased. This was not liked by Khargi and he asked Tota to pay visits to him. Upon this there was an exchange of abuse between the deceased and the appellants and the relations between the parties became strained. On 22-8-1950 a little after sunrise the three appellants went to the choupal of the deceased armed with lathis and started belabouring the deceased. A river flows below the choupal of the deceased. After receiving injuries the deceased fell into the river. The appellants assaulted the deceased with lathis even after he had fallen in the river till he died and was drowned and his body was washed away by the river.

(3) The villagers searched for the body of the deceased but could not find it. Later on, the body was found by the Sub-Inspector in a canal about half a mile from the place of occurrence. The body had been eaten by tortoises and the head and the face were bitten off and the skin had dropped off. The eye lids were absent. The post mortem examination was held the next day at about 1 P. M. The visible injuries on the body consisted of a contusion 2" x 3" on the left shoulder and another, contusion 1" x 1" on the right shoulder. Soft tissues of head and neck were absent. There was a tria radia fracture of right parietal bone.

In the brain there was clotted blood in an area 4" x 4" on the right lobe of cerebrum. The membrances were congested with petechial haemorrhage. In the opinion of the doctor, who performed the post mortem examination, death was due to coma following the injury on the head. The doctor in his statement in Court stated that the head injury could have been caused by one blow or by more than one blow and that the death was due to head injury and not to drowning because there was not much bloating and the deceased had not sucked in a large amount of water.

(4) The appellants denied the commission of the offence and said that they had been prosecuted on account of enmity. In support of the prosecution case, Mohan, son of the deceased, who lodged the first information report, Masih Charan sweeper, who was grazing pigs on the bank of the river at the time of murder, Ishri, Bandu, Ghanshiam and Tirki, who were ploughing their fields at the banks of the river, were produced as eye-witnesses of the incident. The statements of these witnesses are not free from contradictions. But having given our best consideration to the arguments of the learned counsel for the appellants upon the question whether they should be believed or not, we have come to the conclusion that in substance their statement that the appellants beat the deceased with lathis is true, but that the prosecution case that the deceased was beaten even after he had fallen in the river has not been satisfactorily established.

(5) Having regard to the statement of the doctor we are satisfied that the deceased met his death as a result of coma caused by haemorrhage in the brain consequent upon the injury on the head and not by drowning. It is possible that there was only one injury on the head. There were two other injuries on the shoulders and they must have been caused by the two other persons.

(6) As the question whether the injury received by the deceased on the head, though it caused death of the deceased, was sufficient in the ordinary course of nature to cause death, was not cleared up in the court below; we examined the

doctor in this Court. He has stated that the injury caused in the present case was sufficient in the ordinary course of nature to cause death.

(7) It is not clear from the evidence on record as to who caused the fatal injury on the head.

(8) The question then is what offence has been committed by the person who caused the injury on the head and what offence has been committed by the other two appellants, having regard to the applicability of Ss. 34 and 35, Penal Code. It is contended by learned counsel for the appellants that the person who caused the injury on the head could not be held guilty of murder under S. 302, I. P. C., but must at the most be held guilty of culpable homicide not amounting to murder under S. 304, I. P. C. and that the other two accused, having regard to the common intention of them all, which was merely to beat the deceased, could not be held guilty either of murder or of culpable homicide not amounting to murder but only of causing simple injuries, even if S. 34 or 35, I. P. C. were applied to the case.

(9) A large number of authorities have been cited before us, which are not easily reconcilable. Opinions expressed in cases decided by the various Courts in India differ not only with regard to the application of Ss. 299, 300 and 304, I. P. C. to the particular facts of a case but also with regard to the true meaning of those sections. It is, therefore, necessary first to examine the sections themselves and to determine their true meaning.

(10) Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. It is strange that in some cases S. 299 has been taken to be the definition of culpable homicide not amounting to murder, although the section clearly speaks of culpable homicide simpliciter. The scheme of the Penal Code is that first the genus 'culpable homicide' is defined and then murder, which is a species of culpable homicide, is defined. What is left out of culpable homicide after the special characteristics of murder have been taken away from it, is culpable homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder.

This can best be understood if we put Ss. 299 and 300 side by side.

Section 299	Section 300
A person commits culpable homicide, if the act by which the death is caused is done.	Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done.
(a) With the intention of causing death,	(1) With the intention of causing death,
(b) With the intention of causing such bodily injury as is likely to cause death,	(2) With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused,
(c) With the knowledge that. . . the act is likely to cause death.	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,
	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and there is no excuse for incurring the risk. . . . .

Clause (a) of S. 299 corresponds with cl. (1) of S. 300. Clause (b) of S. 299 corresponds with cls. (2) and (3) of S. 300, and cl. (c) of S. 299 corresponds with cl. (4) of S. 300.

(11) 'Clause (b) of S. 299 and cl. (3) of S. 300.' Clause (b) of S. 299 speaks of intention to cause an injury likely to cause death. Clause (3) of S. 300 speaks of an intention to cause bodily injury which injury is sufficient in the ordinary course of nature to cause death. The word 'likely' means 'probably'. It is distinguished from 'possibly'. When the chances of a thing happening are even with or greater than, its not happening, we say that the thing will 'probably' happen. When the chances of its happening are very high, we say that it will 'most probably' happen. An injury "sufficient in the ordinary course of nature to cause death" merely means that death will be the 'most probable' result of the injury having regard to ordinary course of nature. The expression does not mean that death must result in which such an injury is caused.

Therefore, the expression "sufficient in the ordinary course of nature" is a species of the genus 'likely'. In Ss. 299 and 304, the word 'likely' is used in a comprehensive sense as including both the higher and the lower degrees of likelihood. This is very often lost sight of. In S. 300, the word 'likely' is used in the sense of a higher degree of likelihood only as subsequent discussion will show. In common parlance, however, the word 'likely' is used only as denoting a lower degree of likelihood. It is in this sense that the word is used in decided cases to distinguish between an offence falling under S. 302 from that falling under S. 304. I shall also hereafter use it in that sense except where the contrary appears from the context.

(12) When we talk of the intention of causing an injury 'likely to cause death' it is not necessarily implied that the consequences of the injury are foreseen. All that is necessary to be shown is that such an injury was intended as in fact is likely to cause death. So also in cl. (3) of S. 300, the intention spoken of is to cause a particular injury which in fact is of such a nature as is ordinarily sufficient to cause death. It is not necessary that the accused should have the knowledge that the injury he intends to cause will be sufficient in the ordinary course of nature to cause death.

(13) In this connection the case of — 'Emperor v. Damullya Molla', AIR 1931 Cal 261 (SB), is very often quoted in support of the view that it must be proved that the accused had knowledge that the injury which he intended to cause was sufficient in the ordinary course of nature to cause death. This is a misreading of that decision. In that case there was a trivial quarrel between husband and wife, the husband at first beat his wife with a lathi and then picked up a water pot and hit her on the head which caused a fracture of the left parietal bone. The case was tried by a jury who held that the accused was not guilty of murder but was guilty under cl. (2) S. 304 I.P.C. It was urged in the High Court that the offence was of murder. The contention was repelled by the Court.

Rankin, C. J., observed:

"The question in such cases is not concluded by any amount of reasoning from the mere fact that the injury caused did in fact result in death. What one has to see, is, first what degree of injury did the man intend, and secondly, what did he know as to the consequences of such injury. In this case, the jury were quite entitled to find that he did not know that the amount of injury which he would do when he struck the woman on the head by a water

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Clause (a) of S. 299 corresponds with cl. (1) of S. 300. Clause (b) of S. 299 corresponds with cls. (2) and (3) of S. 300, and cl. (c) of S. 299 corresponds with cl. (4) of S. 300.

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Therefore, the expression "sufficient in the ordinary course of nature" is a species of the genus 'likely'. In Ss. 299 and 304, the word 'likely' is used in a comprehensive sense as including both the higher and the lower degrees of likelihood. This is very often lost sight of. In S. 300, the word 'likely' is used in the sense of a higher degree of likelihood only as subsequent discussion will show. In common parlance, however, the word 'likely' is used only as denoting a lower degree of likelihood. It is in this sense that the word is used in decided cases to distinguish between an offence falling under S. 302 from that falling under S. 304. I shall also hereafter use it in that sense except where the contrary appears from the context.

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(13) In this connection the case of — 'Emperor v. Damullya Molla', AIR 1931 Cal 261 (SB), is very often quoted in support of the view that it must be proved that the accused had knowledge that the injury which he intended to cause was sufficient in the ordinary course of nature to cause death. This is a misreading of that decision. In that case there was a trivial quarrel between husband and wife, the husband at first beat his wife with a lathi and then picked up a water pot and hit her on the head which caused a fracture of the left parietal bone. The case was tried by a jury who held that the accused was not guilty of murder but was guilty under cl. (2) S. 304 I.P.C. It was urged in the High Court that the offence was of murder. The contention was repelled by the Court.

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"The question in such cases is not concluded by any amount of reasoning from the mere fact that the injury caused did in fact result in death. What one has to see, is, first what degree of injury did the man intend, and secondly, what did he know as to the consequences of such injury. In this case, the jury were quite entitled to find that he did not know that the amount of injury which he would do when he struck the woman on the head by a water

pot would likely cause death nor did he intend such an injury as in the ordinary course of nature would cause death."

The learned Chief Justice was endeavouring to show that the injury actually inflicted could not have been intended to be inflicted and from that point in view his Lordship referred to knowledge of the consequence of such injury. As the husband could not imagine that he would be causing fracture of the skull by hitting the woman with a water pot, he could not be said to have intended an injury that would be sufficient in the ordinary course of nature to cause death or even an injury which was likely to cause death.

(14) The difficulty that usually arises is of ascertaining the intention of the accused when, say, the injury actually caused is fracture of the skull and compression of the brain resulting in death. The injury actually caused is sufficient in the ordinary course of nature to cause death. Did the accused intend to cause the injury actually caused or did he merely intend to cause a wound on the head? The presumption is that man intends the natural consequences of his act. But this doctrine cannot be carried too far, for otherwise, it would eliminate from the law the distinction between intentional and negligent or accidental wrong doing.

The true rule is that where the injury caused is not the result of accident or of negligence, a strong presumption arises that the injury caused was intended to be caused, though this presumption may be rebutted by other circumstances, e. g. the motive of the accused, the nature of attack, the time and place of attack, the position and condition of the deceased, the number of injuries, the force used etc.

(15) 'Clause (b) of S. 299 and cl. (2) of S. 300'. When cl. (3) of S. 300 speaks of an injury "sufficient in the ordinary course of nature to cause death," it contemplates an injury caused to a normal grown up human being, and does not take account of the special physical condition of the person harmed accelerating his death. When an injury which would not be sufficient to cause the death of an ordinary grown up human being, is sufficient to cause the death of a person in a sub-normal state of health, e. g., by reason of age, disease, or weakness or previous injuries, it is spoken of as an injury "likely to cause the death of the person 'to whom the harm is caused'", bearing in mind that person's special physical condition. This is provided for in cl. (2) of S. 300.

A person is guilty of murder if, having full knowledge of the peculiar physical condition of another, and further having knowledge that the injury intended to be caused will most likely result in that person's death on account of his peculiar physical condition, he causes the injury to him and death ensues.

The conclusion that cl. (2) of S. 300 refers to the case of a person with a peculiar physical condition and to the accused having knowledge of that peculiarity, is reached on the following considerations:

(a) A comparison of cls. (3) and (2) indicates that while in cl. (3), the person to whom the harm is caused is not spoken of at all, he is particularly mentioned in cl. (2). The inference is irresistible that some peculiarity of the person harmed was intended by the legislature to be within the knowledge of the accused in cl. (2).

(b) Illustration 2 to S. 300 which undoubtedly illustrates the meaning of cl. (2) also speaks of a person with a diseased spleen.

(c) If no peculiar physical condition of the person harmed were intended, then cl. (2) would cover a case of an injury which is merely likely to cause death and not necessarily "sufficient in the ordinary course of nature to cause death" to be enough to make the offender guilty of murder, provided he knows this fact.

Since there is no direct evidence of knowledge of a person and knowledge of a normal human being is imputed to all, the condition requiring knowledge that the injury is likely to cause death of the person harmed (assuming the person harmed to be a normal one) will serve no particular protection to the offender, and in practically all cases a person will be held guilty of murder even if the injury is not sufficient in the ordinary course of nature to cause death, but is merely "likely to cause death", i. e., even when the probability of death is not very high. This would render cl. (3) wholly superfluous and unnecessary.

(d) In case of doubt, a penal statute must be construed in favour of an accused rather than in favour of the prosecution. The present tendency is to take a more humanitarian view than used to be taken formerly.

(16) This view is supported by opinion of Melville, J. in — 'Reg v. Govinda', 1 Bom 342. See also —'The King v. Aung Nyun', AIR 1940 Rang 259 (FB), & —'Babulal Beharilal v. Emperor', AIR 1946 Nag 120.

(17) In almost every case in which a somewhat contrary opinion seems to have been expressed, the case was really governed by cl. (3) of S. 300. For example:

(18) (1) In — 'Ghurey v. Rex', AIR 1949 All 342 (decided by P. L. Bhargava J. and one of us) a number of injuries were caused on different parts of the body, but none on any vital part of the body. Death was due to shock & haemorrhage caused by multiple injuries. It was held that the multiple injuries inflicted upon the man were sufficient in the ordinary course of nature to cause death. But it was added "at any rate, were such as were likely to cause death." These additional remarks were unnecessary and were made under the impression that cl. (2) of S. 300 applied even to normal persons. On a further consideration of the matter we have come to a contrary conclusion.

(19) (2) In — 'Mewa v. Rex', 1950 All LJ 75 (Kidwai and Chandiramani JJ.) the injuries caused were sufficient in the ordinary course of nature to cause death. The opinion expressed in —'Gajraj v. Emperor', 1942 Oudh WN 316 which was referred to with approval in the above case restricting the applicability of part 1 of S. 304 to cases falling under the exceptions to S. 300 is with great respect unsupportable.

(20) (3) The same remarks apply to —'Emperor v. Ratan', AIR 1932 Oudh 186.

(21) Clause (c) of S. 299 and cl. (4) of S. 300. Both require knowledge of the probability of the act causing death. Clause (4) of S. 300 requires this knowledge in a very high degree of probability. The following factors are necessary: (i) that the act is imminently dangerous, (ii) that in all probability it will cause death or such bodily injury as is likely to cause death, and (iii) that the act is done without any excuse for incurring the risk.

(22) Clause (4) of S. 300 is not intended to apply to cases in which a person intends to inflict an injury likely to cause death because the section speaks of knowledge and not of intention of an injury likely to cause death. Usually it applies to cases in which there was no intention of causing death or of causing any bodily injury.

It may, however, also apply to an act in which the intention is to cause simple grievous hurt merely, but the act is done with the knowledge and in the circumstances mentioned in the clause.

(23) As a result of the above discussion it may be laid down that S. 304 will apply to the following classes of cases. (i) when the case falls under one or the other of the clauses of S. 300 but it is covered by the exceptions to that section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression "sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause death" and the case does not fall under cl. (2) of S. 300, (iii) when the act is done with the knowledge that death is likely to ensue but there is no intention to cause death or an injury likely to cause death. In such cases there may be either no intention to cause any injury at all, or there may be an intention to cause simple or grievous hurt but not an injury likely to cause death.

(24) When death is caused by a lathi blow or blows, the nature of the offence committed will depend upon — (a) the intention of the accused, or/and (b) the knowledge of the accused, and (c) the nature of the injury caused.

(25) At one time it was considered that the wielding of a lathi was an imminently dangerous act and that, therefore, when a severe injury was caused resulting in death, the case fell within the purview of cl. (4) of S. 300 vide —'Garib v. Emperor', 17 All LJ 985, — 'Emperor v. Umrao', 21 All LJ 316 and — 'Parshadi v. Emperor', 1929 All LJ 244.

(26) This view has not been consistently followed in this Court.

(27) In — 'Perana v. Emperor', 1936 All LJ 333, it was observed that

"the use of lathis is certainly dangerous but is not so dangerous that one would suppose that anybody would in the ordinary course think that death is a probable cause of the use of a lathi. Our experience is that lathis are frequently used and result in nothing more than injuries which are simple hurts or at the most grievous hurts."

In —'Ganga Sahai v. State', Cri Appeal No. 1072 of 1949, decided by Sapru and V. Bhargava, JJ. on 27-3-1951, it was observed:

"The learned Sessions Judge appears to think that because the fatal injuries were caused by a lathi which is a dangerous weapon S. 302 was the right section to apply. As is well known, this view no longer finds favour with this Court. It cannot be said of every lathi blow that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death."

Some times where death resulted from a single lathi blow on a vital part of the body e. g. the head, it has been held that the case fell under S. 304 because the injury intended to be caused was such as was "likely to cause death" vide — 'Khiman v. Emperor', 1936 All LJ 73. — 'Perana v. Emperor', 1936 All LJ 333. But in none of these cases cl. (3) of S. 300 was discussed.

(28) Where actual injury caused was sufficient in the ordinary course of nature to cause death and it could not be said that the injury was accidentally or negligently caused a strong presumption arises that the intention was to cause the injury which has been caused and as such the case would fall under cl. 3 of S. 300. It would be particularly so if the attack was premeditated, just as it was in the present case. This presumption may be rebutted. It is not the law that where death is caused by one lathi blow alone the offence will invariably fall under S. 304, IPC. In determining the intention other circumstances as have been already mentioned in the earlier part of the judgment will also have to be taken into consideration.

(29) In the present case the injury was sufficient in the ordinary course of nature to cause death. There is nothing to show that the injury was caused accidentally or negligently. The presumption, therefore, is that the intention was to cause the injury which was actually caused or in other words the intention was to give a smashing blow on the head. The fact that there was one injury only does not destroy the presumption, because the force with which the blow was caused must have been very great. The motive was to take revenge on the deceased for having abused the appellants though this was in exchange of the abuse showered upon the deceased by the appellants themselves.

The motive further was to prevent the deceased from asking Tota appellant to visit the deceased. The motive was not strong enough for causing death. Even if the accused did not have the intention of causing death, they certainly had the intention of beating the deceased. In the absence of any definite evidence that the intention of giving the beating was confined to causing simple hurt or grievous hurt or an injury likely to cause death ('likely' used in the sense of a lower degree of likelihood), the presumption of intention drawn from the nature of the injury actually caused remains unshaken. It must, therefore, be held that the person who actually caused the injury on the head was guilty of murder as defined in cl (3) of S. 300.

(30) The same intention must be attributed to the other two persons for the very same reasons as stated above. In their case also there is nothing to show that the intention of beating was merely confined to causing simple hurt or grievous hurt or an injury likely to cause death. It is true that they inflicted simple injuries but all the three were acting in concert and the intention to be inferred must be the intention deducible from the entire act committed by all the three. The entire act included the injury on the head. The intention of the other two persons must be gathered not merely from the two simple injuries which they inflicted but also from the injury on the head. The reason is that under S. 34 when a criminal act is in furtherance of the common intention of all, everyone of the joint actors is responsible for the entire act. When three persons attack another with lathis, not upon a sudden quarrel but in concert and after previous consultation, they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention.

(31) If, however, we conclude that the common intention was to give simple hurt or grievous hurt or an injury likely to cause death, then the mere fact that one of them has actually caused an injury sufficient in the ordinary course of nature to cause death would be immaterial and the persons who actually did not cause the fatal injury would not be guilty of murder but would be guilty of causing simple hurt or grievous hurt or of culpable homicide not amounting to murder, as the case may be. The reason is that in such a case either the person who caused the fatal injury, (injury sufficient in the ordinary course of nature to cause death) caused it either accidentally without intention of causing such injury, or,

exceeded the common intention and formed a stronger intention of causing an injury of that nature.

If he caused the injury without the intention of causing the injury sufficient in the ordinary course of nature to cause death, he would not be guilty of murder under S. 300, but would not (sic) be guilty of the offence which would be made out upon and (sic) the intention and knowledge attributed to him, i. e. either for simple hurt, for grievous hurt, or for culpable homicide not amounting to murder, and if he could not be held guilty of murder, his associates too could not be held guilty of murder.

If on the other hand he exceeded the original common intention and formed the intention of causing the injury which was actually caused, he alone would be guilty of causing murder but his associates would not be guilty of murder, because the act was done by him not in the furtherance of the common intention which was of a lower degree but in furtherance of a different intention which was of a higher degree, and which was formed by him alone. It should be remembered that S. 34 makes persons liable for the "acts" of an associate and does not make them liable for the "offence" which might be committed by an associate, and further S. 34 makes persons liable for the act of an associate only when the act was done "in furtherance of the common intention" and not in furtherance of a different intention.

The intention to cause an injury sufficient in the ordinary course of nature to cause death is an intention which is quite different from the intention to cause simple hurt or grievous hurt or an injury likely to cause death.

(32) In the present case, however, as already discussed above, there is nothing to show that the intention of the person who actually caused the fatal blow on the head was different from the intention of the others. Hence all the three will be liable for murder as defined in cl. (3) of S. 300.

(33) In a case of this nature where only one blow on the head was given and the lathi was an ordinary lathi used by villagers, neither ringed nor extra heavy, and where it is not known who gave the fatal blow, we consider that the lesser penalty provided by law will meet the ends of justice.

(34) The result, therefore, is that while affirming the conviction of the appellants under S. 302, I.P.C. we substitute the sentence of transportation for life in place of the sentence of death imposed by the lower Court. The appeal is allowed only to this extent. The reference is rejected.

B/D.H. Appeal partly allowed.

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MALIK C. J. AND V. BHARGAVA J.

Bareilly Corporation Bank Ltd., Bareilly, Applicant v. Commissioner of Income-tax, U.P., Lucknow, Respondent.

Misc. Case No. 59 of 1949, D/- 9-9-1952.

(a) **Income-tax Act (1922), Ss. 2 (6C) and 10(2) (XI) — Capital or revenue receipt — Assessee carrying on banking and money lending business — Advance of loan in course of business — Purchase of property in discharge of loan — Resale at a profit — Transaction held was entered into in course of money-lending business and that receipts from re-sale were revenue receipts.**

The assessee, a limited Banking company was carrying on the business of money-lending on personal or other security. Though according to its articles the objects of the company included acquisition of movable or immovable property and to sell, improve, manage, etc., or otherwise deal with the property of the company, the assessee was not actually carrying out these activities as a business. In the course of its banking business it had advanced a loan to R. In order to discharge this loan which was mounting up R transferred on 1-1-1941 its 3/4th interest in the shares, and assets etc., in a Match factory. The assessee started making transfers of the property so acquired in bits. Ultimately this resulted in a profit to the assessee in the year 1944 and the Income-tax Officer holding it to be the profits of the money-lending business of the assessee in the nature of revenue receipt, assessed income-tax on it. It was found as a fact that the property under consideration was not purchased by the assessee as an investment but were only taken by them on being compelled by circumstances to accept them as payment towards their loan, that the property was accepted in lieu of the loan at a time when the value of such property was rising in the market and it was felt that this was probably the only means by which either the loss could be cut down or a profit earned on that transaction, that the assessee had a rooted objection to investing money in immovable property so much so that the assessee did not buy buildings for the purpose of housing its various branches. On a reference under S. 66(1), Income-tax Act:

Held (i) on the statement of the case and on the construction of the Articles of Association of the Assessee the transaction of purchase of the Match Factory and the subsequent sale of those premises in different bits could legally be held to be a transaction entered into by the assessee in the course of its money-lending business; (Paras 8, 9)

(ii) that, in the circumstances of the case, the receipts of the assessee by the re-sale of the premises of the Match Factory were revenue receipts. AIR 1951 All 556, Disting. (Paras 8, 9)

Anno: Income-tax Act, S. 2 (6c) N. 9; S. 10 N. 12.

(b) Income-tax Act (1922), S. 66 — Question of fact or law.

Ordinarily the question whether a certain property was acquired and sold in the course of a transaction entered into when carrying on a particular business such as money-lending business is a question of fact. (Para 5)

When inferences have to be drawn from facts proved, the question whether those inferences could or could not be drawn can be a question of law: AIR 1950 All 390 and 1942-10 ITR (Sup.) 27, Ref. (Para 6)

Anno: I. T. Act, S. 66 N. 4, 10.

G. S. Pathak, for Applicant; J. Swarup, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('50) 1950-18 ITR 286: (AIR 1950 All 390) 6, 7
('51) 1951-19 ITR 42: (AIR 1951 All 556) 8
('50) 1950-18 ITR 139: (AIR 1950 Bom 200) 4
(1930) AC 415: (99 LJ KB 318) 4
(1942) 10 ITR (Sup) 27 5, 7
(1944) 24 Tax Cases 498: (1942 SC 493) 4
(1929) 14 Tax Cas 694 4

V. BHARGAVA J.: This is a reference by the Income-tax Appellate Tribunal under S. 66(1), Income-tax Act. The assessee is a limited Banking Company having among its objects the following.

Cl. (a) To give loans or advances on personal or other security and to carry on banking business generally.

Cl. (c) To acquire by purchase, lease, exchange or otherwise any movable or immovable property & any rights or privileges which the company may think necessary or convenient with reference to any of the objects for which the company is established or the acquisition of which may seem calculated to ensure any immediate or remote advantage to the company.

Cl. (g) To sell, improve, manage, develop, exchange, lease mortgage, dispose of, turn to account or otherwise deal with all or any part of the property of the company and to sell and to realise the proceeds of sale of any movable or immovable property of the company.

(2) Though according to clauses (c) & (g) the objects of the company included acquisition of movable and immovable property which may seem calculated to ensure advantage of the company and to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account or otherwise, deal with all or any part of the property of the company, the assessee was not actually carrying on these activities as a business. In the course of its business, however, the assessee was advancing loans and one of the loans advanced was a sum of Rs. 38,000/- at an interest of 6 per cent. per annum as an over-draft to the Rohelkhand Ice Factory. The interest was charged at a reduced rate of 5 per cent. per annum after a certain period. This loan kept on mounting up and in order to discharge the loan, the Rohelkhand Ice Factory entered into an agreement with the assessee transferring its 3/4ths interest in the shares and assets etc., including lands, buildings, and godown of the Match Factory at Bareilly for a consideration of Rs. 75,000/-. An additional sum of Rs. 1,219/2/- was also included in the consideration, as this amount had to be spent by the assessee on account of stamp-duty payable on the deed of transfer.

Under the deed of transfer, all the income of the Rohelkhand Ice Factory from this property was to be the income of the Ice Factory upto 31st December 1939, but thereafter it was to be the income of the assessee. This transfer was taken in pursuance of a resolution adopted by the Board of Directors of the assessee company on 18th December 1939, and on the same day another resolution was passed indicating how the taking of this transfer was not going to result in loss to the assessee company, the reason given being that the property was likely to yield an income of 4 per cent. On the 30th December 1939 an entry was made in the accounts of the assessee company debiting Rs. 75,000/- as costs paid to Rohelkhand Ice Factory for this property. The deed of transfer was actually executed on the 22nd December 1940, and the sum of Rs. 1,219/2/- of general stamp paper for execution of the deed was debited in the accounts a day earlier as cost of general stamp paper for execution of the deed of transfer and for meeting registration charges. The transfer was actually completed on the 1st January 1941.

The assessee started making transfers of the property so acquired in bits. The first of these transfers was made on the 19th December 1941 and there were other transfers on the 26th October 1943, 3rd November 1943, 18th January, 1944, 25th May, 1944 and 16th December, 1944. As a result of these transfers the book value of the property which originally stood at Rs. 76,219/- fell to Rs. 4779/8/- by the end of the year 1944. The amount realised by these transfers together with the sum of Rs. 4,779/8/- which was the book value of the residue of the property left with the assessee exceeded the cost value of the property i.e. Rs. 76,219/- by a sum of Rs. 28,879/-. This sum of Rs. 28,879/- was shown as having been realised by the assessee during the year 1944 and the Income-tax Officer, holding it to be the profits of the business of the assessee in the nature of revenue receipt, assessed income-tax on it. In appeal the Appellate Assistant Commissioner as well as the Income-Tax Appellate Tribunal upheld the order of the Income-tax Officer. Thereupon the assessee applied to the Tribunal to state the case for opinion to this Court.

(3) The Tribunal has, on the above facts, referred the following two questions:

(i) Whether on the above statement of the case and on the construction of its Articles of Association the transaction of purchase of the Match Factory and the subsequent sale of its premises in different bids could legally be held to be a transaction entered into by the applicant in the course of its money lending business?

(ii) Whether in the circumstances of the case, the receipts of the applicants by the resale of the premises of the Match Factory were revenue receipts or capital receipts?

(4) Mr. Pathak, learned counsel for the assessee, has addressed arguments at great length to us to make out that this purchase of the property by the assessee and its re-sale in bits were not in the course of the business of the assessee of "acquiring or selling immovable property" nor was it an adventure in the nature of a trade and consequently the income which arose out of this transaction should not be treated as a revenue receipt. His contention was that this sum of Rs. 28,879 had accrued as profit on a capital investment as a result of the appreciation of the value of property acquired as capital so that it must be held to be capital receipt. This argument of the learned counsel does not appear to us to be relevant in this case as the questions referred to us by the Tribunal are not touched by this point. The income-tax authorities have not taxed the amount of Rs. 28,879 as income from the business of acquiring and selling immovable property nor has it been held by the income-tax authorities that this transaction was an adventure in the nature of trade or commerce.

Learned counsel had cited before us the cases of — 'Seksaria Biswan Sugar Factory Ltd., v. Commissioner of Income-tax (Central) Bombay', 1950-18 ITR 139 (Bom). — 'Commissioner Inland Revenue v. Fraser', (1944) 24 Tax Cas 498 — 'Jones v. Leeming', (1930) AC 415, and — 'The Commissioner of Inland Revenue v. Hyndland Investment Company', (1929) 14 Tax Cas 694 in support of his arguments. We do not consider it necessary to discuss these cases as they only bear on the question as to whether in this case the transaction of purchases of the shares and assets etc., of the Match Factory by the assessee could or could not be held to be an adventure in the nature of a trade. What the income-tax authorities have held is that the acquisition and sale of this property by the assessee was a transaction entered into by the assessee 'in the course of its money lending business' and it is on this

basis that the questions have been framed by the Tribunal for reference. We, therefore, need only examine this aspect of the case.

(5) Ordinarily the question whether a certain property was acquired and sold in the course of a transaction entered into when carrying on a particular business such as money lending business is a question of fact. Learned counsel for the assessee has, however, argued that under certain circumstances the decision of such a question depends on inferences to be derived from facts and in such cases it becomes a question of law. In support of this contention learned counsel referred us to the views of the Lord Chancellor (Viscount Simon), in — 'Bomford v. Osborne', 1942-10 ITR (Sup) 27. The Lord Chancellor, discussing the comment of the Commissioners that their conclusions were a finding of fact, observed:

"In the present instance (and the practice is not uncommon) the Commissioners after carefully setting out exhaustively the facts proved or admitted, proceed in a subsequent paragraph to state their own conclusions as a finding of fact. Presumably, the Commissioners mean to say that they deduce from the facts which were proved or admitted the three conclusions stated in para 5, and that they regard these conclusions as matters of fact. No doubt there are many cases in which Commissioners, having had proved or admitted before them a series of facts, may deduce thereform further conclusions which are themselves conclusions of pure fact. But in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the Commissioner's conclusions."

(6) There can be no doubt that when inferences have to be drawn from facts proved, the question whether those inferences could or could not be drawn can be a question of law. The function of this Court in examining the finding of an Income-tax Tribunal under such circumstances were very clearly brought out by one of us in the case of — 'Lalit Ram Mangilal v. Commissioner of Income-tax', UP Lucknow, 1950-18 ITR 286 (All). Where it was held:

"Certain facts are proved by direct or circumstantial evidence and these findings might be called the primary findings of facts. It is not disputed that such findings cannot be reopened before this Court so long as there is evidence on which such findings are based. After the primary facts have been found the question arises of inferences from them. Any legal effect from such findings must necessarily be a question of law. Where it is an inference of fact, if the inference could not be derived from the proved facts, even in that case it is possible to hold that this Court can go into the question on the same ground on which this Court does not consider itself bound by findings of fact which are not based on any evidence. Where the inference drawn is not a pure inference of fact but is a mixed inference, partly of fact and partly of law, so far as the inference is an inference of law this Court cannot be bound, but a pure inference of fact from primary facts proved, if it is not possible to hold that such inferences cannot follow from such findings, cannot be re-opened before us."

(7) It may be noticed that the views of the Lord Chancellor in — 'Bomford v. Osborne', (1942-10 I. T. R. (Sup) 27) and the views expressed in — 'Lalit Ram Mangilal v. Commissioner of Income-tax, U. P.', (1950-18 I. T. R. 286 All) are, in no way, divergent. Even the Lord Chancellor was of the view that, where conclusions of facts are deduced from pure findings of fact the question of law that arises merely is as to whether the facts proved or admitted "provide evidence" to support the conclusions drawn. In the case before us, therefore, we have first to determine what are the primary questions of fact which have been determined by the Tribunal and then we are only competent to examine whether the inference drawn by the Tribunal that the acquisition and sale of the property by the assessee was a transaction entered into by it in the course of its money-lending business, could or could not have been drawn from those facts. It appears from the statement of the case and the appellate order of the Tribunal that the Tribunal arrived at the following four primary findings of facts:

1. That the assessee was carrying on banking business and, in the course of such business, it had advanced a loan to the Rohelkhand Ice Factory.

2. That the property under consideration viz. the shares and assets etc., of the Match Factory were not purchased by the assessee as an investment but were only taken by them on being compelled by circumstances to accept them as payment towards their loan under circumstances which indicate that this was the only means of realising that loan.

3. That the property was accepted in lieu of the loan at a time when the value of such property was rising in the market and it was felt that this was probably the only means by which either the loss could be cut down or a profit earned on that transaction.

4. That the assessee had a rooted objection to investing money in immovable property so much so that the assessee did not buy buildings for the purpose of housing its various branches.

(8) It appears impossible for us to say that on these primary facts found by the Tribunal, the Tribunal could not have arrived at the inference that the acquisition and sale of this property by the assessee were merely steps in the transaction of advancing and realising its loan which had been advanced to the Rohelkhand Ice Factory in the course of its business of money lending. As soon as the assessee found it possible, the property which had been accepted in lieu of the loan was converted into cash by sale of that property. We cannot see any force at all in the contention that this property was taken as an investment of capital by the assessee when the assessee's own case throughout has been that it never wanted to invest its capital in immovable property; and the conduct of the company in selling the property as soon as it was feasible clearly shows that the property was held only temporarily in lieu of its stock-in-trade of the money-lending business.

We may give an illustration which makes the position quite clear. Supposing an assessee is carrying on only one business viz., moneylending, and, in the course of this business, he advances a loan to another person. The assets of that person somehow become non-available to the moneylender except for a valuable watch. The debtor may offer that watch to the moneylender as being the only means by which his debt can be discharged and the moneylender may be forced to accept it in payment of his debt though he might have a rooted objection to realise his loans in kind and might never have intended keeping his money invested in a watch. In such a case, after accepting the watch, the moneylender would sell it & convert it into cash that his money might again become available for his business of money-

lending. Under these circumstances no one can contend that the acquisition of the watch by the moneylender was an investment of his capital and that, if he realised any profit or loss on the sale of the watch taken in lieu of the loan which was due to him from his debtor, such profit and loss would be a capital receipt or capital loss and not a revenue receipt or revenue loss. Obviously the acquisition of the watch and its sale will be treated as a transaction entered into during the course of moneylending business when it became necessary to do so for the purpose of realising the loan advanced.

The case before us is exactly parallel. In this case, the assessee was compelled to accept the shares and assets etc., of the Match Factory in lieu of the loan advanced to the Rohelkhand Ice Factory and it is impossible to hold that this acquisition of the property was meant to be an investment of capital. The property was sold and converted into cash as soon as it was feasible to do so and the money so realised became available for use by the assessee in its moneylending business. The acquisition and sale of the property were, therefore, merely steps in the transaction of advancing the loan to the Rohelkhand Ice Factory and realising the loan from that Factory. Any amount realised in excess of the amount due from the factory on the loan was, therefore, income arising from a transaction of moneylending business.

Learned counsel, in this connection, referred us to a decision of this very Bench in — 'Gurucharan Prasad Jagannath Prasad v. Commissioner of Income-tax U. P. and Ajmer-Merwara Lucknow 1951-19 I. T. R. 42 (All). The facts in that case were, however, quite different. In that case, the most important circumstance that was found was that the assessee had received the properties in the year 1923 and they were sold in the year 1941. The assessee had kept those properties with him for a period of eighteen years. During that period, the properties or their value were not available to the assessee for carrying on moneylending business and it was held that his retention of the property for such a long period clearly indicated that he treated these properties as his own property which had been received by him in satisfaction of his debts due from his debtor. He did not convert the properties almost immediately into cash for the purpose of carrying on his moneylending business. There was a further fact that the assessee had continued to maintain the account of his debtor as showing an outstanding balance and it was not till the properties were sold, eighteen years later, that it was contended that the difference in the amount outstanding in the account and the value of the property realised was a bad debt. It was in those circumstances that it was held that the loss incurred by the sale of the property was not revenue loss and that that loss could not be treated as a bad debt. The circumstances in the present case are entirely different. In this case, it is clear that the Income-tax Tribunal was fully justified in inferring that the property acquired from the Rohelkhand Ice Factory was sold by the assessee as payment of the loan advanced and was converted into cash very soon afterward when it became feasible to do so.

(9) Consequently, our answer to the questions referred by the Tribunal is as follows:

1. On the statement of the case and on the construction of the Articles of Association of the assessee the transaction of purchase of the Match Factory and the subsequent sale of those premises in different bits could legally be held to be a transaction entered into by the assessee in the course of its money-lending business.

2. That, in the circumstances of the case, the receipts of the assessee by the re-sale of the premises of the Match Factory were revenue receipts.

(10) The department will be entitled to Rs. 400/- as its costs from the assessee.

B/K.S. Answer accordingly.

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DESAI J.

State v. Ganga Sahai, Respondent.

Criminal Appeal No. 1170 of 1952, D/- 25-10-1952.

(a) High Court Rules and Orders—(Allahabad) Rules of High Court, 1952, Vol. I, Chap. 5, R. 2(1), Chap. 11 R. 9, Chap. 18 R. 2, Proviso — Motions for admission — Powers of Judge sitting alone — Power to dismiss appeal summarily — (Civil P. C., O. 41 R. 11) — (Criminal P. C., S. 421).

Under R. 2 (1) of Chapter 5 of the Rules of the High Court, 1952, Vol. I, every motion for the admission of a memorandum of appeal, whether civil or criminal, has to be heard by a Judge sitting alone. There is a distinction between a motion for the admission of an appeal and the hearing of an appeal after admission and issue of notice to the respondent. Certain civil appeals and certain criminal appeals can be disposed of by a Judge sitting alone vide R. 2 (ii) (VII) etc. but other civil and criminal appeals cannot be disposed of by him. These provisions have reference to those civil and criminal appeals which have been admitted and come up for disposal after the issue of notice. They have no reference to "motions for admission" which are exclusively dealt with under R. 2 (i). "Motions for admission" of appeals in case in which a sentence of death has been passed are made before a Judge sitting alone though such appeals after being admitted, can be disposed of only by a Bench of two Judges. When there is a motion for admission of an appeal before a Judge sitting alone, he has power not only to admit the appeal and order a notice to be issued, but also to refuse the motion and dismiss the appeal summarily. He can dismiss every appeal summarily regardless of whether he would be competent to dispose of it after admission and issue of notice or not. Under R. 9 of Chapter 11, a Judge sitting alone is required to admit every first appeal other than an execution first appeal and direct a notice to be issued; in other cases he has been given the right to admit or dismiss the appeal as he thinks fit. That he can dismiss an appeal under O. 41, R. 11, Civil P. C. is made clear by R. 9 (b) (1). The proviso to R. 2 of Chapter 18 allows the Bench (which includes a Judge sitting alone) before which a motion is made for the admission of an appeal to dismiss it summarily under S. 421, Criminal P. C. There is, therefore, no doubt that a Judge sitting alone is competent to dismiss a criminal appeal summarily. (Para 2)

Anno: Civil P. C., O. 41 R. 11 N. 2, 4; Cr. P. C., S. 421 N. 1.

(b) Criminal P. C. (1898), S. 421 — Scope and applicability — Applies to appeals by Government.

Section 421 of the Code makes absolutely no distinction between appeals filed by Government and appeals filed by convicted persons. The fact is that every criminal appeal must be entertainable under any of Ss. 405 to 417 and must be presented in the manner prescribed by Ss. 419 and 420, and the procedure on its being presented before the appellate Court must be governed by S. 421. There is, no warrant for contending that an appeal filed by Government under S. 417 cannot be dismissed summarily. (Para 3)

Anno: Cr. P. C., S. 421 N. 1.

(c) Evidence Act (1872), S. 3 — Circumstantial evidence — Duty of Court.

One of the principles on which the Court acts on circumstantial evidence is that the fact to be inferred from circumstantial evidence must be quite inconsistent with any reasonable hypothesis of the innocence of the accused. If the circumstantial evidence is quite consistent with his innocence, it is not open to the Court to presume his guilt. In that event, the prosecution must produce direct evidence to prove his guilt. Thus when the only evidence against the accused was his own statement that he had bought the mare from one Bhura Brahman:

Held that as there was nothing improbable in the explanation, there was no justification for rejecting it & presuming dishonest knowledge. It could be only a suspicion that he had dishonest knowledge. When he offered an explanation which would reasonably be true, the prosecution could not contend that the possession of the accused-respondent should be presumed to be dishonest. The prosecution could not succeed unless it led direct or indirect evidence to prove dishonest knowledge on the accused-respondent's part. No onus lay upon the respondent to prove that he bona fide bought it. That would be nothing less than proving his innocence and he was not required under the law to prove it unless the prosecution had first proved his guilt. (Para 5)

Anno: Evi. Act, S. 3 N. 6.

(d) Criminal trial — Practice — Appeal by Government — Summary dismissal — Duty of Government.

Government may be expected, if not as a matter of law, at any rate of conduct, in litigious matters, to set a very high standard. They should not file an appeal when there is no evidence at all against the accused. If Government do not like their appeals to be dismissed summarily it is obvious that they should not file appeals which merit the fate of summary dismissal. The Court makes no distinction between appellant and appellant. 31 CLR 76, Rel. on. (Para 6)

Shri Rama, Dy. Govt. Advocate, for the State.

REFERENCE ..... /Para 6
31 CLR 76

DESAI J.: This is an appeal by the Uttar Pradesh State against Ganga Sahai who has been acquitted of the charges under Ss. 379 and 411, I. P. C. by a Magistrate.

(2) I have heard Mr. Shri Rama on his motion for admission. He contended that the appeal must be admitted and that the motion for its admission cannot be refused by a single Judge. I do not see any substance in this contention. Under R. 2 (i) of Chap. 5 of the Rules of the Court, 1952, Vol. I, every motion for the admission of a memorandum of appeal, whether civil or criminal, has to be heard by a Judge sitting alone. There is a distinction between a motion for the admission of an appeal and the hearing of an appeal after admission and issue of notice to the respondent. Certain civil appeals and certain criminal appeals can be disposed of by a Judge sitting alone vide R. 2 (ii) (vii) etc. but other civil and criminal appeals cannot be disposed of by him. These provisions have reference to those civil and criminal appeals which have been admitted and come up for disposal after the issue of notice. They have no reference to "motions for admission" which are exclusively dealt with under R. 2 (i). "Motions for admission" of appeals in case in which a sentence of death has been passed are made before a Judge sitting alone though such appeals after being admitted, can be disposed of only by a Bench of two Judges. When there is a motion for admission of an appeal before a Judge sitting alone, he has power not only to admit the appeal and order a notice to be issued, but also to refuse the motion and dismiss the appeal summarily. He can dismiss every appeal summarily regardless of whether he would be competent to dispose of it after admission and issue of notice or not. Under R. 9 of Chap. 11, a Judge sitting alone is required to admit every first appeal other than an execution first appeal and direct a notice to be issued; in other cases he has been given the right to admit or dismiss the appeal as he thinks fit. That he can dismiss an appeal under O. 41, R. 11, C. P. C. is made clear by R. 9 (b) (i). Proviso to R. 2 of Chap. 18 allows the Bench (which includes a Judge sitting alone) before which a motion is made for the admission of an appeal to dismiss it summarily under S. 421, Criminal P. C. There is, therefore, no doubt that a Judge sitting alone is competent to dismiss a criminal appeal summarily.

(3) Mr. Shri Rama's next contention was that a Government appeal cannot be dismissed summarily. This contention is equally devoid of merit. Every criminal appeal is liable to be dismissed summarily under S. 421 of the Code which makes absolutely no distinction between appeals filed by Government and appeals filed by convicted persons. It is laid down in that section that "on receiving the petition under S. 419 or S. 420, the appellate Court may dismiss the appeal summarily". It was argued that this provision deals with appeals filed under Ss. 419 and 420 of the Code and not under S. 417. Sections 419 and 420 lay down the manner in which every appeal by whomsoever and against whatsoever order must be filed. They between themselves exhaust the manners in which a criminal appeal can be filed. Even an appeal filed by Government under S. 417, Cr. P. C. must be filed in the manner prescribed under S. 419. The present appeal has been filed in the manner prescribed in that section. Therefore every appeal is governed by S. 421. Sections 405 to 418 only lay down in what circumstances, by whom, and on what grounds criminal appeals can be filed. They do not at

all lay down in what manner the appeals should be filed. As S. 421 refers to the manner in which a criminal appeal is filed before the appellate Court, it could only mention Ss. 419 and 420 and could not possibly mention Ss. 405 to 418. Section 421 lays down the procedure to be followed by the appellate Court before which an appeal is presented. If it be argued that this section does not apply to appeals filed by Government under S. 417, it can also be argued that it does not apply to appeals filed under any of Ss. 405 to 415-A; that could be quite absurd. The fact is that every criminal appeal must be entertainable under any of Ss. 405 to 417 and must be presented in the manner prescribed in Ss. 419 and 420, and the procedure on its being presented before the appellate Court must be governed by S. 421. There is, therefore, no warrant for contending that an appeal filed by Government under S. 417 cannot be dismissed summarily.

(4) Coming to the merits, I find that no case was made out against the respondent and the judicial Magistrate quite rightly acquitted him. One Thakur Das lost his mare in the beginning of 1949. It is not known how he lost it, whether it strayed from the place where it was tied or it was stolen by somebody. There is no evidence of anybody who might have seen it being taken away by anybody. It cannot be presumed that it was stolen; it is quite likely that it broke loose itself and strayed away. That mare came in possession of the respondent and he sold it in July 1950 to Naim Singh for Rs. 800/-. Naim Singh sold it for Rs. 400/- to Hem Singh after a few days. It was recovered from Hem Singh's possession on 3-8-50. This is all that is proved in the case. There is no evidence whatsoever to show how and when the respondent obtained possession over the mare except his own statement that had purchased it from Bhura Brahman for Rs. 500/-.

(5) The prosecution rested its case against the respondent only on the facts that the mare belonging to Thakur Das was lost was in the beginning of 1949 and that it was in the respondent's possession in July 50. These two facts were clearly insufficient to make out any offence against the respondent. It could not be presumed that he stole the mare because not only is there no evidence that the mare was stolen, but also that the respondent stole it was not the only fact to be inferred from his possession. The case rested against him on circumstantial evidence and one of the principles on which the Court acts on circumstantial evidence is that the fact to be inferred from circumstantial evidence must be quite inconsistent with any reasonable hypothesis of the innocence of the accused. If the circumstantial evidence is quite consistent with his innocence, it is not open to the Court to presume his guilt. In that event, the prosecution must produce direct evidence to prove his guilt. Even if the mare had been stolen, since it was found in the respondent's possession about a year later, it could not be presumed that he himself had stolen it. He could not be convicted under S. 411, I. P. C. even, in the absence of proof that he kept it in his possession knowing it to be stolen property. No evidence was led by the prosecution to prove such dishonest knowledge on his part. When the only evidence on the record was his own statement that he had bought it from Bhura Brahman and there was nothing improbable in that explanation, there was no justification for rejecting it and presuming dishonest knowledge. It could be only a suspicion that he had dishonest knowledge. Just as Naim Singh and Hem Singh had bought the mare from other persons so also could the respondent have bought it from Bhura Brahman. When he offered an explanation which would reasonably be true, the prosecution could not contend that the possession of the respondent should be presumed to be dishonest. The prosecution could not succeed unless it led direct or indirect evidence to prove dishonest knowledge on the respondent's part. No onus lay upon the respondent to prove that he bona fide bought it from Bhura Brahman. That would be nothing less than proving his innocence and he was not required under the law to prove it unless the prosecution had first proved his guilt. If the mare had strayed of its own accord, the respondent might have criminally misappropriated it by taking it into his possession. But merely from the facts that it had strayed and that after about a year it was found in the respondent's possession, it cannot be said for certain that it was criminally misappropriated by the respondent because he could have bought it innocently from Bhura Brahman as stated by him. There was thus no case at all against the respondent and the learned Magistrate rightly acquitted him.

(6) In the end Mr. Shri Rama made a fervent appeal that this appeal may not be rejected summarily. I do not consider that this was an appeal which should have been filed by Government. "Government may be expected if not as a matter of law, at any rate of conduct, in litigious matters, to set a very high standard", see — 'Crown v. Mc. Neil', 31 C. L. R. 76. They should not have filed an appeal when there is no evidence at all against the accused. If Government do not like their appeals to be dismissed summarily it is obvious that they should not file appeals which merit this fate. The Court makes no distinction between appellant and appellant.

(7) The appeal is dismissed under S. 421, Criminal P. C.

C/H.G.P. Appeal dismissed.

A.I.R. 1953 ALLAHABAD 213 (Vol. 40, C.N. 97)
(LUCKNOW BENCH)
BEG J.

Bachchu Singh, Plaintiff-Appellant v. Harbans Singh, Defendant-Respondent.

Second Appeal No. 732 of 1946, D/- 15-10-1951.

Transfer of Property Act (1882), Ss. 5 and 6(a) — Family settlement — Reversioner giving up half share in property in possession of widow after her death — If transfer of spes successionis — Reversioner if estopped from claiming entire property — (Evidence Act (1872), S. 115) — (Hindu Law — Family settlement).

A dispute having arisen between the members of a Hindu family with regard to the joint family property it was referred to arbitration. The arbitrators made their award and a decree was passed in terms thereof. The plaintiff and the defendant who were parties to the award had stated that they had nothing to do with the property in possession of the widows

but after the death of the widows they would have equal share in that property. The award proceeded to distribute the property between them on this basis. After the death of the widows, the plaintiff claimed the entire property as the next reversioner:

Held that the agreement was neither a transfer nor an agreement to transfer but was in the nature of a family settlement. The award adjusted the rights between the parties on certain assumptions and considerations one of them being that the plaintiff had undertaken not to claim a half share in the property in dispute. It was not a transfer of a spes successionis or an agreement to transfer the same and was not hit by S. 6(a), T. P. Act, and was therefore valid and binding. (Para 5)

Held also that the plaintiff having taken advantage and reaped the benefit of the settlement was estopped from claiming the entire property as a reversioner. Case law Ref. (Para 5)

Anno: T. P. Act, S. 5 N. 4; S. 6 N. 3, 4; Evi. Act, S. 115 N. 18.

R. N. Shukla, for Appellant; Sarvsri Suraj Narain, Bindeshwari Prasad and Krishna Swarup Varma, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('22) AIR 1922 PC 403: (45 All 179 PC) 6
('23) AIR 1923 PC 189: (50 Cal 929 PC) 7
('40) AIR 1940 PC 181: (ILR (1940) All 719 PC) 8
('19) 41 All 611: (AIR 1919 All 371) 11
('30) AIR 1930 All 430: (124 Ind Cas 714) 12
('30) AIR 1930 All 498 (2): (126 Ind Cas 24) 12
('30) AIR 1930 All 687: (52 All 716) 12
('39) AIR 1939 All 689: (ILR (1939) All 950 FB) 12
('50) AIR 1950 All 320 12
('08) 31 Mad 474: (18 Mad LJ 469) 11
('21) 24 Oudh Cas 151: (AIR 1921 Oudh 105) 9
('38) 1938 Oudh WN 711: (AIR 1938 Oudh 190) 10
(1804) 2 Sch & LF 41 11

JUDGMENT: This second appeal arises out of a suit for possession of four pies share in 'haqiat pukhtedari' in village Ahkori, pargana Gwarich, tahsil Tarabganj, on the allegation that this property was held by one Mst. Sukhrani in her capacity as a Hindu widow and that after the death of the said widow the property devolved upon the plaintiff-appellant Bachchu Singh as the nearest reversioner of the last male owner.

(2) The main defence set up on behalf of the defendant-respondent Harbans Singh was that there was a settlement between the parties to the suit in the year 1932, according to which the plaintiff was entitled to only a half share in the property in suit.

(3) The trial Court upheld the plea of the defendant-respondent and decreed the plaintiff's suit for possession to the extent of two pies share and dismissed it in respect of the remaining two pies share in the property in dispute.

(4) The plaintiff went up in appeal and the lower appellate court upheld the judgment and decree of the trial court. The plaintiff has filed a second appeal in this Court and the main contention urged on behalf of the appellant by his learned counsel is that the settlement in question is bad in law and cannot be given effect to. It would appear that the property in dispute originally belonged to two persons, Sheo Ratan Singh and Bhagwati Singh, who were the grandsons of Drigbijai Singh. The plaintiff Bachchu Singh and the defendant Harbans Singh are collaterals whose common ancestor Sital Singh was a brother of Drigbijai Singh the grandfather of Sheo Ratan Singh and Bhagwati Singh. In the year 1931 the widows of Sheo Ratan Singh and Bhagwati Singh were in possession of the property in dispute. At that time, there was a dispute between Bachchu Singh plaintiff-appellant and Harbans Singh defendant-respondent regarding the joint family property owned by them. By an agreement dated the 2-6-1930, they referred the dispute between them to an arbitration. This agreement to refer the dispute to arbitration recites that there had been a dispute between the parties regarding the joint family property and hence they were referring it to the arbitrators whose decision would be binding on them. On 23-6-1931, the arbitrators gave their award. On the 2-7-1931 the defendant-respondent applied for making this award rule of Court. On the 3-10-1932, the Court passed a decree in terms of the said award. In the said award, the parties to the present suit stated that they had nothing to do with the property of Sheo Ratan Singh and Bhagwati Singh at that time but after the death of the widows they would have an equal share in the said property. On this assumption, the award proceeded to distribute the joint family property between the plaintiff and the defendant. It may be taken that the adjustment of their rights and the division of their shares in the joint family property was made on the basis of the parties' undertaking to claim only one-half share in the property of Sheo Ratan Singh and Bhagwati Singh, which was in the possession of the widows at that time.

(5) The learned Counsel appearing for the plaintiff has strenuously argued that this agreement would be tantamount to an agreement to transfer the property and would, therefore, be bad in law, being a transfer of 'spes successionis', under S. 6, Transfer of Property Act. After having heard him, I cannot see my way to agree with him on this point. It appears to me that the agreement in question is neither a transfer nor an agreement to transfer but is in the nature of a family settlement. The parties to the agreement are relations. The agreement for arbitration itself recites that there had been a dispute between the parties regarding the joint family property. The award adjusts the rights of the parties in the said property on certain assumptions and considerations. One of the considerations of the said award was that Bachchu Singh had undertaken to claim only two pies share in the property in dispute. It cannot by any means be described to be a transfer of 'spes successionis' or even an agreement to transfer the same. It was merely an item of consideration moving between the parties in the wider transaction of family settlement. All that such an agreement amounts to is that Bachchu Singh had undertaken not to do a certain thing in the event of a certain contingency. He having undertaken not to do it, took the advantage of his undertaking and got the family property divided on that basis. The result of it necessarily must have been

that he would have been given a share in the joint family property larger in extent than might have been given to him if this undertaking had not been given by him. The question is whether having taken advantage of this promise at the stage of arbitration proceedings and having fully reaped its fruits by getting the division of the property made in his favour on that understanding and presumption, he can now be allowed to turn round and while pocketing the benefit that he got out of this transaction he can be permitted to deprive the opposite party of the corresponding benefit which he gets from a promise of this nature. The question is one of personal contract between the parties to do or not to do a certain thing and I can see no principle of law or equity which would stand in the way of Harbans Singh's setting up this promise by Bachchu Singh as a shield in a suit launched against him by the plaintiff Bachchu Singh claiming possession of the property. Bachchu Singh is really estopped from changing his position and setting up a claim in respect of the property which was clearly given up by him.

(6) The learned counsel for the appellant has cited three cases in support of his contention. None of these cases in my opinion seems to help him. The first case, — 'Thakurain Harnath Kuar v. Thakur Indar Bahadur Singh' AIR 1922 PC 403, was a case in which a decree was passed by the Court declaring that a certain person was the owner of the property. This person transferred the property to a third person who brought a suit on the basis of this transfer. There was in that case, therefore, clearly a transfer of 'spes successionis' and the facts of that case are not on all fours with the present case.

(7) He next cited — 'Annada Mohan Roy v. Gour Mohan Mullick', AIR 1923 PC 189, which was also a case of purchase of a right of expectancy or 'spes successionis' and has hardly any relevancy to the present case.

(8) Lastly he strongly relied on — 'Mt. Har Naraini v. Sajjan Pal Singh', AIR 1940 PC 181, which lays down that a guardian cannot make any agreement regarding the reversionary interest of a minor. The law relating to the protection of interests of a minor by a guardian stands on a different footing altogether and is governed by different considerations and the observations made by their Lordships of the Privy Council in that context can have no application to the case of an agreement entered into as a part of a family settlement.

(9) In — 'Wazan Singh v. Ratan Singh', 24 Oudh Cas 151, a registered agreement was executed between a widow on one side and certain reversionary heirs on the other, by which the reversioners relinquished their claim to a certain share and agreed to divide the rest in proportion among themselves after the widow's death. It was held that the consideration for such an agreement was the settlement of the mutual claims between the reversioners 'inter se' and that such an agreement is valid and binding not as an assignment or relinquishment of the rights in expectancy but as a settlement by which the parties defined their respective shares for the sake of avoiding future trouble and dispute.

(10) The above case was followed in — 'Chhatarpal Singh v. Sant Bakhsh Singh', 1938 Oudh WN 711, which laid down that a compromise between the members of the same family which is for the benefit of all the parties and meant to put a stop to further litigation is a family settlement and is binding as such. Section 6 (a), Transfer of Property Act, has no application to a compromise amounting to a family arrangement.

(11) In a similar case reported in — 'Chahlu v. Parmal', 41 All 611, Walsh, J., in defining the scope of Ss. 5 and 6, Transfer of Property Act, observed thus:

> "Reading sections 5 and 6 together, it is clear that the latter section does no more than enumerate certain incorporeal, inchoate, or contingent rights which cannot be transferred by an act of conveyance from one person to another. The other rights enumerated in section 6 show that this is so. The section is not one imposing a statutory prohibition against the formation of contracts relating to a certain specified subjects, as though, for example they were contrary to public policy and therefore forbidden. It merely enacts that a transfer or act of conveyance purporting to pass is ineffectual to pass any interest in these particular rights. The result is that they cannot be assigned either at law or to adopt the phraseology of English lawyers at equity by an act of transfer. And it follows that an imperfect act of transfer or an act purporting to transfer rights mentioned in the section confers no equitable interest upon the transferee such as was recognised by the Court of Equity. But this does not mean, and in my judgment could never have been intended to mean, that an arrangement or contract supported by good consideration and otherwise binding in equity upon the parties thereto will not be held binding in equity upon the parties to it merely because one of the results of it is to put one of the parties in the same position as if he had taken a transfer from the person entitled to an inheritance if a transfer could be actually effected."

While citing with approval — 'Olati Pulliah Chetti v. Varadarajulu Chetti', 31 Mad 474, the same learned Judge made the following remarks:

> "The case of — 'Olati Pulliah Chetti v. Varadarajulu Chetti', where an alleged reversioner admitted the widow's absolute interest, without expressly relinquishing anything is a case much in point. It was there held that a compromise cannot be impeached by one of the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right; that a compromise for valuable consideration cannot be repudiated unless it is shown to be illegal or void; and that an admission does not affect a transfer or fall within S. 6 (a) of the Transfer of Property Act as a transfer of a mere 'spes successionis'. As was said in an old English case, — 'Underwood v. Lord Courtown', (1804) 2 Sch. & L.F. 41, "It only amounts to this. I give you so much for not seeking to disturb me."

(12) In — 'Nakched Chaudhari v. Sukhdeo Chaudhari', AIR 1930 All 430, following — 'Chahlu v. Parmal', it was held that though the transfer of an interest by a reversioner is void, he may by becoming a party to a compromise and by taking the benefit thereunder be estopped from claiming as a reversioner. The same view of law was taken by another single Judge in a case reported in — 'Ram Pratap

v. Indrajit', AIR 1950 All 320, by a Bench of the Allahabad High Court in cases reported in — 'Raghubir Datt v. Narain Datt', AIR 1930 All 498 (2) and — 'Pohkar Singh v. Mt. Dulari Kunwar', AIR 1930 All 687, and by a Full Bench of the same court in a case reported in — 'Uma Shankar v. Ram Charan', AIR 1939 All 689 (FB).

(13) Having heard learned counsel for the parties at length, I have come to the conclusion that the settlement arrived at between the plaintiff and the defendant is not hit by S. 6 (a), Transfer of Property Act, and must be upheld as valid and good.

(14) I see no force in this appeal, which is accordingly dismissed with costs.

B/K.S. Appeal dismissed.

A.I.R. 1953 ALLAHABAD 216 (Vol. 40, C.N. 98)
(LUCKNOW BENCH)
KIDWAI AND BEG JJ.

Mahipal Singh, Defendant-Appellant v. Bhagwan Din, Plaintiff-Respondent.

Second Appeal No. 309 of 1945, D/- 20-11-51.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 43 — Applicability.

Section 43 does not deal either with void or voidable or illegal transfers or sub-leases. By reason of that section it is only those leases which are consistent with the provisions of the Act that can be held binding upon the successor. (Para 9)

B. K. Dhaon, for Appellant; B. P. Misra, for Respondent.

KIDWAI J.: Bhagwan Din, plaintiff, instituted the suit out of which this appeal arises in the Court of the Munsif, South Unnao, claiming that he was the sub-tenant of three plots of land in village Hasnapur, in the district of Unnao, which the defendant Mahipal Singh held as tenant-in-chief from the 'taluqdar'. He claimed that his sub-tenancy was a permanent one under an agreement between the father of the defendant and the plaintiff and that a rent of Rs. 34/- had been reserved which he was paying. He further pleaded that the defendant had taken action under S. 175, U. P. Tenancy Act, and that this act cast a cloud on his title as a permanent sub-tenant, which had compelled him to institute the suit out of which this appeal arises for a declaration that the defendant is bound by the agreement entered into between the plaintiff and the defendant's father and for an injunction directing the defendant not to take proceedings under S. 175, U. P. Tenancy Act.

(2) The defence was a denial of the agreement and a plea that the agreement was contrary to the provisions of the law and as such void and ineffectual. It was also pleaded that the Court had no jurisdiction to try the suit.

(3) The learned Munsif framed three issues, the first of which was to try the question whether there was contract as alleged, the second was as to jurisdiction and the third as to relief.

(4) The learned Munsif found that he had jurisdiction to try the case; that the contract was established and that the contract was not illegal. He accordingly granted the declaration and issued the injunction, though in his judgment he ordered that the suit of the plaintiff for "specific performance" be decreed.

(5) The defendant appealed but the learned Civil Judge of Unnao dismissed the appeal upholding the findings of the learned Munsif. The defendant has now come up in second appeal and the case has been referred to a Bench for disposal in view of the importance of the points raised.

(6) The pleadings do not show when the father of the defendant died. If he died before the U. P. Tenancy Act was passed, the defendant is not in possession as successor but independently in possession as a tenant under the landlord since the Oudh Rent Act did not recognise a hereditary right of succession beyond the period of five years. In that case any agreement entered into between the plaintiff and the father of the defendant would not be binding upon the defendant.

(7) If, on the other hand, the father of the defendant died after the U. P. Tenancy Act had come into force, he became a hereditary tenant under the provisions of that Act and the defendant succeeded to his holding under the provisions of S. 35 of the Act. In such a case he would be the successor of his father but that does not mean that any agreement entered into by his father would be binding upon him.

(8) Section 43 deals with the binding nature of sub-leases granted by a tenant and it provides,

"When a tenant has sub-let, the successor-in-interest of such tenant shall be bound by the terms of the sub-lease, in so far as they are consistent with the provisions of this Act."

Both the lower Courts have failed to consider this section altogether although they have referred to Ss. 39 to 44 of the U. P. Tenancy Act in dealing with the case. They have acted upon the distinction drawn in S. 44 between void and voidable transfers and they have come to the conclusion that since the sub-lease of the nature of the present one was only voidable, it bound the successors-in-interest of the man who granted it.

(9) Section 43 does not deal either with void or voidable or illegal transfers or sub-leases. By reason of that section it is only those leases which are consistent with the provisions of the Act that can be held binding upon the successor. Section 39 deals with the power of a tenant to sub-let and it directs that a tenant, other than a tenant of 'sir' or a sub-tenant, may sub-let the whole or any portion of his holding under such restrictions as are imposed by this Act. Thereafter follows S. 40 which directs that no hereditary tenant shall sub-let the whole or any portion of his holding for a term exceeding five years, or within three years of any portion of such holding being held by a sub-tenant. These are the provisions of the Tenancy Act with regard to sub-letting and if the terms of the sub-lease granted by a tenant are not consistent with these provisions, those terms will not bind the successor by reason of S. 43, even though such a lease may only be voidable.

(10) Thus having regard to the provisions of S. 43, U. P. Tenancy Act, the defendant is not bound by the agreement between Bhagwan Din and the defendant's father, which has been found as a fact to have been established. The plaintiff's learned Advocate contended that in any case the defendant had himself accepted the sub-lease. No such plea was taken in the plaint nor is there anything on the record to

show that Mahipal Singh accepted rent from Bhagwan Din on the basis of any such agreement. All that the record shows is that Mahipal Singh did accept rent from Bhagwan Din, but from this it cannot be presumed that he had any knowledge of any alleged oral agreement between his father and Bhagwan Din entered into about 20 years before the suit was filed. Thus this plea too is not established.

(11) In these circumstances this appeal must be allowed and we allow it and set aside the decrees of both the Courts below. The plaintiff's suit shall stand dismissed with costs in all the Courts.

B/V.R.B. Appeal allowed.

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(LUCKNOW BENCH)

MALIK C. J. AND BEG J.

Ram Sunder Misra, Defendant-Appellant v. Triloki Nath Pandey and others, Plaintiffs-Respondents.

Second Rent Appeal No. 53 of 1946, D/-15-11-1951.

(a) Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 295 A (inserted by U. P. Tenancy Amendment Act 10 of 1947) — Applicability — Suit for ejectment of sub-tenant — Defendant denying his status — Court finding that defendant was sub-tenant — Suit decreed before amending Act came into force — Appeal against decree dismissed — Second appeal after amending Act came into force — Defendant's counsel accepting position that he was sub-tenant — Mere fact that decree was passed in ejectment of defendant held would not change his status and, therefore, section was applicable. **(Para 7)**

(b) Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 295 A (inserted by U. P. Tenancy Amendment Act 10 of 1947) — Suit in ejectment — Anticipatory decree.

As, according to S. 295 A, a sub-tenant is not liable to ejectment for a period of five years from the date the amending Act came into force, a decree in anticipation of the cause of action arising on the expiry of five years cannot be passed in a suit for ejectment of the sub-tenant. (Para 8)

K. N. Tondon, for Appellant; R. N. Shukla, for Respondents.

MALIK C. J.: This is a defendant's appeal in a suit for ejectment under S. 175, U.P. Tenancy Act. The plaintiffs gave a notice of ejectment on 1st July 1944, claiming that the plaintiffs were hereditary tenants of the plots in suit of which the defendant was a sub-tenant.

(2) The defendant filed objections to the ejectment on the ground that he was 'britdari sankalp holder' from 'Shahi' times, his ancestors having purchased this right under a sale deed dated 4th September 1879.

(3) The trial Court held that the plaintiffs were hereditary tenants and the defendant was a sub-tenant and decreed the suit on 1st September 1945.

(4) The decree was affirmed on 20th March 1946.

(5) There was a second appeal filed in this Court in the same year. It came up for hearing before a learned single Judge of this Court on 26th October 1950, who referred it to a bench to decide the effect of certain sections of the U.P. Tenancy Amendment Act (10 of 1947) on this appeal.

(6) Section 26 of this Amendment Act provides that a new S. 295A shall be added to the original Act. According to this Section 295 A,

> "Notwithstanding any contract to the contrary or anything contained in this Act or any other law for the time being in force every person who on the date of the commencement of the U.P. Tenancy (Amendment) Act, 1947, is a sub-tenant shall subject to the provisions of the proviso to sub-s. (3) of S. 27, U.P. Tenancy (Amendment) Act, 1947, be entitled to retain possession of his holding for a period of five years from that date ... and for this period nothing in sub-s. (2) of S. 44 or S. 171 shall render the landholder of such sub-tenant liable to ejectment under the provisions of S. 171."

It is urged that by reason of this provision the plaintiffs had no right to eject the defendant till some date in 1952. The appellant no longer disputes the finding that he is a sub-tenant of the plaintiffs, but reliance is placed on this section and it is urged that the plaintiffs cannot eject the defendant till the period mentioned in the section is over. Our attention has been drawn to S. 31 of the Act which makes the Act retrospective and makes it applicable not only to suits to be filed after the Act came into force but to all proceedings — appeals and revisions — pending on the date of the commencement of the Act. The said section directs that all appeals and revisions have to be decided in accordance with the provisions of the said Act and, where necessary decrees and orders shall be amended in accordance with the said provisions. Section 31, therefore, makes it perfectly clear that the Act is intended to apply to this appeal and, if that be so, S. 295A provides that a sub-tenant shall not be ejected for a period of five years.

(7) Learned counsel for the respondent has, however, urged that the defendant has ceased to be a sub-tenant after the decree passed by the lower appellate Court and, therefore S. 295A is not applicable to him. He has further urged that a decree should be passed in his favour executable in June 1952, the Act having come into force on 14th June 1947. We are afraid neither of these two contentions can be accepted. No doubt the defendant had denied that he was a sub-tenant, but the lower Courts have found that the defendant was a sub-tenant of the plaintiffs and learned counsel for the defendant has now accepted the position that his client holds that status. The mere fact that a decree was passed for ejectment of the defendant would not change his status and make him a trespasser especially as the decree had not become final and the question of the status of the defendant was still 'sub judice' when the appeal was filed in this Court.

(8) As regards the second contention, the Act makes it amply clear that the defendant, being a sub-tenant, is not liable to ejectment for a period of five years from the date the Act came into force. The plaintiffs cannot, therefore, claim that they have now any subsisting cause of action which would entitle them to a decree for ejectment. Their cause of action for ejectment would arise on the expiry of a period of five years and we cannot pass a

decree in anticipation of the cause of action arising in 1952.

(9) The result, therefore, is that this appeal must be allowed and the plaintiffs' suit must fail. The parties, however, in the peculiar circumstances of the case, shall bear their own costs in all the Courts.

B/V.R.B. Appeal allowed.

A.I.R. 1953 ALLAHABAD 218 (Vol. 40, C.N. 100)

MUSHTAQ AHMAD J.

Ghasi Ram, Appellant v. Chaubey Mitra Sen, Respondent.

Second Appeal No. 532 of 1950, D/- 14-10-52.

(a) Transfer of Property Act (1882), S. 106 — Plaintiff obtaining permission from District Magistrate under S. 3, U. P. (Temporary) Control of Rent and Eviction Act — Even then notice under S. 106, T. P. Act is necessary — AIR 1952 All 863, Foll.—(Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3). (Paras 10, 11)

Anno: T. P. Act, S. 106 N. 24.

(b) Transfer of Property Act (1882), S. 106 — Underlying principle — Notice asking tenant to vacate house by 1st May 1947 is valid.

The principle underlying the rule contained in S. 106 seems to be that the tenant must have a clear 15 days' time prior to the end of the month of his tenancy, so that he may in the meanwhile remove his effects after arranging for another accommodation. If in addition to these 15 days he is allowed a few hours more, so that he leaves the premises by the first day of the ensuing month, he cannot be said to be prejudiced. Indeed he has a little more time to do the needful to comply with the notice served by the landlord. It would be too technical and hair-splitting to hold that, because of the tenant having been given a little more time even after the expiry of the month of the tenancy, he has been prejudiced and the landlord must wait for another month to give somewhat less generous notice and thereby procure his tenant's ejectment. A notice asking the tenant to vacate the houses "by 1st May 1947" and not on or by 30th April 1947 is not, therefore, an invalid notice. (Para 13)

Anno: T. P. Act, S. 106 N. 40 Pt. 6.

(c) Civil P. C. (1908), S. 35 and O. 41, R. 35 (3) — Suit for ejectment of tenant and for arrears of rent — Trial Court dismissing relief for ejectment and decreeing arrears — Appellate Court decreeing relief for ejectment but vacating decree in respect of arrears on ground that arrears had already been deposited in Court — Decree for costs also passed in plaintiff's favour — Plaintiff held was entitled to costs. (Para 14)

Anno: C.P.C., S. 35 N. 7; O. 41 R. 35 N. 3.

Baleshwari Pd., for Appellant; J. Swarup, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('21) AIR 1921 All 194: (43 All 330) 12

('51) 1951 All LJ 285: (1951 All WR (HC) 121) 12

('51) 1951 All LJ 702: (1952 All WR (HC) 80) 12

('52) 1952 All LJ 373: (AIR 1952 All 863) 11

JUDGMENT: These are defendant's appeals in a suit for ejectment from a house and two shops and for recovery of Rs. 701/- as arrears of rent.

(2) The plaintiff's case was that the defendant had under a 'Kiraya Nama' dated 1st April 1944, obtained the house and the shops from the plaintiff at an annual rent of Rs. 530/-, this sum being payable as follows:

Rs. 100/- on 1st April 1944,
Rs. 94/- on 20th May 1944, and
Rs. 336/- in equal instalments of Rs. 28/- on the first day of every month.

Total Rs. 530/-.

(3) The plaintiff further alleged that the tenancy had terminated on 31st March 1945 but that, rent having been accepted by him from the defendant after that date, the latter was still a tenant, now liable to be ejected in view of the permission obtained by the plaintiff from the District Magistrate under S. 3(a), U. P. (Temporary) Control of Rent and Eviction Act, 3 of 1947. In fact no such permission was necessary to eject the defendant, and indeed the District Magistrate said in his order that none was necessary but that if permission was needed, it was granted. On 31st March 1947 the plaintiff gave notice to the defendant to vacate the buildings by 1st May 1947. A suit was then filed by him on 2nd June 1947 claiming ejectment as well as arrears of rent in the amount of Rs. 701/-, out of which Rs. 21/- were stated to be payable up to 1st April 1946 and Rs. 680/- up to 1st June 1947.

(4) The defence taken was that there had been no wilful default on the part of the defendant, that he had tendered Rs. 310/- to the plaintiff, the same having been refused, that then a money order for that amount was sent to the plaintiff but was returned, and that the notice dated 31st March 1947 was invalid as it did not expire with the end of the month of the tenancy.

(5) The trial Court, while dismissing the relief for ejectment on the finding that the notice given by the plaintiff was invalid, decreed it for Rs. 701/- as arrears of rent. It further found that it was necessary for the plaintiff to give a notice under S. 106, T. P. Act in spite of the permission obtained by him from the District Magistrate under S. 3 of the aforesaid Act.

(6) Two appeals against this decree were filed in the lower appellate Court, one, No. 86 of 1949, by the plaintiff and the other, No. 89 of 1949, by the defendant.

(7) The point raised in the former appeal was that a decree for ejectment should have been passed by the trial Court and the point raised in the latter appeal was that no arrears of rent should have been decreed by that Court.

(8) The lower appellate Court modified the decree of the trial Court by decreeing the relief for ejectment but vacating the decree in respect of arrears of rent on the ground that the amount claimed by the plaintiff had already since been deposited for him in Court as being the rent due up to 31st August 1948. This being the position, the learned Judge also passed a decree for costs in favour of the plaintiff. His findings were that the notice dated 31st March 1947 was invalid as it expired on 1st May 1947 and not on 30th June (April?) 1947 when the month of the tenancy had expired, but that, in this case, it was not necessary for the plaintiff to have served a notice under S. 106, T. P. Act on the defendant at all. The first finding was thus

in favour of the defendant-appellant and the second against him.

(9) The appeal first mentioned on the top of this judgment was filed by the defendant to challenge the decree for ejectment passed by the lower appellate Court, and the other appeal was filed by him to challenge the order of costs passed by that Court in favour of the plaintiff.

(10) The main point argued before me by the learned counsel for the defendant-appellant was that the learned Civil Judge having held that the notice referred to above was invalid and it being necessary for the plaintiff to have served the defendant with a valid notice of ejectment prior to the suit, the same should have been dismissed. Learned counsel for the respondent contended that notice was in fact not necessary, as held by the lower appellate Court, after the plaintiff had obtained permission from the District Magistrate under S. 3, U. P. (Temporary) Control of Rent and Eviction Act.

(11) So far as the latter point is concerned, I am committed to the view that notice under the said section was necessary. I so held in the case of — 'Ram Sarup v. Gayatri Devi', 1952 All L J 373, on the basis of an earlier Bench decision of this Court and I am not prepared to modify my view on that point.

(12) As regards the question whether the notice dated 31st March 1947 was or was not valid, I am definitely of the view that it was. The whole argument of the learned counsel for the defendant-appellant was that the notice in this case having asked the defendant to vacate the house 'by 1st May 1947' and not on or by 30th June (April?) 1947, it was not a notice which could be deemed as expiring with the end of the month of the tenancy. He relied in support of this point on the Bench decision in — 'Shankar Lal v. Babu Ram', AIR 1921 All 194, in which the notice served on the tenant had required him to vacate the premises "by 30th June 1919" and the argument was that it was an invalid notice as it had not required the defendant to do so by 1st July 1919.

The argument was not accepted and it was held that the notice was valid. This case does not, in my opinion, help the appellant as it is only an authority for the proposition that, where the notice asks the defendant to vacate the premises on the last day of the month of the tenancy, it is valid notice. It does not mean that the Bench also meant to hold that, if the notice had asked the tenant to leave the premises by the 1st of the next month, it would have been invalid. On the contrary, learned counsel for the plaintiff-respondent has cited two decisions of this Court, one, a Bench decision in — 'Durga Prasad v. Rama Kant', 1951 All L J 285, and the other a decision by myself in the same volume at page 702. (Mohan Lal v. Kunwar Sen, 1951 All L J 702). In the former it was held:

> "Where a landlord in his notice requires the tenant to vacate the premises on the date immediately following the date of the expiry of the monthly tenancy, the notice complies with the provisions of S. 106, T. P. Act".

In the latter the tenancy was one that had commenced on the first day of each Hindi month, so that it expired on the last day of that month. The notice given to the tenant was to vacate the premises on the 1st of the following month. It was nonetheless held by me to be a valid notice.

(13) The principle underlying the rule seems to be that the tenant must have a clear 15 days' time prior to the end of the month of his tenancy, so that he may in the meanwhile remove his effects after arranging for another accommodation. If in addition to these 15 days he is allowed a few hours more, so that he leaves the premises by the first day of the ensuing month, I cannot see how he is prejudiced. Indeed he has a little more time to do the needful to comply with the notice served by the landlord. It would, in my opinion, be too technical and hair-splitting to hold that, because of the tenant having been given a little more time even after the expiry of the month of the tenancy, he has been prejudiced and the landlord must wait for another month to give somewhat less generous notice and thereby procure his tenant's ejectment. In my view, therefore, the lower appellate Court was not right in holding that the notice given in this case was invalid, although such a finding did not affect the suit as it held at the same time that no notice was in fact necessary.

(14) As regards the appeal raising the question of costs the lower appellate Court having never held that the plaintiff was not entitled to a decree for arrears of rent, and the decree for arrears passed by the trial Court having been vacated on the particular ground that the arrears for the period up to 31st August 1948 had already been deposited in Court, there is no reason why the plaintiff was not entitled to his costs.

(15) For these reasons there is no force in either of these two appeals. They are accordingly dismissed with costs.

B/V R.B. Appeals dismissed.

A.I.R. 1953 ALLAHABAD 219 (Vol. 40, C.N. 101)

MOOTHAM J.

Bhagwati Chaube, Plaintiff-Appellant v. Ram Adhar Chaube and others, Defendants-Respondents.

F. A. F. O. No. 282 of 1948, D/- 7-12-1951.

Tenancy Laws — U. P. Tenancy Amendment Act, (10 of 1947), S. 31 — "Pending under the said Act" — Suit filed in Civil Court.

Provisions of S. 31 apply not only in the case of appeals and revisions but also to proceedings in suits. Where, the suit had been properly filed in the court of Munsif it could not be a suit pending under the U. P. Tenancy Act which would necessarily have had to have been filed in a revenue court. It is therefore not affected by the provisions of S. 31 and the jurisdiction of the civil Court remained unaffected. The effect of the amending Act was not to divest the civil court of the jurisdiction which it admittedly had in a case prior to the coming into operation of that Act: AIR 1949 All 542, Rel. on. (Paras 3, 4)

Shambhu Prasad, for Appellant; H. L. Kapoor, for Respondents.

REFERENCE ..... /Para

('49) AIR 1949 All 542: (1949 All WR HC 121) 4

JUDGMENT: This is a plaintiff's first appeal from an order of the learned Civil Judge of Gorakhpur.

(2) The plaintiff had filed a suit on the 19-12-1946, in the court of a Munsif for a decla-

ration that he was entitled to exclusive possession of certain plots of land or alternatively for possession of those plots. It is unnecessary to state the circumstances which led up to the filing of this suit, for, it is not in dispute that at the time the suit was filed, it was properly filed in the court of the Munsif. It is also common ground that had the suit been filed after 14-6-1947, the date upon which the U. P. Tenancy Amendment Act (Act 10 of 1947) came into force the suit would have had to be filed in a revenue court.

The suit, as I have said, was filed in December 1946. It was decided by the learned Munsif on 5-2-1948. The plaintiff appealed from the decision of the Munsif to the court of the District Judge and cross-objections were filed by the defendants who are the present opposite parties. The learned District Judge transferred the case to the Court of the Civil Judge. The learned Civil Judge, being of opinion that the effect of the amending Act was to divest the civil court of jurisdiction set aside the judgment and decree of that Court and directed that the plaint be returned to the plaintiff for presentation to a revenue Court. It is from that order that the present appeal has been filed.

(3) Section 31 of the amending Act provides, 'inter alia' that all suits "pending under the said Act", meaning the U. P. Tenancy Act 1939, shall be decided in accordance with the provisions of that Act as amended by the amending Act, and it is the case for the appellant that the plaintiff's suit was not a suit "pending under the said Act", that it was therefore not affected by the provisions of S. 31 of the amending Act, and the jurisdiction of the civil Court remained unaffected. It appears to me clear that as the suit had been filed in the Court of a Munsif, and as it is not in dispute that it was properly filed in that Court it could not be a suit pending under the Tenancy Act which would necessarily have had to have been filed in a revenue court. I am of opinion therefore that Mr. Shambhu Prasad's submission on this point is correct.

(4) It has however been argued by Mr. Kapoor that apart altogether from S. 31 of the amending Act the effect of that Act was, as from the date upon which it came into operation, to take away from the civil Courts their jurisdiction in all cases which, had they been filed after the amending Act came into operation, would have had to be filed in a revenue Court. I do not think that submission is well founded, for it appears to me that if it were correct then S. 31 of the Act would be wholly unnecessary; and that I think is the view taken by a bench of this Court in — 'Basdeo Singh v. Bharat Singh', AIR 1949 All 542, in which the Court said:

> "It is obvious that the provisions of S. 31(1)" — that is of the amending Act — "apply to appeals and revisions under the U. P. Tenancy Act and not to those under the Code of Civil Procedure."

The matter before the Court related to an appeal, but the provisions of S. 31 apply not only in the case of appeals and revisions but also to proceedings in suits. In my opinion, therefore, the effect of the amending Act was not to divest the civil Court of the jurisdiction which it admittedly had in this case prior to the coming into operation of that Act and that this appeal must succeed.

(5) I, therefore, set aside the order of the learned Civil Judge dated 1-9-1948 and direct that the case be sent back to the lower appellate Court for hearing in the ordinary course.

(6) The appellant is entitled to his costs.

B/D.H. Appeal allowed.

A.I.R. 1953 ALLAHABAD 220 (Vol. 40, C.N. 102)

RAGHUBAR DAYAL AND AGARWALA JJ.

Mool Chand and another, Appellants v. State.

Criminal Appeal No. 154 of 1952, D/- 9-9-1952.

Penal Code (1860), S. 302 — Punishment — Criminal P. C. (1898), S. 367 (5).

Per Agarwala J.: Under S. 302 a discretion is vested in Courts either to impose a sentence of death or of transportation for life. The true principle of exercising the discretion of imposing either the penalty of death or of transportation for life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of transportation for life is imposed in all other cases. Though under S. 367 (5), Criminal P. C., the Court is required to give reasons why the sentence of death is not passed for an offence punishable with death, the law does not lay down in what cases the two sentences shall be imposed and the law has deliberately conferred a discretion on the Court to award one sentence or the other according to the circumstances of each case. This discretion is intended to be exercised to secure the end which the law has in view, namely, social justice. (Paras 14, 18)

While one accused inflicted the gandasa injuries, the other merely held the legs of the deceased and the latter was aged 20 years only:

Held that in the circumstances, a sentence of transportation for life would meet the ends of justice in the latter's case. (Para 19)

Per Raghubar Dayal J.: Under the provisions of the Penal Code and the Code of Criminal Procedure the Court is to pass the sentence of death unless there be extenuating circumstances and the Court is not to withhold the passing of the death sentence on the ground that there were no aggravating circumstances to justify the death penalty. The facts that one of the accused is about 20 years old and that he is not alleged to have actually used the gandasa do not justify awarding him the lesser penalty of law provided for the offence, when the murder was planned and brutal: Case law discussed. (Paras 31, 41)

Anno: Penal Code, S. 302 N. 2, 6, 19, 28; Cr. P. C., S. 367 N. 14.

C. S. Saran, for Appellants; Govt. Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('44) 1944 FCR 169: (AIR 1944 FC 35: 46 Cri LJ 305) 39
('29) AIR 1929 All 160: (30 Cri LJ 559) 38
('42) R. T. No. 82 of 1942 (All) 36
('48) AIR 1948 Lah 58: (49 Cri LJ 26) 37
('43) AIR 1943 Mad 69: (44 Cri LJ 299) 36
('33) AIR 1933 Nag 307: (34 Cri LJ 1168) 35

('35) AIR 1935 Oudh 265: (36 Cri LJ 529) 34
(1900-2) 1 Low Bur 216 (FB) 33
('22) 23 Cri LJ 437: (AIR 1922 Low Bur 32) 33
(1936) AC 578: (105 LJPC 115) 13

AGARWALA, J.: This is an appeal by Mool Chand, aged 22 years, and Phool Chand, aged 30 years, against their conviction under S. 302 and under Ss. 302/34, I. P. C. respectively and sentence of death. There is also before us the usual reference for the confirmation of the death sentence.

(2) The appellants were prosecuted along with Brij Lal and Ram Naresh under Ss. 147, 148, 302 read with S. 149, I. P. C. for having conspired together to murder one Nathey Ahir after arming themselves with deadly weapons in the company of one or two more persons and for having committed murder of the aforesaid person at about mid-night between the 3rd and 4th August 1951 in village Bahapur, while the deceased was sleeping on a Machan in a field. Brij Lal and Ram Naresh were acquitted by the learned Sessions Judge.

(3) It appears that Mool Chand's father Lautan and Phool Chand's father Sultan were cousins. They used to cultivate a field of Rampat zamindar, P. W. 13. Rampat ejected them by means of a suit and then cultivated the land himself for two years. In the month of Jeth or Baisakh 1951 Nathey deceased got the land from Rampat. Mool Chand and Phool Chand did not like this. They threatened Nathey that if he did not leave the land, he would come to harm. Brij Lal and Ram Naresh had, however, other enmity with Nathey and the prosecution case was that they conspired with Mool Chand and Phool Chand to murder Nathey. For the last three nights before the incident Nathey used to sleep on a Machan in his Jondhari field in order to guard his crops in the night. In the night in question, according to the prosecution, while Nathey was sleeping on a cot on his Machan, five or six persons including the appellants and Brij Lal and Ram Naresh attacked Nathey with gandasas. The actual attack was made by Mool Chand and Brij Lal while Phool Chand and Ram Naresh held the feet of Nathey to facilitate his being killed, and one or two persons, who could not be recognised, armed with lathis were standing nearby.

(4) The first information report was lodged by the deceased's wife, Smt. Dhananti, at 6-30 in the morning of the 4th of August. The Sub-Inspector Ram Adhar Singh at once proceeded to the place of occurrence and held an inquest. He found the deceased lying dead on the cot over the Machan in a pool of blood. The accused were absconding and he searched their houses in their absence and found two blood-stained gandasas from the house of Mool Chand in the presence of witnesses.

(5) The post-mortem report revealed that the deceased had received no less than 12 injuries of which 11 were incised wounds all inflicted on right side of chest, temple, face and neck.

(6) Human blood was found on one of the gandasas, while on the other the blood was disintegrated and its origin could not be determined. The accused pleaded not guilty. Mool Chand denied that the gandasas belonged to him or that they were recovered from his house. The recovery of gandasas from the house of Mool Chand was, however, proved by witnesses of recovery. Smt. Dhananti, Rama Awadh, Rama Deo and Jholai, eye-witnesses, were produced by the prosecution. Baldat and Lakni swore that immediately after the incident they saw the accused running away from the scene of murder.

(7) We have been taken through the evidence of the witnesses and I have no doubt in my mind that the prosecution case is fully established on the evidence on the record. Certain discrepancies were pointed out in the statements of the witnesses but they are all minor and immaterial. There is no reason to disbelieve the prosecution witnesses on that ground. In my opinion, guilt was brought home against the appellants and they were rightly convicted under S. 302 read with S. 34, I. P. C.

(8) It has been strongly urged that on the prosecution evidence Phool Chand was merely holding the feet of the deceased while the actual act of inflicting injuries by a gandasa was done by Mool Chand and that, therefore, Phool Chand should be given transportation for life instead of a sentence of death. It is also pointed out that he is only 20 years of age. In my opinion, this contention is sound and Phool Chand's death sentence should be commuted to transportation for life.

(9) I may here state the views I hold on the question of sentence in a case of murder. The penalty of death comes to us as a relic of the ancient doctrine of vengeance which is graphically expressed as 'a tooth for a tooth' and "an eye for an eye". Instead of allowing the injured parties themselves to settle tneir disputes by taking vengeance themselves, the State intervened and took upon itself the infliction of the same punishment as would have been inflicted by an injured person.

(10) Says Holmes in his 'Common Law' at pages 2 and 3:

> "It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman Law started from the blood feud, and all the authorities agree that the German law began in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off. The gradual encroachment of the composition may be traced in the Anglo-Saxon laws, and the feud was pretty well broken up, though not extinguished, by the time of William the Conqueror. The killings and house-burnings of an earlier day became the appeals of mayhem and arson."

(11) The doctrine of revenge gave place to the doctrine of deterrent punishment. The state inflicted a particular punishment for an offence because that punishment was considered to be a sufficient deterrent for the repetition of the crime.

(12) Of late it has been found that the policy of deterrent punishment does not solve the social problem of crimes. It is now believed that a person becomes a criminal mainly because his habits and frame of mind have been moulded in that direction by his social environments. To prevent a person from committing a crime, the substitution of environments which will avoid the formation of anti-social instincts and habits in a person is a better remedy for the prevention of crime than infliction of deterrent punishment. Thus the modern doctrine is of correction or reformation rather than punishment. The infliction of the sentence of death is a negation of reformation and, there-

fore, death penalty is being abolished in several civilised States of the world. Thus in the modern age a more humanitarian view of punishment is adopted.

(13) Under the Indian Penal Code punishments are graded according to the seriousness of the crime. The doctrine of deterrent punishment is the underlying policy of the whole scheme of punishment. At the same time, the Code allows latitude to the court to adapt the punishment to the circumstances of each case. In most cases the Code prescribes the maximum punishment, but does not prescribe the minimum punishment and the latitude given to the Judge is very great. In other cases, the Code prescribes both the maximum and the minimum penalty. There is nothing in law to prevent this discretion being exercised in consonance with the more humanitarian view of the modern age. True, Judges are not social reformers. They are interpreters of the law and enforce it as they find it. Yet, they must of necessity move with the times, or else the justice which they seek to do may, by change of circumstances, become inequitable.

They keep pace with the progress of time in two ways: first, by interpreting the words of the law in the light of the accepted ideas of the age and newly discovered facts. As was observed by the Privy Council in — 'James v. Commonwealth of Australia', (1936) A. C. 578 at p. 614, the full import and true meaning of 'words'

> "can often be appreciated when considered as the years go on in relation to the vicissitudes of facts which from time to time emerge. It is not that the meaning of words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

Secondly, where the law gives a discretion to the Judges they exercise that discretion so as to ensure social justice in accordance with the spirit of the times. No Judge now, for instance, would punish a Jean Valejin who has been through hunger and penury and has seen his family starve before his eyes, with the same severity as he would another who while in the enjoyment of plenty and prosperity has committed theft.

(14) Under S. 302, I. P. C. a discretion is vested in Courts either to impose a sentence of death or of transportation for life. Discretion must always be exercised according to principles and not according to the humour of the Judge, arbitrarily or fancifully. The principle upon which discretion is to be exercised not being fixed by any statute may be interpreted progressively in accordance with the spirit of the times so that real, and not technical justice may be secured. To my mind, the true principle of exercising the discretion of imposing either the penalty of death or of transportation for life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of transportation for life is imposed in all other cases.

(15) There are four classes of murder as mentioned in the four clauses of S. 300, I. P. C., namely,

(a) when the intention is to kill;

(b) when the intention is not to kill but to inflict injuries which are sufficient in the ordinary course of nature to cause the death of a normal person;

(c) when the intention is not to kill but to inflict injuries, with the knowledge of the special physical condition of the person injured, such injuries being sufficient to cause his death in that physical condition, though not sufficient to cause the death of a normal person; and

(d) when the intention is not to kill but the act is recklessly done and so imminently dangerous that it is likely to result in death or to cause injury which is likely to cause death and the act is done without any excuse for doing it.

(16) It appears to me that the sentence of death should be restricted to class (a) 'intention to cause death', because it is always brutal and barbarous to intentionally kill another, and to classes (b), (c) and (d) when the injuries caused are brutal or the action of the accused is highly repugnant. In other cases, a sentence of transportation for life should be imposed. Even when death should be the ordinary penalty according to the above classification, the lesser penalty provided by law may be imposed in certain circumstances. It is not possible to enumerate the circumstances exhaustively or to lay down any hard and fast rule. Each case will have to be decided on its own facts.

Some of the cases in which the lesser penalty of law should be awarded may be stated:

1. Where the accused is very young or too old, I would normally consider that a young man below the age of 18 should be considered too young to merit the death penalty and above the age of 70 to be too old for that sentence.

2. Where the accused is a young man who has acted under the instigation or the influence of his elders, I would normally consider that a man who has completed 20 years of age has no justification for pleading that he has acted under the instigation or the influence of his elders. He should have by the time he attains that age enough discretion to judge for himself.

3. Where the murder is committed during the course of a sudden quarrel and without premeditation or on the impulse of the moment and the case does not fall under any of the exceptions to S. 300.

4. When the conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband or other mere relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying an immoral intrigue with the woman.

5. When the liability is vicarious and the accused neither took part in the actual beating of the deceased nor instigated others to beat him.

6. Where there are several persons involved in the murder and only one death is caused and the actions of several accused are capable of being graded in the matter of causing death. For example, where one person inflicts injuries which bring about the death and the others merely help the former, such as by standing by or performing minor acts, the conscience of the law in such a case will be satisfied if the persons who inflicted the fatal injuries are sentenced to death and the others are sentenced to transportation for life, unless they were the ring-leaders of all the accused.

(17) In the last category of cases mentioned above all the accused are no doubt equally guilty because all of them pre-planned the murder and their action is brutal, but a differentiation in the sentence may be made because the

person who actually wields the instrument with which he causes death may be presumed to be more brutal than the one who merely helps in the commission of the crime.

(18) I am aware that under S. 367(5), the Court is required to give reasons why the sentence of death is not passed for an offence punishable with death. I am also aware that this provision has been construed as implying that the sentence of death is the normal sentence and the sentence of transportation for life is an exception. But the law does not lay down in what cases the two sentences shall be imposed and I maintain that the law has deliberately conferred a discretion on the court to award one sentence or the other, according to the circumstances of each case. This discretion is intended to be exercised to secure the end which the law has in view, namely, social justice. In my view the principles I have laid down in this judgment are calculated to serve that end.

(19) Applying these principles to the accused in the present case, I find that while Mool Chand appellant inflicted the gandasa injuries, Phool Chand merely held the legs of the deceased. Phool Chand is aged 20 years only. In the circumstances, a sentence of transportation for life will meet the ends of justice in his case.

(20) I would, therefore, dismiss the appeal of Mool Chand, confirm the death sentence imposed upon him and accept the reference in his case.

(21) I would dismiss the appeal of Phool Chand with this modification that instead of the sentence of death I would substitute a sentence of transportation for life and in his case I would reject the reference.

(22) RAGHUBAR DAYAL, J.: I have been through the judgment of brother Agarwala, and agree to the order proposed. I would like to note my reasons.

(23) The prosecution case as put in court is that these two appellants, namely, Mool Chand and Phool Chand, together with four or five other persons, went to the machan on which Nathey deceased was sleeping on the night between the 3rd and 4th August 1951, that the two appellants, Brij Lal and Ram Naresh got on the machan, that Mool Chand appellant and Brij Lal struck the deceased with gandasas and Phool Chand and Ram Naresh held certain parts of the body of the deceased, that the other persons in the party remained standing on the ground and that on the approach of the witnesses these persons ran away. Of the six prosecution witnesses, Smt. Dhananti, widow of Nathey, Ram Awadh, Ram Deo and Jholai depose about seeing Mool Chand and Brij Lal striking with the gandasa and Ram Naresh and Phool Chand holding the body of the deceased, while Baldat and Lukki depose about those persons running away. There is nothing to show that these witnesses had any reason to depose falsely against the accused appellants. I, however, doubt whether the four witnesses who depose to have seen the actual murdering depose correctly in that respect.

The first information report, which Smt. Dhananti dictated to Jholai, simply stated:

"After midnight he (my husband) raised an alarm from the machan that people were assaulting him. Attracted by his alarm Jholai Barai Pardhan, Ram Deo, Ram Awadh Ahir, Baldat Ahir and Lukki Ahir of my village, many persons of Kudaram and I reached there and saw in the light of the torch that my pattidars Mool Chand and Phool Chand and their friend Brij Lal Pasi of Ramgarh Kuber Bai-ka-Pura, and Ram Naresh Ahir of village Kudaram, at whose place Tudi used to live formerly and who had kept his (Tudi's) mother as his mistress, and one or two other persons who can be recognised if produced, were running towards the west after having cut his neck and killed him with gandasa blows. The accused were chased, but could not be secured."

It is difficult to believe that four persons, including those two who were responsible for this report should have seen the details of the incident with respect to the actual striking with the gandasa and the holding of the body and that those details should not have been mentioned in this report.

(24) Further the machan consisted of the deceased's cot fitted to four bamboos at a height of 2½ cubits, that is, about 1-1/4 yards from the ground. There was a thatch over this cot. It really consisted of two thatches, one sloping towards the west and one towards the east. The thatches were about 3-1/2 feet long, which was the length of the cot, and about 3 feet wide. They extended on each side about a span beyond the cot and were about a foot above the eastern and western edges of the cot. I very much doubt that in this set up of the machan these four accused could have taken their seat on the cot and that the witnesses who had been running from different directions could have been able to see the actual persons striking the gandasa and the persons holding the body.

(25) Ram Deo, who had run with Ram Awadh, stated that they had started running towards the machan silently. Jholai stated that when he ran from his field he did not make any noise. I cannot imagine any good reason for this common silence. Ordinarily, persons running to the help of a victim run raising shouts, and I see no reason why these persons who ran from different directions did not act in the same manner. On their shouts, it would be expected that the assailants would try to run away as soon as possible.

(26) I am, therefore, not inclined to believe the statements of these witnesses that they had seen Mool Chand giving gandasa blows and had seen Phool Chand holding the body of the deceased, and may mention here that the learned Sessions Judge acquitted Brij Lal, the other person who was also said to have given gandasa blows, and Ram Naresh. I am, however, of opinion that the statements of the six witnesses about seeing Mool Chand and Phool Chand running away deserve to be believed, in the absence of any particular reason for them to depose falsely against them in a murder case.

(27) Two gandasas are said to have been recovered from the house of Mool Chand. One of them has been found to be stained with human blood. Mool Chand and Phool Chand are cousins. They, however, reside in separate houses. The mere fact of the recovery of gandasas is not sufficient to lead to the conclusion that Mool Chand must have used a gandasa as deposed to by the witnesses. In fact their recovery may be a reason for the witnesses' stating that Mool Chand did use a gandasa. It is interesting to note that though witnesses now depose that Mool Chand and Brij Lal used gan-

dasas, Ram Awadh and Ram Deo in their statements under S. 164, Cr. P. C., deposed that only Mool Chand used the gandasa. Why they improved on that statement in court is not clear. It cannot be due to the recovery of two gandasas from Mool Chand's house, as the recovery had been made on the 4th August and their statements under S. 164, Cr. P. C. were recorded on the 14th August.

(28) I am further of opinion that the fact of the accused running away from the machan at the time of the incident is sufficient to hold that they were the murderers of Nathey. The accused gave no explanation for their presence there at the time. They denied the prosecution allegations and just stated that the case against them was on account of enmity.

(29) The murder was clearly pre-planned on account of ill-feeling and was brutal. The deceased was given eleven incised wounds, all on the face and neck. They included an incised wound 3"x1/4"xbone deep. oblique extending from the right temple to the right mastoid process across the middle of the external ear. The cartilege of the right ear had been cut through and through. Another was an incised wound 2½"x¾"xbone deep, oblique on the right lower ramus of the mandible ¼" below injury 6. The right lower ramus of the mandible had been cut and fractured. Eight of the wounds were on the right side of the face. The remaining three wounds were on the front of the neck. Two of them were deep wounds. One was 3½x2"x2½" on the front of the neck above the larynx, extending from the middle of the left side of the neck and going across the front of the neck to the right side of the neck back part. The wound went deep, cutting the muscles, nerves and big vessels. The thyroid bone and the body of the 2nd cervical vertebrae had been cut. The oesophagus was also cut at the level of the larynx. The other was 4"x1¼"xbone deep, on the front of the neck right side, going deep, cutting muscles, nerves and big vessels. The transverse process and the body of the fifth cervical vertebrae were also cut.

(30) For such a pre-planned and brutal murder, I am of opinion that the persons responsible for it and taking part in it deserve no leniency in sentence. They plan a brutal murder, they attack a sleeping person and go on hacking him till persons arrive & they had no option but to leave him and run away. In my opinion, both Moolchand and Phoolchand have been rightly sentenced to death by the learned Sessions Judge.

(31) The facts that Phool Chand is about 20 years old and that he is not alleged to have actually used the gandasa do not, in my opinion, justify awarding him the lesser penalty of law provided for this offence, when the murder was planned and committed as mentioned above. He is equally guilty not only of the offence under S. 302, I. P. C. on account of S. 34, I. P. C., but he is equally responsible for the planning and carrying out of the scheme in circumstances which would justify the extreme penalty of law fully. It is not necessary, to my mind, that the assailant who actually inflicts the fatal blow is liable to be awarded the extreme penalty of law and that his associates must be awarded the lesser penalty of law. Nor do I consider the number of persons murdered to be any criterion for awarding death sentences among the accused who are proved to have committed the murder. Punishment is not awarded under the Penal Code on the principle of an eye for an eye and a tooth for a tooth. The punishments provided in the Penal Code are for the prevention of crime by their proving as deterrent to would be criminals and, if possible, to reform the criminal by the suffering he has to undergo on account of his acting against the law and violating the rules of society.

(32) The courts are not much concerned with the policy or reason behind the law which they have to administer. The policy is for the legislature to determine. If change of times, change of circumstances, change of moral values and sentiments are supposed to make a law out of date it is for the legislature to step in and make the law consonant with the prevailing sentiments as to what ought to be a crime and what ought to be the measure of punishment. I do not, therefore, look at this question of the sentence of death in the light of the views of writers who would like it to be abolished and in fact who would like the whole system of punishment to go and to be substituted by the system of mental treatment of the supposed criminal. Any discussion of those views would be futile. The fact remains that the provisions of the Penal Code and the Criminal P. C. in this respect are what they have been for many a year past. Section 302, Penal Code, provides that a person who has committed murder shall be punished with death or transportation for life. This certainly gives a discretion to the court to award either of the two sentences, according to the circumstances of the case, keeping in view the judicial grounds for awarding one or the other of the two sentences.

Section 367 (5), Criminal P. C., provides:

> "If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."

In view of these provisions, it has been consistently held by the various Courts, whenever they had to decide this point, that the sentence of death should be the normal sentence and that there should be extenuating circumstances for justifying the awarding of the lesser sentence. I see no good reason why these provisions be now interpreted to mean that transportation for life should be the normal sentence under S. 302, I. P. C. and that the sentence of death should be justified by aggravating circumstances. The words used in section 367 (5), Cr. P. C., are not open to such an interpretation. Reasons are required for awarding the sentence other than death and not for awarding the sentence of death. I may now refer to some cases on the point.

(33) In — 'Emperor v. Shwe Hla U', 23 Cri LJ (Low Bur) 437 the Judges referring to a Full Bench case of their Court observed:

> "In — 'Crown v. Tha Sin', 1 Low Bur 216 a Full Bench of this Court held that 'the extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.' With this view we entirely concur."

(34) Exactly this view was taken in—'Naresh Singh v. Emperor', AIR 1935 Oudh 265.

(35) In — 'Local Government v. Sitrya Arjuna', AIR 1933 Nag 307, it was observed:

"The duty of a Sessions Judge under section 367 (5), Cr. P. C. is to pass sentence of death in cases of conviction of murder under S. 302, I. P. C. unless there are reasons for not passing such sentence. A mistaken view seems somewhat prevalent, namely, that sentence of death should not be passed unless there are aggravating circumstances, but this is a wrong view and the correct view is that sentence of death should be passed unless there are reasons to the contrary."

(36) In — 'In re Ramudu', AIR 1943 Mad 69, it was observed at page 71:

"There is no provision of law that sentence of death shall not be passed on a person of or above sixteen but not more than eighteen years of age. I had occasion a few days ago to say in a similar case, R. T. No. 82 of 1942 (All), that to commute a sentence of death in the absence of any mitigating circumstances purely on the ground of the age of the accused was in effect to lay it down that persons of a certain age should never be sentenced to death, even though that was not the law..... The prerogative of mercy in individual cases lies with the Provincial Government; and, it is for the Legislature to amend the Children's Act, if an amendment seems required, and to fix the age below which sentence of death shall not be passed at a higher level. It is not for us to usurp the functions of the Legislature."

Mockett J. observed:

"I, however, desire to express my explicit agreement with the observations that he has made on the subject of the sentence in this case. There is no doubt whatever that the authorities on the subject are abundant that the normal sentence for conviction for murder is that of death."

(37) In — 'Gurdev Singh v. Emperor', A I R 1948 Lah 58, four persons convicted of offences under sections 302 and 148, I. P. C., were sentenced to transportation for life. It was found by the High Court that these assailants had intended to cause the death of the victim. The learned Sessions Judge in not awarding the death sentence observed:

"All the accused in this case are young men of 20 or below..... Having regard to the nature of the injuries and the ages of the accused, I feel that it will be extremely hard to send all these four accused to the gallows. I think in this case the sentence of transportation for life under S. 302/149, Penal Code, would meet the ends of justice and I order accordingly."

Munir J. delivering the judgment of the Court, observed at page 61:

"We do not, however, consider it necessary to take additional evidence in the case as we consider that even if three of the appellants are assumed to be 20 and one 19 years old, the sentence of death cannot be refused on this ground."

He further observed:

"The question whether in a given case the sentence of death or the lesser sentence of transportation for life should be passed is essentially a matter in the discretion of the convicting Judge, but while exercising this discretion he must bear in mind the position that the usual sentence on a conviction of murder is death unless there be any extenuating circumstance..... It is only when any well-recognised ground is found to exist that the Judge is justified in withholding the capital sentence. It is impossible to lay down any general rule defining the classes of cases in which the lesser sentence may be imposed, though from time to time certain circumstances have been recognized by the Judges who had to consider this question as valid grounds for imposing such sentence. One of these is the extreme youth of the offender, however brutal or premeditated the offence; but there is no precedent for the proposition that a youth of 19 or 20 comes within this exception. Another ground for the lesser penalty is to be found in those cases where an offender who does not come within the first exception is young and acts at the instigation or under the influence of his elders.

There are several cases in which young men of 20 and above have been awarded the lesser penalty because they joined their elders in the murder. Where the murder is committed in the course of a sudden quarrel and without premeditation or on the impulse of the moment it is usual not to pass the death sentence unless the circumstances be exceptional. In cases of premeditated murder, however, the usual sentence is death unless the conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband or other mere relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying an immoral intrigue with the woman.

There is still another class of cases where the usual sentence may be withheld. These are cases where a man is convicted of murder by reason of vicarious liability. Where death is intended and the murder is premeditated the offender should usually be sentenced to death irrespective of whether the vicarious liability arises by reason of S. 34 or S. 149, Penal Code. But where the common object of an unlawful assembly is the beating of a person and death is not intended but is a likely consequence of the riot, the death sentence is withheld from those who are only constructively liable, but is imposed on the particular member of the unlawful assembly who brought about the death. These are some of the well-recognised cases where the lesser penalty may be awarded on a conviction of murder, but the classification is neither exhaustive nor absolute and many a case may arise which is not covered either by the rule or by the exception. In such cases the matter rests in the discretion of the convicting Judge which cannot be fettered by any hard and fast rule."

He further observed at page 62:

"The learned Sessions Judge finds it extremely hard to send all the four men to the gallows and seems expressly to hold that four lives should not be taken for one. Every sentence in a criminal case, whether it be a sentence of death or transportation or imprisonment, works hardship not only on the man sentenced but on others, but that has never been a circumstance which enters judicial determination of the sentence. Such cases of hardship are for the Provincial Government to consider & relieve and not for the judge. In the present

case as we have held that the murder was premeditated and death was intended we would be putting ourselves in an illogical position if we did not pass the usual sentence."

I agree with practically all the observations in this case.

(38) In — 'Parshadi v. Emperor', AIR 1929 All 160, it was observed:

"The learned Judge has said:

'It is not, I believe, the common practice to sentence to death those who are implicated in a riot in which death is caused and in which the definite assailants are not ascertained' we do not think that the learned Judge is right in stating the proposition so broadly and possibly he did not mean to. It is clear that there may be cases in which the guilt of any particular assailant of actually striking the fatal blow cannot be established but in which all the persons concerned would be indubitably guilty of murder and equally deserve a capital sentence.

Such a case may clearly be where six men go out with the deliberate intention of killing a person and in pursuance of the common object one or other kills him. It may not be possible to establish which struck the fatal blow, but it is manifest that all would be equally guilty and all should receive a capital sentence. That again is a proposition stated broadly and in particular cases might require qualification; but it is sufficient to say that there should not be, if in fact it does exist, a practice to assume that where the particular person cannot be found to be guilty of the fatal blow, the capital sentence should not be inflicted."

(39) In — 'Rajagopalan v. Emperor', 1944-6 F C R 169, two persons were convicted for rioting and murder, the prosecution case being that a large body of persons had attacked the staff of a salt factory and that when an Assistant Inspector appeared on the scene with a rifle about twenty of those persons, who had left the compound of the factory, returned to the compound and seven or eight of them, including the appellants, set upon him with their weapons and caused serious injuries to him as a result of which he died. It was contended that the appellants could be held guilty of murder only by virtue of the provisions of S. 149, I. P. C., and that in a case like that a sentence of transportation for life was more appropriate than the sentence of death. On behalf of the Crown, it was urged that the case of the appellants fell within the purview of S. 34, I. P. C.

Zafrulla Khan J. delivering the judgment of Spens C. J. and himself, observed at page 172:

"In the view that we take, it is unnecessary to decide whether S. 34 would or would not apply to the facts as found by the High Court. We are unable to accede to the contention that in case of a conviction under S. 302, Penal Code read with S. 149, the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. Had there been a finding that the appellants, though they were among the rioters, some of whom in pursuance of the common object of the unlawful assembly as at that stage constituted, caused the death of the Assistant Inspector, had themselves taken no part in the assault upon the deceased, there might have been some force in the suggestion that the lesser sentence would meet the ends of justice in their case.

There is no such finding in this case. On the contrary, the finding is that the appellants were among the seven or eight persons who inflicted the large number of injuries which the deceased received, though the High Court did not go so far as to accept that part of the evidence which indicated the nature of the injuries that the appellants had actually inflicted. Having regard to all the circumstances of the case as disclosed in the evidence, we are not disposed to hold in the case of either of the appellants that the sentence of death is inappropriate."

(40) Varadachariar J. felt some difficulty in sustaining the sentence of death imposed on one of the appellants. He did not, however, lay down any different considerations for the awarding of the death sentence. His difficulty was really his interpreting the judgment of the High Court to mean that if the Judges had been of the view that the appellants were guilty on account of the application of S. 149, I.P.C., they would have been disposed to sentence them to transportation for life and therefore, he felt that the decision on the point whether they were guilty of murder with the help of S. 34 or with the help of S. 149, I. P. C., ought to have been determined and that without a finding on that point the death sentence should not have been confirmed.

(41) The aforesaid cases support what I have said above that the provisions of the Penal Code and the Code of Criminal Procedure have been consistently interpreted by the various courts to mean that whenever a person is convicted of committing murder, the Court is to pass the sentence of death unless there be extenuating circumstances and that the court is not to withhold the passing of the death sentence on the ground that there were no aggravating circumstances to justify the death penalty. The fact that an accused was twenty years of age was not taken to be a sufficient reason for not awarding him the extreme penalty of law. The fact that any of the accused was not the actual person to inflict the fatal blow, was not always a good reason for not awarding the death penalty, though it could be a good reason in certain circumstances depending on the nature of the incident.

There is a definite expression of opinion in various cases that for premeditated murders the death penalty is the only appropriate penalty for persons who actually commit the murder or who just help the actual murderer in carrying out the common intention to kill the other person. I am, therefore, of opinion that persons responsible for premeditated well-planned and brutal murders deserve the death penalty, irrespective of the fact whether they actually gave the fatal blow, or whether they did give any blow to the deceased, or whether they were just present along with the other persons to whom the task of inflicting injuries was assigned.

(42) I am, therefore, of opinion that both the appellants were rightly convicted and sentenced to death by the learned Sessions Judge. However, in view of the opinion of my brother that the sentence of death passed on Phool Chand be commuted to transportation for life, I agree with the order proposed by him to the effect that the appeal of Phool Chand be dismissed

and that the sentence passed against Phool Chand be substituted by a sentence of transportation for life.

(43) BY THE COURT: We dismiss the appeal of Mool Chand. We dismiss the appeal of Phool Chand against his conviction under S. 302, I. P. C., with the modification that instead of the sentence of death we substitute a sentence of transportation for life. We accept the reference for the confirmation of the death sentence against Mool Chand direct that the sentence of death against Mool Chand be carried out according to law. We reject the reference with respect to the confirmation of the death sentence of Phool Chand.

B/D.H. Order accordingly.

A.I.R. 1953 ALL. 227 (Vol. 40, C. N. 103)

MALIK C. J. AND V. BHARGAVA J.

Debi Prasad Malviya, Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

I. T. Misc. Case No. 168 of 1949, D/- 29-10-1952.

Income-tax Act (1922), S. 34 — Piecemeal assessment is not permissible — While assessing Income-tax officer knowing that assessee was being underassessed — Assessment cannot be reopened by notice under S. 34. (Para 5)

Anno: Income-tax Act, S. 34 N. 1.

B. Upadhya, for Applicant; S. C. Das and J. Swarup, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('44) 1944-12 ITR 341: (AIR 1944 Pat 338) 6

('51) 1951-20 ITR 568 (Punj) 6

ORDER: In this reference under S. 66(1), Income-tax Act the point submitted by the Tribunal for opinion is as follows:

"Whether, in the circumstances of the case, the notice under S. 34, Income-tax Act could be legally issued?"

The assessee has filed an application under S. 66(4), Income-tax Act and has urged that another question should have been referred to this Court for opinion. This question he has formulated is as follows:

"Whether in the circumstances of the case when the applicant was not a party to the partnership deeds in Kanpur Iron Supply Co., and U.P. Iron Steel Co., and no share of profits from those firms were received by him he could in law be held to be a 'partner' of the said firm?"

(2) The facts as they appear from the order of the Income-tax Appellate Tribunal and the statement of the case are that the assessee was being assessed as a Hindu undivided family. On 2nd December 1938, a partnership firm known as Kanpur Iron Steel Co., was started of which one Brij Bhoosan Lal, a nephew of the assessee, was a partner. The share of the capital invested in the firm by Brij Bhoosan Lal was advanced by the assessee. The sum of Rs. 17,000 advanced by the assessee was entered in his books as follows:

"Brij Bhoosan ke nam Kanpur Iron Supply Co., ke dia."

No interest was charged on this amount for a period of four years. In the assessment year 1940-41 the assessee showed the profits of this business as part of the income of the Hindu undivided family and claimed that the Hindu undivided family had a one-third share in the partnership firm. In the assessment for the next year, 1941-42, the assessee had not included in his return the income of this partnership firm but the Income-tax Officer added the profits to the total income of the assessee and made assessment on that basis. The assessee accepted the assessment and filed no appeal against the said decision. In the years in question, i.e., assessment years 1942-43 and 1943-44, the assessee did not again include the profits of this partnership business in the return filed by him. On 25th March 1944, the Income-tax Officer made the assessment for the year 1942-43. The assessment, however, was set aside by the Appellate Assistant Commissioner on 30th September 1944, and fresh assessments for the two years in question were made on 25th February 1946. Notices under S. 34 were issued thereafter and assessment for the year 1942-43 was then made on 28th February 1947, and for the year 1943-44 on 30th October 1947.

(3) We have given the facts for the assessment year 1942-43. The facts for the assessment year 1943-44 are also similar.

(4) Learned counsel for the assessee has urged that as Brij Bhooshan Lal was the registered partner of the firm and the firm had been registered under the Indian Income-tax Act, it was not open to the department to treat the assessee as the partner in the Kanpur Iron Supply Company. According to the assessee this raises a very important question of law, i.e., whether a person other than a person registered as a partner of a firm can be treated as a partner. In the view that we have taken on the point that has been referred to us, it is not necessary to go into this question and we do not, therefore, think that it is necessary to grant the application under S. 66 (4), Income-tax Act. It is, therefore, dismissed.

(5) As regards the question referred to us under S. 66(1) we find that the facts on the basis of which notice under S. 34 was issued were all known to the Income-tax Officers concerned except, of course, the actual amount of profits that had been made by the Kanpur Iron Supply Co., in the two years in question. From the assessment order of 25th February 1946, it is clear, as also from the previous assessment order of 25th March 1944, which had been set aside by the Appellate Assistant Commissioner, that the Income-tax Officer knew that the assessee had a one-third share in the partnership firm, Kanpur Iron Supply Co., and that the profits of that concern had to be added to the total income of the assessee. In the assessment order of 25th February 1946, the Income-tax Officer said:

"It appears from the file of the firm Arya Steel Company that it had no business during the previous year for the assessment year 1943-44, while the assessments for that year of the firms Kanpur Iron Supply Co., and U.P. Iron and Steel Company have not yet been completed. Necessary action for revising the present assessment by inclusion of assessee's share of profits in the latter firms will be taken later on receipt of the necessary reports from the Income-tax Officer, Kanpur."

The portion quoted above clearly indicates that the Income-tax Officer knew that the Kan-

pur Iron Supply Company and the U.P. Iron Steel Company had made profits. He also knew that a portion of this profit which had come to the share of the assessee will have to be included in the total income. He was, however, anxious to finish the assessment on the basis of the materials before him. Section 23, Income-tax Act contemplates that the Income-tax Officer should make a complete assessment on the basis of the total income of an assessee. It is not open to him to make assessments piecemeal and in a case where the Income-tax Officer has proceeded to assess one part of the income and has decided to assess the rest of the income on a later date he cannot rely on the provisions of S. 34 for the purpose of reopening the assessment. This is not a case where the Income-tax Officer had believed that there was no other income and the total income was as declared by the assessee on which he proceeded to assess the income-tax. From the order of assessment mentioned above, as also from several other orders it appears that it was well known that the assessee was being under-assessed. It cannot, therefore, be said that the fact was discovered later that the assessee had been under-assessed. In this view of the matter notice under S. 34 was clearly wrong and the Income-tax Officer had no authority to reopen the assessment already made by him.

(6) Learned counsel for the assessee has referred us to — 'Chuni Lal v. Commr. of Income-tax', 1951-20 ITR 568 (Punj), a decision of the Punjab High Court and — 'Fazal Dhala v. Commr. of Income-tax, Behar and Orissa', 1944-12 ITR 341 (Pat), a decision of the Patna High Court. The decisions do, to some extent, support the contention of the assessee. The case before us is clearly a case where the Income-tax Officer wanted to make the assessment piecemeal which, in our view, he was not entitled to do under the Indian Income-tax Act.

(7) The question, therefore, is answered in the negative. The assessee is entitled to his costs which we assess at Rs. 300.

B/R.G.D. Reference answered.

A.I.R. 1953 ALL. 228 (Vol. 40, C. N. 104)

RAGHUBAR DAYAL AND AGARWALA JJ.

Mangi, Appellant v. State.

Criminal Appeal No. 891 and Referred No. 85 of 1952, D/- 14-10-1952.

Criminal P. C. (1898), Ss. 233, 234, 235, 236, 238 and 239 — Scope.

Section 234 cannot be given its literal meaning and must be restricted in its operation in such a manner as not to conflict with Ss. 235, 236, 238 and 239. (Para 12)

The true effect of S. 234 is not to create a prohibition that more than three offences cannot be tried together. Its true effect is to provide for an instance in which more than one offence but not exceeding three committed in different transactions can be tried together. (Para 13)

When there are more than one exception to a prohibition, all of them have to be read together because they carve out the area which is not covered by the prohibition. (Para 14)

So long as a particular joint trial is permitted by one section or the other taken either singly or jointly, it cannot be said to be contrary to the intention of the legislature, though on the face of it it may appear to go beyond one of the provisions of the enactment. The use of the word 'and' between Ss. 236 and 239 instead of 'or' in S. 233 tends to support the view that a joint trial need not be justified by the provisions of only one of the sections mentioned in S. 233 but can be justified by the provisions of all such sections taken jointly. (Para 14)

Hence, where the accused are jointly tried for three or less than three offences of the same nature arising out of different transactions committed within the course of twelve months as well as for different offences arising out of the very same transactions, the trial would be perfectly valid by virtue of the combined effect of Ss. 234 and 235: AIR 1950 All 167, Rel. on; AIR 1952 Bom 177. Criticised; AIR 1938 PC 130, Ref. (Paras 16, 17)

Anno: Cr. P. C., S. 233 N. 1; S. 234 N. 5; S. 239 N. 2.

Hari Swarup, for Appellant; Govt. Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('38) AIR 1938 PC 130: (39 Cri LJ 452) 11
('50) AIR 1950 All 167: (51 Cri LJ 571) 9, 12
('51) 53 Bom LR 928: (AIR 1952 Bom 177: 1952 Cri LJ 779 FB) 9

AGARWALA, J.: Mangi Lohar appeals against his conviction under s. 302, Penal Code and sentence of death. There is also before us the usual reference for the confirmation of the sentence of death. The incident which was the subject matter of investigation in the Court below related to the murder of two boys Rameshwar and Badri, aged about 15 and 10 years respectively on 18th December 1951 in the afternoon in village Bilgaon in police station Jalalpur in the district of Hamirpur.

(2) It appears that the deceased were the daughter's sons of Smt. Tulsia, an old widow aged 65 whose husband had left a tenancy holding, a house & some other property. She had sent for her two grandsons who used to live in another village to help her in cultivation and it is said that she intended that they should take all her husband's property after her death. Her husband had also left two nephews one of them was the appellant and the other was one Daya Ram.

The prosecution case was that Mangi and Daya Ram did not like Smt. Tulsia calling her grandsons in the village for helping her in cultivation and allowing them to inherit the property after her death. Mangi and Daya Ram wanted that the property should be inherited by themselves instead of by the grandsons. They at first asked Smt. Tulsia to send away the two boys. But she would not listen. On the day of occurrence, i. e. 18th December 1951, in the afternoon, Mangi told Smt. Tulsia that she could be allowed to keep the two boys upto the month of Chait (Chait next) on condition that she paid him Rs. 100/- forthwith and that if she refused to do so he would take the lives of the two boys. Some villagers intervened and reprimanded Mangi and assuaged the feelings of Tulsia and assured her that no harm would be done to the boys. Smt. Tulsia did not pay the money and returned to her house.

In the afternoon she started for the fields in a bullock cart with Rameshwar in order to bring fodder. Dalli and Dhani Ram, two other boys, friends of Rameshwar, also accompanied the party in the cart. When the cart was passing along a narrow road with high mounds on either side, Mangi appellant and his brother Daya Ram got into the cart from behind. Mangi was armed with an axe. Daya Ram caught hold of Rameshwar while Mangi struck him with an axe. Rameshwar fell down on the ground. Even after this Mangi continued to inflict blows on him killing him on the spot. Tulsia also received injuries while attempting to protect Rameshwar. Dalli and Dhani Ram ran away in fright. After having murdered Rameshwar and injuring Tulsia, Mangi and Daya Ram, so the prosecution story goes on, returned to the village and found the other boy Badri standing in front of the house of one Ghasya Basor. Mangi killed him also with the axe. Ghasya Basor was inside his house and had just taken his meal. On hearing the cries of the boy he came out. In the meanwhile Tulsia also came weeping and crying on account of the murder of Rameshwar. Ghasya told her that her other grandson had also been killed just then.

(3) The first information report of this incident was lodged by Tulsia herself at the police station at about 3 A. M. next morning. The police station is nine miles away from the place of occurrence. Postmortem examination on the body of Rameshwar revealed that he had received seven incised wounds on various parts of his body. The skull bone had been fractured at various places. Post mortem examination on the body of Badri showed that he had received six incised wounds on shoulders, neck & head. In his case also the skull bones were fractured. The cause of death in both cases was injury to the brain, haemorrhage and shock. The appellant was arrested on the 19th December when the investigating officer reached the village. It is alleged by the prosecution that the appellant pointed out the axe with which the crime was committed. A blood-stained axe and a blood-stained 'safi' were recovered from his house. Both these articles were sent to the Chemical Examiner, U. P. and to the Serologist to the Government of India. The blood-stains on the safi had disintegrated and their origin could not be determined. The blood on the axe was found to be of human origin.

(4) The appellant denied his gullt and stated that he had been implicated falsely on account of enmity. In support of the attack on Rameshwar, Smt. Tulsia, Dhani Ram and Dalli were produced. Smt. Tulsia had herself been injured. There is no reason to disbelieve her story. She implicated not only the appellant but Daya Ram as well. But Dalli and Dhani Ram, the other two witnesses, did not support her in so far as Daya Ram was concerned. Daya Ram was, therefore, not prosecuted by the police. In spite of the fact that Smt. Tulsia implicates Daya Ram there is no reason to disbelieve her so far as the appellant is concerned. The statements of Dhani Ram and Dalli are also worthy of belief. No doubt they are in their teens, Dhani Ram being about 15 years old and Dalli about 13 only. The learned Sessions Judge was satisfied with their statements and believed them to be true. There are slight discrepancies in their statements as to the place from where they accompanied Tulsia and Rameshwar. But this is immaterial. We are satisfied that the appellant indeed attacked Rameshwar with an axe & killed him and also that he injured Tulsia with the axe during the course of his attack upon Rameshwar.

His attack on Badri is proved by Ghasya Basor. We have no reason to doubt his testimony. He raised shouts when he saw Badri being hacked to death by the appellant. Gudda Mali on hearing the shouts came out of his house and saw the appellant running away with an axe smeared with blood. The statement of Gudda Mali corroborates the evidence of Ghasya Basor. The recovery of the axe from the house of the appellant at his instance is proved by the statement of Ajodhya. Vishiwa Nath, another witness, proved the extra-judicial confession made by the appellant. It is not necessary to rely upon the statement of Viswa Nath when the other evidence is conclusive against the appellant, though we may say that we see no sufficient reason to discard Vishwa Nath's statement. The motive for the crime was obvious. The only reversioners that stood in the way of the appellant and his brother to succeed to the tenancy and other properties were the grandsons of Tulsia. If they were removed the way was clear for the appellant and his brother to succeed to the tenancy after the death of Tulsia. The appellant, therefore, resolved to kill her two grandsons in order that he and his brother might succeed to the property.

(5) Learned counsel for the appellant raised a question about the legality of the trial for the offences of murder and of causing hurt to Tulsia. This point was not raised in the court below. But as this is a point which goes to the root of the matter and is a question of law we have entertained it. The contention of the learned counsel is that the three offences for which the appellant was tried at one trial arose out of two separate transactions and as they were not offences of the same nature they could not be tried together. Reference was made in this connection to Ss. 233, 234 and 235 Criminal P. C. and to several decisions of various High Courts in India.

(6) It was conceded by learned counsel that the offences of murder of Rameshwar and of causing hurt to Tulsia arose out of the same transaction but he urged that the offence of murdering Badri arose out of a separate transaction and its trial could not be held jointly with the trial of the other two offences. Further it was urged that if the two murders could be combined under S. 234, the offence of causing hurt to Tulsia could not be so combined.

(7) We are not sure whether the transaction resulting in the death of Badri was not so connected with the transaction which resulted in the death of Rameshwar and injuries to Tulsia as to form part of the same transaction. Having regard to the fact that the object of the appellant was to do away with both the grandsons of Tulsia so that the property might ultimately come to the appellant and his brother and having regard to the fact that the murders of Rameshwar and Badri were committed one after the other in quick succession on the same date and almost so to say, in the same breath, we are inclined to the view that both the murders formed part of the same transaction. But as the case can be decided on the assumption that they were separate transactions we do not express a final opinion upon this matter.

(8) The normal rule undoubtedly is that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately. This is laid down in S. 233, Cr. P. C. But the same section refers to the exceptions to the rule which are to be found in Ss. 234, 235, 236 and 239 of the Code. Section 234 permits a joint trial of more

offences than one not exceeding three provided two conditions are fulfilled: (a) they are of the same nature and (b) they were all committed within the space of 12 months. If S. 234 stood by itself, no doubt, though the offences of the murders of Rameshwar and Badri could be combined in one trial, the offence of causing hurt to Tulsia could not be so combined. We have, however, to consider the effect of S. 235. Section 235(1) refers to offences committed in the course of the same transaction and it provides that all such offences may be tried together. By virtue of S. 235 the offences of murder of Rameshwar and of causing hurt to Tulsia could be tried together because they arose out of the same transaction. There has been a difference of opinion upon the point whether the operation of these two sections could be so combined as to authorise the trial of three or less than three offences of the same nature arising out of different transactions to be tried with other offences which arise out of the very same transactions.

(9) In — 'Rex v. Daya Shankar', AIR 1950 All 167, a Bench of this Court upon a review of the authorities, held that this could be done. It was observed,

> "the provisions of an Act of the legislature must be read as a whole, and in the absence of anything showing a contrary intention, every part of it must be read as supplementing and completing the other part. There is nothing in S. 233 to indicate that Ss. 234, 235, 236 and 239 cannot be read together. An examination of the provisions of these sections leads to the conclusion that the legislature intended that they should be read as supplementing each other."

After making this general observation the Bench held that:

> "The principle underlying S. 234 is that offences of the same kind committed within the space of a short period, namely of one year, and consisting of a few transactions, namely, three transactions, are not expected to prejudice the trial of the accused and so may be tried together. But more transactions than three extending over a larger period may not be so tried together."

Obviously since a trial is in respect of offences and not of transactions, what was meant by the last sentence in the above quotation was that offences of the same kind arising out of more transactions than three could not be tried together. This case was considered by a Full Bench of the Bombay High Court in — 'D. K. Chandra v. The State', 53 Bom L. R. 928 (F.B.). Chagla, C. J. accepted the principle that sections mentioned in S. 233 can be made use of in cooperation, adding, however, that "the cooperation must not lead to the contravention of any of the sections mentioned in S. 233". Commenting upon 'Daya Shankar's case' the learned Chief Justice found it difficult to understand that S. 234 dealt with different transactions and added:

> "It is only S. 235 that deals with transactions and the limitation in that section is that offences arising out of only one transaction could form the subject-matter of different charges and be combined together. Sec. 234 speaks of offences and not of transactions."

(10) We fail to see how cases requiring cooperation of Ss. 234, 235 and 236 can arise without at the same time leading to the contravention of one or the other of those sections, that is to say, cases in which joint trial of several offences be justified by resort to more than one section. When a joint trial for several offences is justified by any of these sections alone, that cannot be said to be a case of cooperation of the several sections.

(11) If S. 234 were to be construed to mean that in no case can more than three offences be tried together, that would mean ignoring Ss. 235, 236 and 239. It is significant that S. 234 does not make any exception in favour of Ss. 235 and 236. Under S. 235 any number of offences arising out of the same transaction may be tried together. Such offences may be more than three. Again under 236, in the case of a single act or series of acts when it is doubtful which of the several offences the facts which can be proved will constitute, the accused may be charged for any number of such offences either cumulatively or in the alternative. An interpretation of S. 234, which would restrict the trial of offences to three would contravene the provisions of Ss. 235 and 236. It would also contravene the provisions of S. 239. The Privy Council has clearly held that the provisions of S. 234 do not govern the provisions of S. 239, vide — 'Babu Lal Chaukhani v. Emperor', AIR 1933 P.C. 130.

(12) It follows, therefore, that S. 234 cannot be given its literal meaning and must be restricted in its operation in such a manner as not to conflict with Ss. 235, 236, 238 and 239. Viewed in this light when S. 234 speaks of the joint trial of three or less offences of the same nature it has reference to offences arising out of different transactions and not out of the same transaction because offences arising out of the same transaction are dealt with in Ss. 235 and 236. For this reason it was said in 'Daya Shankar's case' (AIR 1950 All 167), that S. 234 refers to offences arising out of three different transactions.

(13) In our opinion, the true effect of S. 234 is not to create a prohibition that more than three offences cannot be tried together. Its true effect is to provide for an instance in which more than one offence but not exceeding three committed in different transactions can be tried together.

(14) Though couched in positive terms, S. 233 as already pointed out, in reality contains a general prohibition, namely, that more offences than one cannot be tried together and it also lays down the exceptions to this general prohibition and says that these exceptions are to be found in Ss. 234, 235, 236 and 239. Therefore, the true construction to be placed upon Ss. 234, 235, 236 and 239 is that they are permissions for joinder of trials, that is to say, they lay down the circumstances in which joinder of trials can take place. When there are more than one exception to a prohibition, all of them have to be read together because they carve out the area which is not covered by the prohibition. Sec. 234 should not, therefore, strictly speaking, be read as implying a prohibition of trial of more than three offences, but should be read as laying down a permission for the joint trial of not more than three offences of the same nature.

Section 235 permits the trial of all offences arising out of the same transaction in the same trial. So does section 236 permit the trial of all offences arising out of the same transaction when it is doubtful which of several offences the facts which can be proved would constitute. Section 239 permits a joint trial of several persons in the circumstances mentioned in that section. So long as a particular joint trial is permitted by one section or the other taken either singly or jointly, it cannot be said to be contrary to the intention of the legislature, though on the face of it it may appear to go beyond one of the provisions of the enactment. The use of the word 'and' between Ss. 236 and 239 instead of 'or' in

S. 233 tends to support our view that a joint trial need not be justified by the provisions of only one of the sections mentioned in S. 233 but can be justified by the provisions of all such sections taken jointly.

(15) Section 237 also may be considered in this connection. Section 237 reads as follows:

"If, in the case mentioned in S. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

Take a case in which an accused is tried of three offences of the same nature committed within the course of twelve months and the Court finds that in respect of one of these offences the accused is guilty not of that offence but of a different offence arising out of the same transaction and that before evidence was led it was doubtful which of the two offences on the facts proved in the case the accused could be said to have been guilty. Can the Court convict the accused of a different offence or not. Section 237 clearly says that the Court can do this. It, therefore, follows that the trial would not have been bad if along with the charges of the three offences of the same nature another charge of a different nature arising out of the same transaction out of which one of such offences had arisen had been joined.

(16) Learned counsel conceded that on the view he had urged, there would be multiplicity of proceedings and that the object of the legislature is to avoid such multiplicity. But he contended that in many a case much hardship would be caused to an accused if the view we are taking were upheld. We are unable to agree with this contention. If three offences of the same nature arising out of different transactions are tried together in one trial and at the same time separate trials are held to try the accused for charges for different offences arising out of the very same transaction out of which three offences of the same nature have arisen, then far from lessening the burden of the accused, the multiplicity of the proceedings will result in his harassment all the more. The number of days on which he will have to appear in Court standing in the dock, engaging counsel, preparing the case, procuring witnesses and all the bother that attaches to the defence of a trial will have to be multiplied by as many times as the number of trials. The same will be the difficulty of the prosecution. Thus every one suffers and no one gains by the interpretation sought to be put upon the section on behalf of the accused.

(17) In our view, therefore, the trial of the accused in the present case was in consonance with the provisions of law.

(18) The appeal is accordingly dismissed. The reference is accepted.

A/K.S. Appeal dismissed.

A.I.R. 1953 ALL. 231 (Vol. 40, C. N. 105)

V. BHARGAVA J.

Munshi Lal, Judgment-debtor-Appellant v. Balmukund Singh, Decree-holder-Respondent.

Ex. Second Appeal No. 1536 of 1947, D/- 26-2-1952.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 14 — Decree for ejectment of tenant passed prior to Act — Execution after Act came into force — Tenant if can claim protection under S. 14.

A landlord instituted a suit for ejectment of the tenant on the ground of default in payment of rent and obtained a decree prior to the coming into force of the U. P. (Temporary) Control of Rent and Eviction Act. When the landlord sought to execute the decree, the tenant pleaded protection under S. 14 of the Act claiming that the notice contemplated by S. 3 (a) of the Act should have been given after the filing of the execution. It was found as a fact that a notice fulfilling the requirements of S. 3 (a) had been given prior to the institution of the suit and in spite of it the tenant failed to pay the rent up to the passing of the decree.

Held that the tenant was not entitled to claim protection under the Act. What S. 14 requires is the existence of one of the grounds mentioned in S. 3 of the Act and this existence must relate back to the time when the decree was passed. As the tenant had committed a wilful default in payment of the rent in spite of the notice and the default had continued up to the date of decree, he was liable to ejectment. (Para 2)

Jagdish Swarup, for Appellant; D. Sanyal, for Respondent.

JUDGMENT: This is a second appeal arising out of proceedings for execution of a decree for ejectment from a house. The judgment-debtor-appellant objected to his ejectment on the ground that he was protected from ejectment under the provisions of the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947). The decree sought to be executed was passed on the basis of a suit filed on 2-6-1945. The final judgment of the appellate Court was delivered on 6-9-1946. The decree was thus passed before the Control of Rent and Eviction Act, 1947, came into force. The decree would, therefore, be governed by S. 14 and not by S. 15 of the Act. The lower appellate Court has held that the appellant had made wilful default in payment of arrears of rent and a notice had been served on the appellant making a demand of the rent from him so that the ground mentioned in cl. (a) of S. 3 of the Act existed. On this ground, execution of the decree by ejectment of the appellant has been allowed.

(2) Learned counsel for the appellant has argued that the finding by the lower appellate Court that there was wilful default is not based on evidence and should, therefore, be set aside. The judgment of the lower appellate Court shows that, in the suit itself the appellant had taken up the plea that the rent for the period between October 1943 and 1-3-1944, had been paid before the institution of the suit. This plea was found to be false. The appellant thus defaulted in paying the rent and went to the extent of making a wrong allegation that he had paid it. This would be clearly a wilful default in payment of arrears of rent. It has also been found by the lower appellate Court that a notice fulfilling the requirements of cl. (a) of S. 3 of the Act has been served on the appellant before the institution of the suit. Learned counsel has argued that, under S. 14 of the Act, such notice should have been served after the presentation of the execution application and not before the institution of the

suit. He has based his argument on the words used in S. 14 to the effect that

"no decree.....shall, in so far as it relates to the eviction of such tenant, be executed against him as long as this Act remains in force, except on any of the grounds mentioned in S. 3."

From this language, the learned counsel infers that the notice should have been served after the presentation of the execution application. It is obvious that this could not be the intention of S. 14 of the Act. What S. 14 requires is the existence of one of the grounds mentioned in S. 3 of the Act and this existence must relate back to the time when the decree was passed. In the present case, there is a clear finding by the lower appellate Court to show that there had been wilful default, in spite of the notice, which had continued up to the passing of the decree. In these circumstances, the objection of the appellant was rightly dismissed.

(3) There is no force in this appeal which is dismissed with costs.

B/K.S. Appeal dismissed.

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*A.I.R. 1953 ALL. 232 (Vol. 40, C. N. 106)

MALIK C. J. AND V. BHARGAVA J.

Commr. of Income-tax, U. P. and Ajmer-Merwara, Lucknow, Applicant v. Bijli Cotton Mills Ltd., Agra, Respondent.

Misc. Case No. 214 of 1947, D/- 3-9-1952.

(a) Income-tax Act (1922), S. 31 (3) — Powers of Assistant Commissioner.

Though the appellate Assistant Commissioner may not be able to interfere with the erroneous order of the Income-tax Officer if there is no appeal pending before him, on appeal by the assessee the Appellate Assistant Commissioner has got the right to pass any of the orders mentioned in the various clauses of sub-s. (3) of S. 31. (Para 5)

Anno: Income-tax Act, S. 31 N. 2.

†**(b) Income-tax Act (1922), Ss. 9 (1) and 10 (1) — "Carried on by him" — Promoters of company carrying on business on behalf of company to be floated — Company incorporated — Company accepting profits made before incorporation — Company's liability to be assessed to income-tax for such profits.**

If the promoters of a company buy a property or carry on a business on behalf of a company which they intend to float, on the incorporation of the company, the company has a right to either accept what has been done on its behalf by the promoters or repudiate the same. If the company accepts what the promoters have done on its behalf it has a right to claim from the promoters the entire income of the property since its purchase or the entire income for the period during which the business was carried on for the benefit of the company. Though, strictly speaking, it cannot be said that a person is a trustee for a beneficiary not in existence, on the company being floated, the relationship between a promoter and the company that he has floated must be deemed to be a fiduciary relationship from the day the work of floating the company had been started. If, therefore, the promoters have not bought some property or business for their own use but on behalf of or for the benefit of a company which they were about to float, though the company when floated may have the option to accept the benefit of the contract entered into by the promoters, or buy the property purchased for its benefit, the promoters have no right to refuse to give the property or the business or the benefit derived therefrom to the company if the company wants to acquire that property or the business. (Paras 9 and 10)

Under Ss. 9 and 10, Income-tax Act, it is not only the legal ownership that has to be looked to but the Courts can also go into the question of beneficial ownership and decide who should be held liable for the tax after taking into account the question as to who is as a matter of fact in receipt of the income which was going to be taxed. (Para 13)

A partnership firm entered into an agreement to purchase a cotton mill for a company which it was going to float. When the firm took possession of the mill on 11-12-42, the firm made it clear that it was not taking possession of the mill in its own right but on behalf of the private limited company which was to be floated. The company was incorporated on 11-12-43 and the sale deed in its favour was executed on 2-1-45. After the company was incorporated, it chose to accept the profits made before its incorporation and treated the promoters, the firm, as accountable for all profits made during the period 11-12-42 to 10-12-43:

Held that the income of the period from 11-12-42 to 10-12-43 could be legally assessed in the hands of the company. Case held governed by the principle laid down in AIR 1934 PC 116. (Para 17)

Anno: Income-tax Act, S. 9 N. 2; S. 10 N. 2.

G. S. Pathak, for Applicant; J. Swarup, Standing Counsel and J. N. Takru, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('34) 61 Ind App 209: (AIR 1934 PC 116) 12, 15, 16, 17
('32) AIR 1932 Bom 106: (136 Ind Cas 488) 12, 15
('39) 1939-7 ITR 139: (AIR 1939 Bom 195) 12
(1914) 1 Ch 332: (83 LJCh 372) 10
(1886) 33 Ch D 85: (55 LT 558) 10
(1886) 34 Ch D 398 13
(1887) 35 Ch D 400: (56 LJCh 684) 13
(1921) 7 Tax Cas 387: (89 LJKB 1151) 12

MALIK C. J.: This is a reference under S. 66 (1), Income-tax Act. Two questions have been referred to us, one at the instance of the Commissioner of Income-tax and the other at the instance of the assessee. The questions referred for decision are:

"1. Whether in the circumstances of the case the Appellate Assistant Commissioner was empowered under the law to cancel the assessment and whether the order in appeal passed by the Appellate Assistant Commissioner was within the ambit of his powers under S. 31, Income-tax Act?

2. Whether in the circumstances of the case the income of the period from 11th December 1942, to 10th December 1943, could be legally assessed in the hands of the assessee company which was incorporated on 11th December 1943?"

(2) The facts found in the appellate order of the income-tax Tribunal and which are stated in the statement of the case are that Messrs. David Mills Ltd. were previous owners of the Bijli Cotton Mills at Hathras. Messrs. Shyamlal Chimanlal, a partnership firm, thought of acquiring the Bijli Cotton Mills for a sum of 15 lacs on behalf of a company, which they were going to get incorporated. Messrs. Shyamlal Chimanlal paid the stipulated price to Messrs. David Mills Ltd., purporting to do so on behalf of the company which they were going to float. On 10th December 1942, they obtained possession of the Bijli Cotton Mills as representing the purchaser company which had not yet come into existence but which they specifically mentioned they had decided to get incorporated.

On 11th December 1943, the company was duly incorporated and on 2nd January 1945, a formal conveyance was executed by Messrs. David Mills Ltd. in favour of the new company, called the Bijli Cotton Mills Ltd., Agra. On 14th March 1945, the Income-tax Officer assessed the Bijli Cotton Mills Ltd. on the income from 11th December 1942, to 31st December 1943. This assessment could only be on the basis that the Bijli Cotton Mills Ltd. had earned profits from the date that Messrs. Shyamlal Chimanlal had commenced business after taking over possession of Bijli Cotton Mills from Messrs. David Mills Ltd. The Bijli Cotton Mills Ltd. had claimed certain sums of money as depreciation. They were not satisfied with the depreciation allowed by the Income-tax Officer and filed an appeal under S. 30, Income-tax Act against the assessment order.

While the appeal was still pending the Income-tax Officer thought that he had made a mistake in assessing the Bijli Cotton Mills Ltd., on the income from 11th December 1942, and came to the conclusion that he should have assessed the Bijli Cotton Mills Ltd. only from the date of its incorporation, i.e. 11th December 1943, and that the liability for the payment of Income-tax for the period from 11th December 1942, to 10th December 1943, was of Messrs. Shyamlal Chimanlal, the promoters, who had during that period continued the business. He drew the attention of the Appellate Assistant Commissioner to this, setting forward his views. The Appellate Assistant Commissioner held that the Bijli Cotton Mills Ltd., was assessable only from the period of its incorporation i.e. 11th December 1943, to the end of the year, i.e. 31st December 1943. He, therefore, cancelled the assessment.

(3) Against the order of the Appellate Assistant Commissioner the Bijli Cotton Mills Ltd., (which for the sake of brevity we shall hence-forward call the assessee) filed an appeal before the Income-tax Appellate Tribunal. Before the Tribunal two points were raised. It was urged that the Appellate Assistant Commissioner was seized merely of the appeal filed by the assessee and he could not entertain a sort of cross-objection on behalf of the Income-tax Officer and hold that the assessee was liable for the income only from the date of its incorporation. In other words, the suggestion was that the Appellate Assistant Commissioner was confined only to the points raised by the assessee and he had no right to annul the assessment. It was further urged that it was the assessee which was liable to be taxed for the period from 11th December 1942 to 10th December 1943, as the business was carried on for its benefit and the promoters, Messrs. Shyamlal Chimanlal, were not liable for assessment for that period.

(4) The Appellate Tribunal held on the first point against the assessee and on the second point in favour of the assessee and it was thereafter that the assessee and the Commissioner made applications that the points mentioned above may be referred to this Court for its decision.

(5) Taking up the first question first, we have no doubt that the decision of the Tribunal was right and on appeal by the assessee the Assistant Commissioner was not confined to the reliefs claimed by the assessee. His powers under S. 31 (3), Income-tax Act are very wide. It is true that the Income-tax Officer has not been given a right of appeal, and a right of appeal is given only to the assessee objecting to the assessment, but this is for the obvious reason that the Income-tax Officer cannot have a right to appeal against his own decision. If, therefore, the assessee does not appeal, the Income-tax Officer cannot bring the matter before the Appellate Assistant Commissioner and if a mistake has been made in the assessment which is prejudicial to the interest of the revenue the Commissioner under S. 33 (B) has been given the right to correct the error.

Under S. 33 (A) the Commissioner has also been given the right to call for the record of any proceeding under the Act, of his own motion, in which an order has been passed by any authority subordinate to him, and to make an order in accordance with the provisions of that section. Though, therefore, the Appellate Assistant Commissioner could interfere with the assessment order only if an appeal had been filed before him by the assessee, but once the appeal is before him he can, under S. 31 (3) in disposing of the appeal, confirm, reduce, enhance or annul the assessment. He can also while setting aside the assessment direct the Income-tax Officer to make a fresh assessment in accordance with the provisions of sub-s. 3(b) of that section.

Learned counsel has relied on the words "in disposing of an appeal" in S. 31 (3) and has contended that these words govern all the clauses of the sub-section so that it is only the point relevant to the reliefs claimed in the appeal that can be considered and the appropriate relief granted. We do not agree with this contention as Cl. (a) not only gives the Appellate Assistant Commissioner the power to confirm, reduce or annul the assessment but also gives him the power to enhance the assessment and no assessee is likely to ask for enhancement. The first proviso to the sub-section lays down that the Appellate Assistant Commissioner shall not enhance an assessment unless the appellant had a reasonable opportunity of showing cause against such enhancement.

If the enhancement can only be as a result of the grounds taken by the assessee himself or as a result of the reliefs claimed by him, there can be no question of giving the assessee a reasonable opportunity because the result follows from his own grounds or from the reliefs claimed by him. We are, therefore, satisfied that though the Appellate Assistant Commissioner may not be able to interfere with the erroneous order of the Income Tax Officer, if there is no appeal pending before him, on appeal by the assessee the Appellate Assistant Commissioner has got the right to pass any

of the orders mentioned in the various clauses of sub-s. (3) of S. 31.

(6) That is our answer to the first question.

(7) Coming to the second question, the facts stated above, which have been reproduced from the statement of the case, show that Messrs. Shyamlal Chimanlal entered into an agreement to purchase the Bijli Cotton Mills not for themselves but for a company which they were going to float. It also appears that when they took possession they made it clear that they were not taking possession of the Bijli Cotton Mills in their own right but on behalf of the private limited company which they were going to have incorporated. The company was no doubt incorporated almost one year afterwards, i.e. on 11th December 1943, and the sale-deed in its favour was not executed till the 2nd January 1945, by Messrs. David Mills Ltd. who were the owners.

It further appears from the statement of the case that, after the assessee company was incorporated, the assessee chose to accept the profits made before its incorporation and treated the promoters as accountable for all profits made during the period 11th December 1942, and 10th December 1943. In the circumstances the question arises whether it can be said that the business was carried on by the assessee, during the relevant period.

(8) Learned counsel for the Department has laid great stress on the language of S. 10, Income-tax Act and has pointed out that under S. 10 tax is payable by an assessee in respect of the profit or gains of any business carried on by him. The argument is that the assessee cannot be said to have been carrying on a business prior to its incorporation on 11th December 1943, when it did not exist and during the period from 11th December 1942, to 10th December 1943, the promoters, Messrs. Shyamlal Chimanlal, must be deemed to have been carrying on the business and they are, therefore, the persons who are liable to assessment.

(9) It is true that under the law the assessee, the Bijli Cotton Mills Ltd. came into existence only on its incorporation on 11th December 1943, and it is not possible to hold that the legal title in the business or its profits vested in it before its incorporation. It is, however, well settled that if the promoters of a company buy a property or carry on a business on behalf of a company which they intend to float, on the incorporation of the company, the company has a right to either accept what has been done on its behalf by the promoters or repudiate the same. If the company accepts what the promoters have done on its behalf it has a right to claim from the promoters the entire income of the property since its purchase or the entire income for the period during which the business was carried on for the benefit of the company.

(10) The question whether the promoters can be said to be trustees for a company not in existence and what exactly is the relationship between a promoter and a company, which comes into existence later, has been the subject-matter of several decisions. Though, strictly speaking, it cannot be said that a person is a trustee for a beneficiary not in existence, it has been held that, on the company being floated, the relationship between a promoter and the company that he has floated must be deemed to be a fiduciary relationship from the day the work of floating the company had been started. In — 'Lydney and Wigpool Iron-Ore Co. v. Bird', (1886) 33 Ch D 85 at p. 94 Lindley L. J. said that although the promoter is

> "not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases; and using the word 'promoter' to describe a person acting as James Bird did, it is perfectly well settled that a promoter of a company is accountable to it for all moneys secretly obtained by him from it just as if the relationship of principal and agent or of trustee and 'cestui que trust' had really existed between them and the company when the money was so obtained."

In — 'Omnium Electric Palaces Ltd. v. Baines', (1914) 1 Ch 332, it was doubted whether this was strictly accurate and whether it did not merely confuse matters to attempt to identify the fiduciary duties of a promoter with ordinary out-and-out trusteeship. Buckley in his Companies Acts, 12th edn. at page 108, dealing with this matter says:

> "The case of a promoter is a strong case of fiduciary relationship, inasmuch as the trustee or agent, so far from being selected by his 'cestui que trust' or principal, actually creates the principal in whose affairs he acts."

If, therefore, the promoters have not bought some property or business for their own use but on behalf of or for the benefit of a company which they were about to float, though the company when floated may have the option to accept the benefit of the contract entered into by the promoters, or buy the property purchased for its benefit, the promoters have no right to refuse to give the property or the business or the benefit derived therefrom to the company if the company wants to acquire that property or the business.

(11) There is, therefore, no doubt that Messrs. Shyamlal Chimanlal, as promoters, were accountable to the assessee, Bijli Cotton Mills Ltd., on its incorporation on 11th December 1943, for the entire profits made from 11th December 1942, when they commenced business after getting possession of the property on behalf of the assessee. The fact that the assessee could not claim legal title from 10th December 1942, would for purposes of income-tax make no difference as on equitable grounds the assessee could claim the entire profits of the business run from 11th December 1942, and in the case before us it did and realised the whole amount. It must be held, therefore, that the business was run on its behalf.

(12) In — 'the Commissioner of Income-tax, Bombay v. Abubaker Abdul Rehman', (1939) 7 ITR 139 (Bom) the point arose whether the 'mutwallis' were taxable under S. 3, Income-tax Act as owners of the properties and whether the Income-tax Authorities were not bound to assess them in respect of the income of the 'wakf'. It was conceded by the learned Advocate General that in S. 9 the word 'ownership' was not confined to legal ownership but also to beneficial ownership and the beneficiary should be treated as the owner of the property. It was held in that case that the beneficiaries were directly assessable for the income of the trust property coming into their hands. The learned Judges held that if the income was earmarked and came into the hands of the beneficiaries

then the beneficiaries were primarily liable to be taxed.

To the same effect are the observations of Viscount Cave in — 'Williams V. Singer Pool v. Royal Exchange Assurance', (1921) 7 Tax Cas 387. He held that if the Income-tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The point is well illustrated in the case of the — 'Commissioner of Income-tax ,Bombay v. Trustees of the Sir Currimbhoy Ebrahim', AIR 1932 Bom 106 a decision of the Bombay High Court which was affirmed by the Privy Council. ('Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust v. Commissioner of Income-tax, Bombay', 61 Ind App 209 (PC). It was pointed out that if the income of the trust property as it accrued was earmarked and had to be handed over by the trustee to the beneficiary, the beneficiary could be said to be in receipt of that income and could be taxed directly. If, on the other hand, the income came into the hands of the trustee and he had the right to dispose it of and it was only the balance left over that was payable to the beneficiary then the income was taxable in the hands of the trustee.

(13) These cases, however, make it clear that under Ss. 9 and 10, Income-tax Act, it is not only the legal ownership that has to be looked to but the Courts can also go into the question of beneficial ownership and decide who should be held liable for the tax after taking into account the question as to who is as a matter of fact in receipt of the income which was going to be taxed. If we are correct in this view, then there can be no doubt that after the assessee had adopted the action of the promoters and had decided to take over the business the profits for the whole of the period during which the promoters ran the business which they had to hand over to the Company and which they could not claim that they had a right to keep for their own benefit became income of the assessee. It will be of interest in this connection to quote the observations of Lord Justice Cotton in — 'Ladywell Mining Co. v. Brookes', (1886) 34 Ch D 398; — 'Ladywell Mining Co. v. Huggons', (1897) 35 Ch D 400 at p. 413 where he said:

> "The money was all paid by Palin and his friends and in my opinion they bought for themselves, and without putting themselves into such a position as to entitle the company when formed to say, 'You were acting for us; you were in a fiduciary position as regards this property, and now, therefore, as you have purported to sell this to us, we are entitled to take it at the price you originally gave for it.'".

(14) In that case on the evidence it was held that the promoters had got the mine for their own benefit but if it had been found that the promoters had got the mine for the benefit of the company which they were going to float, the judgment of Cotton L. J. makes it clear that the promoters could not have kept all the profits they made by selling the mine to the company at a higher price than the price they paid for it.

(15) Reference has also been made to Ss. 40 and 41, Income-tax Act and it has been urged that in all cases not coming under those sections the trustee is liable to be assessed personally and the income of the property of which he may be merely the trustee may be added to his income. Section 40 (1) deals with cases of guardians and trustees of persons who are minors, lunatics or idiots and makes a special provision that though in such a case the tax was levied upon and recoverable from such guardian or trustee but it would be leviable and recoverable only on the income of the beneficiary being a minor, a lunatic or an idiot.

Sub-section (2) of S. 40 deals with cases of a trustee or agent of a non-resident. That also is a special provision made where the person primarily liable for the tax is not easily approachable. Section 41 deals with a special set of persons who are generally responsible not for one trust but a number of trusts and if no special provision had been made the whole of the income in their hands from whichever source derived, would have had to be taken into account and made liable to tax. This would have worked great hardship as the tax is on a sliding scale and on higher slabs the rate is much higher.

This section was amended after the decision in the case of — 'Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust', 61 Ind App 209 (PC) and is applicable to the Court of Wards, the Administrator-General, the Official Trustees, any receiver or manager appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing. In all these cases each trust can be treated as a separate entity and the income derived therefrom as one unit for purposes of assessment.

(16) We have already quoted the decision of the Privy Council in the case of — 'Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust', 61 Ind App 209 (PC), where their Lordships have laid down in what cases a trustee can be directly assessed and made liable for income-tax payable on the income of the trust property and in what cases a beneficiary can be made directly liable. In a case where the income when it comes into the hands of the trustee becomes immediately earmarked as payable to the beneficiary and all that the trustee has to do is to hand over that income to the beneficiary, it appears reasonable that the beneficiary should be directly assessed. Where, however, the money is not immediately ear-marked for the beneficiary and the trustee has a right under the trust to dispose of the income and it is only the balance if any that is payable to the beneficiary it cannot be said that the money received belonged to the beneficiary and the income in the hands of the trustee has to be assessed to income-tax in accordance with the provisions of the Income-tax Act.

(17) We have already held that in the case before us though the assessee company came into existence almost a year afterwards, the assessment proceedings were started at a time when the assessee company had already decided to accept what had been done on its behalf by the promoters and take over the property and business and the income made therefrom from 11th December 1942, and it was in the same position as a beneficiary for whom the income was earmarked as payable to it. The case is, therefore, to our minds governed by the principle laid down in — 'Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust case', 61 Ind

App 209 (PC) and the income from 11th of December 1942 to 10th December 1943, could be legally assessed in the hands of the assessee.

(18) The result, therefore, is that we answer the first question in favour of the Department and the second question in favour of the assessee. In the circumstances of the case it is just and proper that the parties should bear their own costs.

A/V.R.B. Answer accordingly.

A.I.R. 1953 ALL. 236 (Vol. 40, C. N. 107)

(LUCKNOW BENCH)

BEG J.

Bachcha Singh and others, Defendants-Appellants v. Gopal Singh and others, Plaintiffs-Respondents.

Second Rent Appeal No. 34 of 1945, D/- 23-1-1952.

(a) Limitation Act (1908), Art. 144 — Entry as tenants "bila tasfia" — Presumption.

Where the entry records the defendants as tenants, the fact that they are shown as 'bila tasfia' merely indicates that the rent was not settled. It certainly does not indicate that they were in possession as owners by adverse possession, nor does it indicate that the persons who were entered therein were setting up their title as proprietors. On the other hand there is a presumption under the Revenue Act that these entries are correct and they rather point to the conclusion that the defendants were either tenants or were prescribing for tenancy rights. 1937 Oudh WN 1157 and AIR 1929 Oudh 370, Rel. on. (Para 8)

Anno: Lim. Act, Arts. 142 and 144 N. 59, 95.

(b) Limitation Act (1908), Art. 144 — Cultivatory plots — Adverse possession.

Where the property in dispute is in the nature of cultivatory plots the considerations that apply to non-agricultural or abadi plots or plots in cities would not apply to such a property. Unless, therefore, there is a very clear assertion of hostile title as owner the mere act of possession however long would only lead to the presumption of adverse possession as tenant and not as owner. Case law discussed. (Para 8)

Anno: Lim. Act, Arts. 142 and 144 N. 95.

(c) Tenancy Laws — U.P. Tenancy Act (17 of 1939), Ss. 94 and 180(2) and 244 — Declaration under S. 180(2) — Assessment of rent under S. 94.

It is open to the trial Court to assess rent under S. 94, U.P. Tenancy Act while giving a declaration under S. 180, sub-cl. (2) to the effect that the defendants have become hereditary tenants of the plots in dispute. There is no bar to such a procedure being adopted by the trial Court. A contrary view would lead to a multiplicity of proceedings the avoidance of which was the very purpose of the said Section. 1949 RD 83 and 1943 RD 480, Dist. (Para 13)

Baldeo Sahai Srivastava and Nand Lal Varma, for Appellants; K. N. Tandon, for Respondent No. 1.

REFERENCES: Courtwise/Chronological/ Paras

('35) 1935 Oudh WN 252: (AIR 1935 PC 36) 9
('43) 1943 RD 480 13
('49) AIR 1949 All 189: (ILR (1949) All 302) 9
('49) 1949 RD 83 13
('50) AIR 1950 All 496: (1950 All WR 547) 10
('29) AIR 1929 Oudh 370: (115 Ind Cas 302) 10
('31) 8 Oudh WN 1275: (AIR 1932 Oudh 135) 9
('31) 8 Oudh WN 849: (AIR 1931 Oudh 401) 9
('31) 8 Oudh WN 854: (AIR 1931 Oudh 381) 9
('37) 1937 Oudh WN 625: (AIR 1937 Oudh 397) 9
('37) 1937 Oudh WN 1157 10

JUDGMENT: This is a second rent appeal arising out of a suit for ejectment and damages filed under S. 180, U. P. Tenancy Act. Subsequent to the filing of the suit the plaintiffs amended their plaint by adding an alternative prayer that in case the defendants were found to have acquired tenancy rights under S. 180, sub-cl. (2), U. P. Tenancy Act, the Court might assess rent on the defendants under S. 94, U. P. Tenancy Act. The plaintiffs' suit related to three plots situate in village Purab Patti, district Pratapgarh.

(2) The suit was contested by the defendants mainly on the ground that they had become the proprietors of the disputed property by adverse possession. As the case raised a question of proprietary title, the revenue Court in which the suit was filed referred the question of proprietary title to the Munsif. The civil Court came to the conclusion that the defendants had not acquired proprietary title by adverse possession.

(3) The revenue Court adopted the finding of the civil Court so far as the question of proprietary title was concerned, but it held that the suit for possession by the plaintiffs was barred by time, and the defendants had acquired tenancy rights as a result of long possession under S. 180, sub-cl (2), U. P. Tenancy Act. The Court accordingly assessed rent on the plots in dispute. Treating the defendants as hereditary tenants, it gave a decree to the plaintiffs for Rs. 43/7/- as arrears of rent for the past three years.

(4) Dissatisfied with the judgment of the trial Court the defendants went in appeal and the learned Civil Judge dismissed the appeal of the defendants and upheld the findings of the trial Court.

(5) The defendants have now come in second appeal against the said judgment.

(6) The main argument advanced by the learned counsel appearing for the appellants in this Court is that the defendants had become proprietors of the property in dispute by adverse possession. In support of his argument he has relied on two litigations that took place between the predecessors-in-interest of the parties. The first litigation was in the year 1899. The defendants have not filed the plaint of that case. They have only filed Ex. A. 3 which is the judgment in a suit under S. 127, Oudh Rent Act. This suit was filed by the ancestor of the plaintiffs-respondents, named Pirthipal Singh, against one Ram Adhin, ancestor of the present defendants-appellants. The judgment shows that this suit was dismissed on the ground that S. 127 was inapplicable to the case. The learned counsel for the defendants strenuously argued that in this case the defendants' ancestor had

set up his title as proprietor of the plots in suit.

I have gone through the entire judgment and I find that nowhere in the body of the judgment it is clearly recited that the defendants' ancestor set up his title as owner of the property in dispute. In the opening para of the judgment the Court has recited the fact that the property was sold by the ancestor of the defendants in the present suit in favour of the plaintiff of that suit, that this land was the sir land of the vendor and had remained in his possession as sir land. The fact that the property was sold by the ancestor of the defendants to the present suit in favour of the ancestor of the plaintiffs on 10-1-1877 is admitted. This recital of fact in the judgment does not clearly indicate that the defendant in that case set up a plea of proprietary title. In any case if the defendants wanted to rely on this argument they should have filed a copy of the plaint of that case which would have clarified the position. Unfortunately they have not done so and the failure to file the plaint of that case, in the absence of any explanation for the same, must lead to a presumption against the defendants.

(7) The second litigation relied on by the defendants took place about the year 1902. It would appear that the ancestor of the plaintiffs gave a notice of ejectment to the ancestor of the defendants and the suit was filed by Ram Adhin Singh, predecessor-in-interest of the defendants to contest this notice of ejectment. The plaint of this suit is Ex. A5. It is dated 9-12-1902. I have carefully gone through the entire plaint and I fail to find any assertion of proprietary title anywhere in the body of this plaint. The judgment of the case is Ex. A9. It is dated 18-3-1903. It would appear that the Court decreed the suit for cancelling the notice of ejectment on the ground that the plaintiff possessed some rights higher than that of an ordinary tenant and he was not liable to ejectment by notice. This is the entire evidence of the second litigation. There is, therefore, nothing in the documentary evidence of the two cases filed by the defendants to indicate that they had definitely and clearly set up their proprietary title against the plaintiffs at any stage.

(8) The next set of documents to which reference has been made in the case is: Ex. A-11, Khasra of the year 1297 F.; A-12, Khasra of the second Settlement; Ex. A14, Khetauni of the 3rd Settlement; Exs. A15, A16 and A17, Khetaunis of the year 1334 F. In all these documents the defendants are recorded as tenants "bila tasfia". The learned counsel for the appellants has argued that the entry as 'bila tasfia' tenants supports his case of adverse possession as owners. I am unable to see any force in this argument. The entry records the defendants as tenants and the fact that they are shown as 'bila tasfia' merely indicates that the rent was not settled. It certainly does not indicate that they were in possession as owners by adverse possession, nor does it indicate that the persons who were entered therein were setting up their title as proprietors. On the other hand I am of opinion that there is a presumption under the Revenue Act that these entries are correct and they rather point to the conclusion that the defendants were either tenants or were prescribing for tenancy rights. The important point that has to be borne in mind in this connection is the fact that the property in dispute was in the nature of cultivatory plots and the considerations that apply to non-agricultural or abadi plots or plots in cities would not apply to such a property. Unless, therefore, there is a very clear assertion of hostile title as owner the mere act of possession however long would only lead to the presumption of adverse possession as tenant and not as owner.

(9) The learned counsel for the appellants has relied on — 'Sheoraj Narain v. Jagannath Prasad', 8 Oudh W N 854. This case does not seem to support him at all, as it was held in that case that the entry in papers as "Kashtkar bila tasfia" points to the conclusion that the defendant was a tenant. He has also relied on — 'Krishnapal Singh v. Rameshwar Bakhsh Singh', 8 Oudh W N 849. This is also inapplicable to the facts of the present case, as in that case the defendant had been asserting his own title and denying the title of the plaintiff. There is no such assertion in this case. He has also cited — 'Indar Gir v. Special Manager, Court of Wards, Balrampur Estate', 8 Oudh WN 1275 and — 'Srishchandra Nandy v. Baijnath Jugal Kishore, Firm', 1935 Oudh W N 252 (PC) in support of his argument that an open visible and continuous possession of property for a long period leads to a presumption of adverse possession.

Both these cases are clearly distinguishable on the ground that the property in dispute in those cases did not consist of cultivatory plots at all. He has also cited — 'Nannhey Khan v. Mt. Gomti', AIR 1949 All 189 for the proposition that long possession extending over fifty years is presumed to be adverse. This case again is inapplicable to the facts of the present case as the property in dispute was not a cultivatory plot. The main question in the present case is not whether the defendants were prescribing at all, but what was the quality of title for which they were prescribing. He has also referred to — 'Saltanat Bahadur Khan v. Gaya Bakhsh Singh', 1937 Oudh W N 625. That case has no application to the present case as in that case the defendants who asserted adverse possession had been transferring property by mortgage and asserting a hostile proprietary title. There is no such assertion in the present case.

(10) The learned counsel for the respondents has invited my attention to — 'Mt. Ram Piari v. Nawab Singh', AIR 1950 All 496 in support of the proposition that where a person is in possession by cultivating a plot of land in an agricultural area and there is nothing to show that he even claimed a proprietary title in the plot, the presumption is that he is prescribing for a tenancy right and not for a proprietary title although there is no contract of tenancy between him and the owner and although no rent is settled. The facts of the present case are closely analogous to the facts of that case and to my mind the ruling clearly supports the contention advanced by him. He has also cited — 'Bhagwan Bux Singh v. Ganesh Bux Singh', 1937 Oudh W N 1157 and — 'Lalta Parshad v. Harnam Singh', AIR 1929 Oudh 370 in support of the proposition that the entry of the defendants as tenants 'bila tasfia' in village papers is inconsistent with their possession being adverse. These rulings support the plaintiffs' case and in view of the law laid down therein the Khetaunis and the Khasra produced

in this case go against the defendants' plea of adverse possession as owners.

(11) After considering the entire evidence produced by the parties and the law referred to by the learned counsel of the parties, I have come to the conclusion that the findings arrived at by the Courts below are correct and cannot be disturbed at this stage.

(12) The second argument of the learned counsel for the appellants is that S. 180 is not applicable to the facts of the present case. This point was not taken in the grounds of appeal in the Court below. It was not argued before the lower Court. It is not taken as a ground of appeal in this Court. I do not think that the appellants should be allowed to raise it at this stage. It raises questions which would require scrutiny into evidence and open up a new and an unexplored avenue of facts which have not been enquired into by any of the Courts below. It is not a pure question of law patent on the face of the record. I am of opinion that this point should not be entertained at this stage and it is not necessary for me to go into it.

(13) The third argument advanced on behalf of the appellants is that it was not open to the trial Court to assess rent under S. 94, U. P. Tenancy Act while giving a declaration under S. 180, sub-cl. (2), U. P. Tenancy Act to the effect that the defendants have become hereditary tenants of the plots in dispute. To my mind S. 244, U. P. Tenancy Act provides a sufficient answer to this argument. There is no bar to the procedure adopted by the trial Court. A contrary view would lead to a multiplicity of proceedings the avoidance of which was the very purpose of the said section. I am of opinion that the trial Court acted rightly in adopting this procedure. The learned counsel for the appellants has cited — 'Deputy Commr., Partabgarh v. Udai Pratap Singh', 1949 R. D. 83 and — 'Ramdei Kuer v. Lachman', 1943 R. D. 480 in support of his argument.

I do not think that any of those rulings are applicable in the present case. In the cases cited by him the prayer to fix rent was made at the stage of second appeal. The question was one of fact and the parties would have to adduce evidence on the point before the Court could come to any conclusion regarding the proper amount of rent payable by the tenant. This could not be permitted at the stage of second appeal. In the present case the plaint was amended in the trial Court itself. Parties had full opportunity to adduce evidence on the proper amount for rent to be fixed by the Court. The Court applied its mind to the evidence and gave a finding thereon. The defendants-appellants themselves did not think it worthwhile raising this point at any previous stage. The procedure adopted by the trial Court cannot be considered to be illegal or unwarranted and the appeal cannot be allowed on this ground.

(14) Having heard the learned counsel for the appellants at great length, I find that there is no substance in this appeal. It is accordingly dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1953 ALL. 238 (Vol. 40, C. N. 108)

MOOTHAM AND AGARWALA JJ.

Bhim Sen and another, Defendants-Applicants v. Murari Lal, Plaintiff-Opposite Party.

Civil Revns. Nos. 102, 103 and 104 of 1949, D/- 20-9-1951.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4) — "Annual reasonable rent" is "Reasonable annual rent" as defined in S. 2(f). **(Para 3)**

† (b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4) — Proviso refers to cases where tenant claims the agreed rent is higher than annual reasonable rent.

Proviso to S. 5 (4) has reference only to claims which come within the second class namely, the cases in which the tenant claims that the agreed rent is higher than reasonable annual rent. It is not a limitation upon the claim of the landlord for enhancement of the rent, because the suit of the landlord for enhancement of rent is on the ground not that the agreed rent is low, but that the reasonable annual rent is low, and in such a case there would be no point in laying down that the Court must be satisfied before it varies the rent that the transaction was unfair.

(Paras 3 and 8)

Anangpal Gupta, for Applicants; Krishna Shanker, for Opposite Party.

MOOTHAM J.: The opposite party is the landlord of three shops. Each of the applicants is a tenant of one of the shops for which he paid an agreed rent of Rs. 10/- a month. The landlord being of opinion that neither the agreed rent nor the reasonable annual rent of these shops was adequate, brought a suit against each of his tenants under sub-s. (4) of S. 5, U. P. (Temporary) Control of Rent and Eviction Act, 1947, claiming in each case that the reasonable annual rent of the accommodation let to the tenant should be enhanced. The learned Munsif by his order dated 13-12-1948, increased the rent in one case to Rs. 24/- a month and in the two other cases to Rs. 28/- a month. It is that order which is the subject of the present applications.

(2) Sub-section (4) of S. 5 reads as follows:

"(4) If the landlord or the tenant, as the case may be, claims that the annual reasonable rent of any accommodation to which the Act applies, is inadequate or excessive, or if the tenant claims that the agreed rent is higher than the annual reasonable rent he may institute a suit for fixation of rent in the Court of the Munsif having territorial jurisdiction, if the annual rent claimed or payable is Rs. 500/- or less, and in the Court of the Civil Judge having territorial jurisdiction if it exceeds Rs. 500/- provided that the Court shall not vary the agreed rent unless it is satisfied that the transaction was unfair, and in the case of lease for fixed term made before 1-4-1942, that the term has expired."

It is argued that the proviso to this section operates as a bar to a suit of a landlord who seeks for an increase in the reasonable annual rent in a case in which there already is an agreed rent between the parties unless the landlord can satisfy the Court that the agreement was unfair. That is the only point which arises in this case.

(3) In my opinion this sub-section makes provision for two classes of cases: first, cases in which a landlord or tenant seeks an enhancement or reduction of the reasonable annual rent (the sub-section refers to an "annual reasonable rent" but it is not in dispute that what is meant is the "reasonable annual rent" as defined in S. 2(f)), and, secondly, cases in which the tenant claims that the agreed rent is higher than the reasonable annual rent and that it should be reduced. It appears to me clear, on a plain reading of the sub-section, that the proviso has reference only to claims which come within the second class. The expression "agreed rent" in the proviso relates back to a similar phrase in the earlier part of the sub-section and links the proviso with the second of the two classes of cases to which I have referred. Some argument has been based upon the word "vary" in the phrase "vary the agreed rent", it being contended that had the proviso related only to the second class of case the word "reduce" would have been used. Had the phrase been "increase or reduce the agreed rent" the position would have been different, but in my opinion the use of the word "vary" instead of "reduce" does not throw doubt upon the meaning and effect of the proviso.

(4) These applications must therefore be dismissed with costs.

(5) AGARWALA J.: Sub-section (4) of S. 5 is rather clumsily worded. In order to understand the sub-section one has to bear in mind the definition of "reasonable annual rent" as given in S. 2(f) of the Act. Accommodations are divided into two classes, those constructed before 1-7-1946, those constructed after 1-7-1946. Reasonable annual rent in the case of an accommodation constructed after 1-7-1946, has to be determined by the District Magistrate under S. 3 (a). When the accommodation was constructed before 1-7-1946, then one has to see whether the accommodation was assessed to municipal assessment. If it was assessed, the reasonable annual rent will be such assessment plus 25 per cent, thereon. In the case of a part of an accommodation being let out the proportionate amount of the assessment will be taken into consideration, and 25 per cent will be added thereto to get at the annual reasonable rent. If, however, there was no assessment, then again one has to see whether the accommodation was held on rent between 1-4-1942 and 30-6-1946, or was not held between those dates. If it was held on rent between these dates then the annual reasonable rent is fifteen times the rent for one month nearest to & after 1-4-1942, which means the rent plus 25 per cent thereon. If the accommodation was not so held on rent then the District Magistrate has to determine the reasonable annual rent under S. 3(a).

(6) Having got at the meaning of reasonable annual rent, let us proceed to find out what is laid down in S. 5. Clause (1) deals with the rent payable for any accommodation. What is the rent payable for an accommodation to which the Act applies? It is the rent agreed upon between the parties. Then the section considers the cases in which the rent can be either enhanced at the instance of the landlord or reduced at the instance of the tenant. When can the rent be enhanced at the instance of the landlord? The landlord may have the enhancement of rent in two ways. He may enhance it of his own will by serving a notice in writing upon the tenant. This is provided for in cl. (2). If the landlord takes recourse to this procedure then there are limitations upon his power of enhancement. These limitations are two-fold. Firstly, the enhanced rent should not exceed the reasonable annual rent; and secondly, it should not also exceed 50 per cent of the rent, if any payable on 1-10-1946. This is the date from which the Act operates.

(7) If the landlord is not satisfied with the enhancement up to the annual reasonable rent but wants to enhance it further he cannot do so by a mere notice. He must resort to a suit to be filed in the Court of the Munsif having territorial jurisdiction, if the annual rent claimed or payable is Rs. 500/- or less, and in the Court of the Civil Judge having territorial jurisdiction if it exceeds Rs. 500/-. This is provided for in cl. (4). What are the powers of the Court in such a suit? There is no limit fixed so far as enhancement is concerned, provided that considerations provided for in S. 6 are borne in mind. It is not necessary to mention those considerations. If the tenant sues for reduction of rent, it may be reduced to any extent. But the Court must be satisfied that the transaction was unfair, and in the case of lease for a fixed term before 1-4-1942 that the term has expired.

(8) Proviso 1 to sub-s. (2) and the proviso to sub-s. (4) have created some difficulty of interpretation. Proviso 1 to sub-s. (2) does not give a new definition of annual enhanced rent different from that given in s. 2(f). It merely puts down an upper limit up to which the rent may be enhanced by the landlord at his will by a mere notice. In such a case even though the rent is reasonable rent as defined in s. 2(f) it should not be more than 50 per cent. of the rent payable on 1-10-1946. The proviso to sub-s. (4):

> "Provided that the Court shall not vary the agreed rent unless it is satisfied that the transaction was unfair, and in the case of lease for a fixed term made before 1-4-1942, that the term has expired"

refers only to the claim by a tenant that the rent is higher than the annual reasonable rent. The words "agreed rent" in the proviso have reference to the same words occurring in the sub-section earlier and, therefore, the proviso referred to is a limitation only upon the claim of the tenant. It is not a limitation upon the claim of the landlord for enhancement of the rent, because the suit of the landlord for enhancement of rent is on the ground not that the agreed rent is low, but that the reasonable annual rent is low, and in such a case there would be no point in laying down that the Court must be satisfied before it varies the rent that the transaction was unfair. Question of the transaction being unfair arises when the tenant had been forced to take the accommodation on rent on excessive rent, (rate?) because he could not get other suitable accommodation. It can hardly be said that the landlord was obliged to let out an accommodation by reason of an unfair transaction. The proviso, again, referring as it does to the transaction being unfair so far as agreed rent was concerned can have no reference to a claim based upon the ground that the annual reasonable rent is low. The word 'vary' in the context in which it appears, must mean 'reduce' and not 'enhance'.

(9) Sub-section (4), however, omits to mention a case in which the landlord, though satisfied with the annual reasonable rent, is yet not satisfied that the rent plus 50 per cent thereof under the proviso to sub-s. (2) is fair. In the present case, the Court below has found after taking into account relevant circumstances, that the fair rent for the accommodation in dispute would be Rs. 24/- in one case and Rs. 28/- in the other two cases

This enhanced rent is no doubt more than 50 per cent of the rent payable on 1-10-1946, but that is not a relevant consideration when the enhancement is sought by a suit under sub-s. (4). The Court below has not found that the original transaction of letting out the accommodation on rent to the tenant was unfair. This again is irrelevant. I agree with my learned brother in dismissing these applications in revision.

B/R.G.D. Applications dismissed.

A.I.R. 1953 ALL. 240 (Vol. 40, C. N. 109)

WALIULLAH AND V. BHARGAVA JJ.

Pokhan Singh and another, Appellants v. Radhey Lal and others, Respondents.

F. A. F. O. No. 102 of 1947, D/- 5-1-1950.

Court-fees Act (1870), S. 7 (ix), Sch. 1 Art. 1 and Art. 2 B (U. P.) — Appeal under S. 23, U. P. Agriculturists' Relief Act — Valuation — U. P. Agriculturists' Relief Act (27 of 1934), Ss. 12 and 23.

Proceedings under S. 12, U. P. Agriculturists' Relief Act are not a 'suit'. Where the appeal is from a decree in proceedings on an application under S. 12, S. 7 (ix), Court-fees Act which fixes an artificial value for the subject-matter in dispute in "suits" against a mortgagee for the recovery of the property mortgaged cannot apply to the appeal. In the appeal under S. 23, Agriculturists' Relief Act the appellant is bound to pay court-fee on the amount or value of the subject-matter in dispute in appeal and not on the principal amount secured under the mortgage. The subject-matter in dispute in appeal would be the market value of the property in respect of which the right of redemption granted by the lower Court is sought to be set aside in appeal. Case law discussed.

(Paras 2, 4, 5)

Anno: Court-fees Act, S. 7 N. 1, 5; Sch. 1 Art. 1 N. 6; Art. 2 B (U.P.) N. 1.

S. C. Asthana, for Appellants; Junior Standing Counsel, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('41) 1941 All LJ 409: (AIR 1941 All 357) 4
('46) 1946 All LJ 43: (AIR 1946 All 303) 4
('46) ILR (1946) All 409: (AIR 1946 All 304) 4
('48) 1948 All LJ 296: (AIR 1949 All 100) 4
('41) AIR 1941 Oudh 447: (194 Ind Cas 425) 4

V. BHARGAVA, J.: This appeal is directed against the order of the learned District Judge of Mainpuri directing the appellants to file court-fee to the extent of Rs. 150 in order to make up the deficiency on their memorandum of appeal, filed before the District Judge against the decision of the Civil Judge of Mainpuri in proceedings on an application under S. 12, Agriculturists' Relief Act. The Inspector of Stamps and Registration, on examination of this memorandum of appeal, held the view that the court-fee was payable on the principal amount secured by the original mortagage as provided in S. 7(ix), Court-fees Act. In the present case, the principal sum secured was Rs. 4,000. The learned District Judge accepted this report of the Inspector of Stamps and directed the present appellants to make up the deficiency in court-fee. The appellants in this appeal contend that the court-fee was not payable on the principal amount secured by the original mortgage but 'ad valorem' on the amount at which the appeal was valued in the memorandum of appeal.

(2) There is no dispute that the court-fee on a memorandum of appeal filed under S. 23, U. P. Agriculturists' Relief Act, 1934, is payable under Art. 2B of Sch. 1, Court-fees Act. The amount of proper fee under this item is laid down to be the same as would be leviable on a memorandum of appeal under Art. 1. Reference has, therefore, to be made to Art. 1 to determine the court-fee payable in this case. Article 1 lays down that the court-fee payable on a plaint, written statement, pleading, a set off or counter-claim or memorandum of appeal would be determined by the amount or value of the subject-matter in dispute. This would show that the court-fee on the memorandum of appeal filed before the District Judge was to be determined by the amount of the value of the subject-matter in dispute in the appeal. The Inspector of Stamps whose report was accepted by the District Judge was of the view that the amount or value of the subject-matter in dispute in the appeal in such a case was to be determined with reference to S. 7(ix), Court-fees Act which lays down:

> "In suits against a mortgagee for the recovery of the property mortgaged: according to the principal money expressed to be secured by the instrument of mortgage."

There is no doubt that in a 'suit' for the recovery of the property mortgaged, the value of the subject-matter in dispute would have to be artificially fixed in accordance with the principle laid down in S. 7(ix) of the Act and may, in a number of cases, be different from the market value of the subject-matter in dispute. In an appeal arising out of such a suit also, the valuation would have to be fixed artificially with reference to S. 7(ix), Court-fees Act, because cl. (iv) of S. 2 of Court-fees Act enlarges the definition of the word 'suit' so as to include a first or second appeal from a decree in a suit and also a Letters Patent Appeal. The word 'suit' itself is not defined in the Court-fees Act and, therefore, reference has to be made to the Code of Civil Procedure to determine its meaning. Under S. 26 of the Code every suit is to be instituted by the presentation of a plaint or in such other manner as may be prescribed. No rules have been framed under this section prescribing any other manner for the institution of a suit.

A suit must, therefore, be deemed to be a proceeding arising on the presentation of a plaint. Proceedings under S. 12, U. P. Agriculturists' Relief Act are instituted not on the presentation of a plaint but on the presentation of an application. There can, therefore, be no doubt that proceedings under S. 12, U. P. Agriculturists' Relief Act are not a 'suit'. Since the proceedings out of which this appeal before the lower Court arose were not a 'suit', the word 'suit' as used in the Court-fees Act would not include this appeal. If the appeal had arisen out of a suit, then the word 'suit' would have included the appeal also for purposes of the application of the Court-fees Act. The present is, however, a case where the appeal is not from a decree in a suit but from a decree in proceedings on an application. Consequently, S. 7(ix), which fixes an artificial value for the subject-matter in dispute in "suits" against a mortgagee for the recovery of the property mortgaged cannot apply to this appeal. The decision of the learned District Judge accepting the report of the Inspector of Stamps that the value of the subject-matter must be fixed with reference to S. 7(ix), Court-fees Act is, therefore, not correct.

(3) It may, however, be mentioned that even the contention of the appellants that the court-fee is payable 'ad valorem' on the amount at which the appeal was valued by the appellants is not correct because the appellants do not possess the right to place any arbitrary value on the subject-matter in dispute in the appeal. Since the value of the subject-matter in dispute in the appeal has to be fixed without reference to any other provisions of the Court-fees Act which only apply to suits or to first or second appeals from decrees in suits, this value must be held to be the value of the relief claimed in the memorandum of appeal. In the appeal before the learned District Judge, the appellants had challenged the right of the respondents to redeem the mortgage. Redemption was allowed by the trial Court without any payment. The subject-matter in dispute in the appeal was, therefore, the right of redemption without payment. This right of redemption translated into the actual form in which it can be executed through the Court means the right to get possession over the property mortgaged. In this case, therefore, the value of the subject-matter in dispute must be held to be the value of the property mortgaged, a decree for possession of which had been granted against the appellants and was sought to be set aside in appeal by them. The vaule of the property has also to be determined without any reference to any of the provisions of the Court-fees Act.

It is only in suits and in appeals arising out of suits that the value of the property, for purposes of court-fee, is determined in accordance with the provisions of S. 7, Court-fees Act. In the present case, this value will have to be the market value of the property which will have to be determined by the lower Court independently of the provisions of the Court-fees Act and without application of the artificial principles which have been laid down under S. 7 of the Act for determining the value of the property. In this case, redemption has been allowed by the trial Court without any payment. Even in a case where redemption is allowed on payment of certain sum and the right of redemption is challenged in appeal, the court-fee will have to be determined on similar principles. In such a case the value of the subject-matter in dispute in appeal would naturally be the value of the property in respect of which redemption was allowed minus the amount directed to be paid by the mortgagor in order to obtain possession of the property on redemption. This would be the subject-matter in dispute, because, if the appeal is allowed, the appellants would get the advantage of retaining possession over the mortgaged property but would lose the advantage of receiving the amount of the redemption money decreed.

(4) Reference was made by the learned Junior Standing Counsel to the cases of —'Abdul Haq v. Shamshuddin', 1941 All LJ 409 and — 'Kishen Lal v. Preduman Kishen Singh', 1946 All LJ 43 in support of the decision given by the learned District Judge. These were, however, cases in which the appeal was from a decree in a suit and not from a decree in a proceeding under the Agriculturists' Relief Act. The case of — 'Balram Singh v. Dudh Nath', 1948 All LJ 296 was also cited but this was a case where the nature of the proceedings under S. 12 U. P. Agriculturists' Relief Act was determined with reference to the Arbitration Act and not with reference to the Court-fees Act. The views expressed in this case are also, therefore, inapplicable. On the other hand, in — 'Basant Lal v. Lalta Prasad', ILR (1946) All 409, it was held that the value of the subject-matter in dispute in an appeal filed under S. 23, U. P. Agriculturists' Relief Act cannot be determined with reference to S. 7 (ix), Court-fees Act and that the court-fee was payable on the amount or value of the subject-matter in dispute in the appeal.

A similar view was taken by a Division Bench of the erstwhile Chief Court of Oudh in — 'Surjan Singh v. Mashal Singh', AIR 1941 Oudh 447. In both these cases it was held that in an appeal u/s. 23, Agriculturists Relief Act the appellant was bound to pay court-fee on the amount or value of the subject-matter in dispute in appeal and not on the principal amount secured under the mortgage. These decisions did not proceed on the interpretation of the word 'suit' as used in the Court-fees Act but on the interpretation of the words, 'the amount or value of the subject-matter in dispute' as used in Sch. I, Court-fees Act. They are, however, both in line with the view taken by us above.

(5) We would, therefore, allow the apppeal, set aside the order of the learned District Judge and send the case back to him with a direction to fix the court-fee on the memorandum of appeal according to the subject-matter in dispute in appeal which would be the market value of the property in respect of which the right of redemption granted by the lower Court is sought to be set aside in appeal. In the circumstances of this appeal, parties must bear their own costs of this appeal.

B/D.H. Appeal allowed.

A. I. R. 1953 ALL. 241 (Vol. 40, C. N. 110)

CHATURVEDI J.

Bhagwati Prasad and another, Applicants v. Mt. Shitali and others, Opposite Party.

Civil Revn. No. 461 of 1950, D/- 13-10-1952.

Debt Laws — U.P. Agriculturists' Relief Act (27 of 1934), S. 12 — Mortgage of occupancy plots — Redemption of — Application under S. 12 is not maintainable for redemption: AIR 150 All 604 (FB), Foll. (Para 1)

Hirday Nath Seth and Man Singh, for Applicants; Vishwanath Singh, for Opposite Party.

REFERENCE ..... /Para

('50) 1950 All LJ 713: (AIR 1950 All 604 FB) 1

ORDER: This is a defendant's application in revision arising out of an application under S. 12, Agriculturists' Relief Act. The learned counsel for the plaintiffs opposite parties, Mr. Bishwanath Singh has very frankly conceded that this application must be allowed, because the properties sought to be redeemed are certain occupancy plots. A Full Bench case of this Court has ruled that an application under S. 12, Agriculturists' Relief Act is not maintainable for redemption of a mortgage of occupancy plots. This Full Bench case is reported in — 'Mahabal Singh v. Ram Raj', 1950 All LJ 713 (FB).

(2) I, accordingly, allow this application in revision, set aside the decrees of the Courts below and dismiss the suit. In view of the peculiar circumstances of the case, I direct that the parties shall bear their own costs in all the Courts.

B/V.R.B. Revision allowed.

A. I. R. 1953 ALL. 242 (Vol. 40, C. N. 111)
(LUCKNOW BENCH)
MISRA AND BEG JJ.

Brahma Din and others, Appellants v. Bachan Pershad and others, Respondents.

First Appeal No. 57 of 1945, D/- 17-3-1952.

(a) Debt Laws — U.P. Debt Redemption Act (13 of 1940), S. 2(9) — "Recoverable" — Meaning of — Mortgage by conditional sale.

A loan cannot be said to be recoverable only by payment in the form of money. The right of foreclosure given to the mortgagee of the mortgage by conditional sale under S. 67, Transfer of Property Act, is nothing but a method prescribed by law for the recovery of the loan advanced by him by seeking the relief of foreclosure against the mortgagor's property. The effect of passing a decree for foreclosure in favour of the mortgagee would be to destroy the right of redemption possessed by the mortgagor in the mortgaged property thereby making the mortgagee the owner of the entire right, title and interest possessed by the mortgagor in the said property. Mortgages by conditional sale are loans within the meaning of the Debt Redemption Act. (Paras 5, 6)

(b) Debt Laws — U.P. Debt Redemption Act (13 of 1940), S. 2(9) — "By a contract with the borrower" — Deed of gift.

The exemption in S. 2(9) would apply only where such a liability is transferred "by a contract with the borrower or his heir or successor or by sale in execution of the decree." In the case of a gift it cannot be said that there has been any transfer by a contract with the borrower or his heir or successor or by sale in execution of a decree. (Para 7)

R. B. Lal, (for No. 5) and N. C. Chaturvedi, for Appellants; H. K. Ghose, for Respondents.

BEG J.: This is a first appeal arising out of an application for redemption under S. 12, U. P. Agriculturists' Relief Act, 1934. The facts giving rise to the case may be briefly stated as follows:

(2) On 23-12-1889, Salik Ram and Shrimati Rukmin executed two mortgage deeds for Rs. 5,500/- and Rs. 300/- in favour of three persons named Daljit, Ram Ratan and Niranjan. On 17-4-1936, one Data Ram, a successor-in-interest of the mortgagors, gifted the property in question to Brahma Din, the father of the applicant Bachan Prasad. Thus, after the death of Brahma Din the applicant became the sole representative-in-interest of the original mortgagors. He gave this application impleading 18 persons as opposite-parties. These 18 persons are the successors-in-interest of the three original mortgagees.

The two mortgage transactions in respect of which the application for redemption was given appear to be mortgages by conditional sale. Under the terms of the said deeds the mortgagees were put in possession of the mortgaged property and they were entitled to take its profits in lieu of interest. The period given in the mortgage deeds was 40 years. The applicant filed the application under S. 12, U. P. Agriculturists' Relief Act, on 17-11-1944, alleging that the entire mortgage money relating to the two mortgage deeds had been paid off from the profits of the property realised by the mortgagees and that a huge amount remained due to him. He accordingly prayed for a decree for redemption in respect of the mortgaged property without payment of any dues.

(3) The application for redemption was resisted by the opposite-parties on various grounds, all of which were decided against them by the trial Court. The trial Court decreed the suit for redemption without payment of any amount by the applicant. Dissatisfied with the judgment of the trial Court, 16 opposite-parties filed this appeal in this Court impleading Bachan Prasad, the applicant, as respondent 1 and the two remaining opposite-parties as respondents 2 and 3.

(4) Before the argument started the learned Counsel for respondent 1 took a preliminary objection based on the ground that Ram Bharosey, appellant 2, Ram Bali appellant 4, Ragubans appellant 7, Shrimati Ram Bitana appellant 8 and Maharaj Gajadhar Prasad respondent 3, having died during the pendency of the appeal & their legal representatives not having been brought on the record within time the whole appeal had abated. The facts relevant to this objection were incorporated in Civil Miscellaneous Application no. 419 of 1949 dated 24-3-1949. In reply to the said application, a counter-application was filed in this Court on behalf of the appellant Sheo Dutt (Civil Misc. Application No. 855 of 1949) in which a prayer was made for impleading the heirs of the deceased parties under O. 1, R. 10 and S. 151, Civil P. C. The learned counsel for respondent 1, however, did not press his application and wanted the case to be argued on the merits. In these circumstances it is not necessary to give a decision on the preliminary point which was raised on behalf of respondent 1 by his application No. 419 of 1949.

(5) The main point argued by the learned Counsel appearing for the appellants in this case is that the transactions embodied in the mortgage deeds in question do not relate to loan as defined in S. 2 (9), U. P. Debt Redemption Act, and, therefore, the trial Court was not justified in giving the benefit of the said Act to the applicant. In this connection the learned Counsel referred to the terms of Ex. 2, the mortgage-deed for a sum of Rs. 5,500/- dated 23-12-1889, and of Ex. 3, the second mortgage deed for a sum of Rs. 300/- of the same date. According to the terms of the deeds in question the mortgagees were put in possession of the mortgaged property for a period of 40 years in lieu of the interest on the amount advanced. After the expiry of 40 years it was stipulated that the mortgage money due under the said deeds shall be paid to the mortgagees and the property shall be redeemed. If the mortgagors did not pay up the said amount, the mortgaged property shall be deemed to have been sold to the mortgagees, who would be considered to have become vendees of the same.

The definition of loan as given in S. 2 (9), U. P. Debt Redemption Act, is as follows:

> "'loan' means an advance in cash or kind made before the first day of June, 1940, recoverable from an agriculturist or a workman or from any such person and other persons jointly or from the property of an agriculturist or workman and includes any transaction which in substance amounts to such advance, but does not include an advance the liability for the repayment of which has, by a contract with the borrower or his

heir or successor or by sale in execution of a decree been transferred to another person or an advance by the Central or States Government or by a local authority authorised by the States Government to make advances or by a co-operative society or by a Scheduled bank:

"Provided that an advance recoverable from an agriculturist or from an agriculturist and other persons jointly shall not be deemed to be a loan for the purposes of this Act unless such advance was made to an agriculturist or to an agriculturist and other persons jointly".

Learned counsel appearing for the appellants placed emphasis on the word "recoverable" in the above definition and argued that in order that a transaction should be a loan under the Debt Redemption Act it is necessary that the money should be recoverable as such either from the person of the mortgagor-agriculturist or from his property. In the present case the loan was not recoverable in either manner hence it could not be a "loan" under the U. P. Debt Redemption Act. We have given our serious consideration to this argument of the learned Counsel and we find ourselves unable to accept his contention. It is, no doubt, correct that in a deed of mortgage by conditional sale of the nature of Exs. 2 and 3, which are before us, the mortgagees have no right to recover the money from the mortgagor personally or from his property but it does not follow from that that the loan in question was not recoverable in the manner mentioned in S. 2 (9), U. P. Debt Redemption Act.

The mortgagee in such case possesses a right to foreclosure as defined in S. 67, T. P. Act, according to which he has, at any time after the mortgage money has become due to him and before a decree has been made for the redemption of the mortgaged property or the mortgage money has been paid, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property. It seems to us that the right of foreclosure given to the mortgagee of the mortgage by conditional sale under S. 67, T. P. Act, is nothing but a method prescribed by law for the recovery of the loan advanced by him by seeking the relief of foreclosure against the mortgagor's property.

The effect of passing such a decree for foreclosure in favour of the mortgagee would be to destroy the right of redemption possessed by the mortgagor in the mortgaged property thereby making the mortgagee the owner of the entire right, title and interest possessed by the mortgagor in the said property. It appears to us that the right of foreclosure is nothing but a process for the recovery of loan given to the mortgagor by seeking the relief prescribed under S. 67, T. P. Act.

(6) The meaning of the word "recoverable" as given in the Iyer's Law Lexicon is as follows:

"The plain, ordinary and natural meaning of the word "recoverable" is that which is able to be, or is capable to be, or is capable of being recovered; obtaining 'obtainable from a debtor or possessor, as by legal process'. It means that which can be recovered as a matter of a legal right."

The argument advanced by the learned counsel for the appellants seems to us to proceed on the erroneous assumption that a loan can be said to be recoverable only by payment in the form of money. The Transfer of Property Act has prescribed various methods of the satisfaction of loans advanced by way of mortgage. Sale of property is one of the methods and foreclosure is another method of the satisfaction of the loan. In the case of sale the satisfaction may be effected by the mortgagee being paid in the form of cash and in the case of foreclosure the loan can be said to be discharged by vesting the mortgagee with the enlarged rights that accrue in his favour as a result of the decree of foreclosure being passed in respect of the property.

We can find no warrant for the meaning sought to be attributed to the word "recoverable" by the learned Counsel appearing for the appellants. He has, however, argued that the word "recoverable" should be strictly construed and if that method of construction is adopted, then a transaction of mortgage by conditional sale would be excluded from the definition of the word "loan" in S. 2 (9), U. P. Debt Redemption Act. If the preamble of an Act is a guide to the interpretation of the sections, then it seems to us that there can be absolutely no justification for including all other kinds of mortgages within the definition of "loan" in S. 2 (9), U. P. Debt Redemption Act, and excluding mortgages by conditional sale only from the definition. There seems to be no ground for making any such distinction.

The purpose of the Act as defined in the preamble of the Act is "to provide for further relief from indebtedness to agriculturists and workmen in the Uttar Pradesh". A mortgagor who enters into a transaction of mortgage by conditional sale is as much indebted as a mortgagor who enters into a transaction of simple mortgage or usufructuary mortgage or an English mortgage or an anomalous mortgage. Under S. 58 (a), T. P. Act, a mortgage is defined as a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. This is a feature which is common to all mortgages of whatever kind or species they may be.

Mortgage by conditional sale, like other mortgages, is stamped with the same characteristic as there is in it as in all other mortgages a transfer of interest in immoveable property for the purpose of securing the payment of money advanced. The relief of foreclosure is, therefore, a method for the purpose of satisfying the claim of the mortgagee to the payment of money by taking away the right of redemption which the mortgagor possessed in the property. We have no doubt in our minds that the transactions in question are loans within the meaning of the Debt Redemption Act and the applicant was entitled to the relief granted to him by the trial Court.

(7) The learned Counsel for the appellants has next argued that the transactions in question cannot be deemed to be a loan on another ground which he advanced as an alternative argument in favour of the appellants' case. He based this argument on the deed of gift (Ex. 1) executed by Data Ram in favour of Brahma Din, the father of the applicant, and he argued that the liability for the repayment of the loan having been transferred by the said deed, the loan in question would cease to be a loan under the definition of the same in S. 2 (9), Debt

Redemption Act. This argument ignores the obvious words of the section in question according to which the exemption would apply only where such a liability is transferred "by a contract with the borrower or his heir or successor or by sale in execution of the decree." In the case of a gift it cannot be said that there has been any transfer by a contract with the borrower or his heir or successor or by sale in execution of a decree. The transaction in question must, therefore, be held to be a loan and cannot be deemed to have gone out of the ambit of the definition of loan as a result of the deed of gift referred to on behalf of the appellants.

[8] Lastly the learned counsel for the appellants argued that it is open to this Court in appeal to vary the decree in favour of the mortgagees, who are not parties to this appeal. In this connection he relied on O. 41, R. 4, Civil P. C. This question would only have arisen if we had accepted his initial contention that the transaction in question is not a loan. In view of the conclusion arrived at by us that the decision of the trial Court was right and the transaction in question is a loan, it is not necessary for us to go into this matter.

[9] No other ground mentioned in the memorandum of appeal has been pressed on behalf of the appellants. We find no force in this appeal, which is accordingly dismissed with costs. The connected applications (Civil Misc. Applications Nos. 419 and 855 of 1949) are also dismissed. Stay order, dated 10-12-1945 is vacated.

B/D. H. *Order accordingly.*

A.I.R. 1953 Allahabad 244 *[Vol. 40, C.N. 112]*

SAPRU AND CHATURVEDI JJ.

Triloki Nath Garg—Applicant v. *The University of Allahabad—Opposite Party.*

Civil Misc. Writ No. 672A of 1952, D/- 5-12-1952.

Constitution of India, Art. 226—Academic bodies.

It is not right and proper for the University to allow a candidate to appear in a subject in which it is not prepared to offer facilities for instruction. It is however undesirable to issue notice to the University to show cause why an order should not issue directing the University to provide practical training for the applicant under Art. 226.
[Paras 2, 3, 4]

S. C. Khare — for Applicant.

Sapru J.—This application has been presented to this Court under Art. 226 of the Constitution by Sri Triloki Nath Garg, an ex-student of the B. Sc. Class of the University of Allahabad. For the B. Sc. degree examination, candidates are expected to offer three subjects. The subjects offered by the applicant were zoology, botany and military science. At the 1951 examination for the B. Sc. degree, the applicant was able to obtain the minimum pass marks in two of the subjects offered by him, viz., botany and zoology. He was, however, unable to get the minimum pass marks both in the theory paper on military science and the practical test for military science. As it is incumbent, in order to be declared successful, on candidates to obtain minimum pass marks in all the subjects offered, the applicant was declared unsuccessful. He was, however, allowed to appear as a private candidate the following year by a special resolution of the executive council passed on the 10th of November 1951.

[2] The applicant attributes his weakness in military science—both theoretical and practical—to the fact that the University had not allowed him an opportunity to acquire practical training in military science by permitting him to attend the course of study provided for it. As the University is not before us, we cannot say what measure of truth there is in this statement. We are, however, surprised at the statement, for, the Allahabad University is a teaching and unitary University and it is obligatory on it to provide instruction in the subjects it permits candidates to sit for its various degree examinations. Failure to provide such instruction, for whatever reason, places pupils who study at the University at a disadvantage in their examinations. A teaching University cannot fulfil its purpose without ensuring that there is correspondence between the teaching offered by it and its examination standards. Obviously, a student who finds that he cannot get any instruction in subject which he has been permitted to take up for study is at a very serious handicap so far as success in the examination for which he is studying is concerned.

[3] Our attention has been invited to the fact that, according to the rules of the University, it will not be open to the applicant to appear in the forthcoming examination for the B. Sc. degree without the permission of the executive council. It has been further urged that, even if he is permitted to do so, he will be faced with the position that the University will not provide him any instruction in practical military science. On these grounds, we have been pressed to issue notice to show cause why an order should not issue directing the University to provide practical training for the applicant. We, however, think it undesirable to issue notice in this case as Courts are rightly reluctant to interfere with the internal autonomy of academic bodies. At the same time, on the material before us, we cannot help feeling that it is essential for us to invite the attention of the University authorities to the grievance of the applicant that, while he had been permitted to offer military science, teaching in the practical part of military science was denied to him. We have advised the applicant to make proper representations to the University authorities. If he does so, the University should take a reasonable view of any representations made by the applicant to it for—

(a) permission to appear at the 1953 examination for the B. Sc. degree and

(b) facility for acquiring, between the period now and the examination, some practical training in military science.

[4] Mr. Khare has emphasised that the theory part of military science is inseparable from the practical part of it, that students who do not get an opportunity to acquire a practical knowledge of military science cannot properly pursue their theoretical study of it. There is force in this argument. We are dismissing this application as it is not in the interest of the applicant himself that there should be a delay of months in disposing of the application. We think that the purpose he has in view can be achieved more expeditiously by a proper representation to the University authorities who, we have no doubt, will consider the new representation in the light of the observations made by us. We wish to make it clear that, in our opinion, it is not right and proper for the University to allow a candidate to appear in a subject in which it is not prepared to offer facilities for instruction. It is, therefore, from every point of view obligatory on the University to take steps to see that any representations made by the applicant are considered in a reasonable and sympathetic spirit. With these observations, the application is dismissed.

[5] A copy of this order shall be given to learned counsel on payment of the usual charges.

A/D.H. *Application dismissed.*

A.I.R. 1953 Allahabad 245 *[Vol. 40, C.N. 113.]*

RAGHUBAR DAYAL AND AGARWALA JJ.

Murlidhar Dalmia, Applicant v. *State.*

Criminal Revn. No. 543 of 1949, D/- 18-9-1952.

(a) Cotton Cloth and Yarn Control Order (1945), Cl. 3 (a)—Ready-made clothing—Meaning of—(U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order (1945), Cl. 2 (a))—(Words and Phrases).

The expression 'ready-made clothing' must mean clothing which is ready for immediate use and which is meant for such use. It cannot mean an article which may not be meant for immediate use in the form in which it is, but just happens to be in the shape of any article of apparel.

The articles recovered from the accused's possession consisted of ten yards pieces of white cambric cloth roughly sewn together with a loop of *markin* (inferior cloth) at one end for passing through the waist-cord. In as many as 74 out of 133 loops did not even have the opening for putting in the waist-cord. The whole thing, if a *lehnga*, in that form and of that cloth was likely to be used, would have to be resewn :

Held that the articles recovered could not be said to be ready-made *'lehngas'*. They did not, therefore, come within the ready-made clothing exempted from the definition of cloth : Cri. Revn. No. 249 of 1948 (All.), *Disting.* [Paras 12, 13]

(b) Criminal P. C. (1898), Ss. 35, 423, 439, 537 — Single sentence for various offences.

The single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, unless there had been a failure of justice and the maintenance of that sentence by an appellate or revisional Court, even when the accused is acquitted of some of the offences convicted of, will not amount to an enhancement of the sentence and such a sentence should be interpreted to mean that the trial Court awarded identically the same sentence for each of the offences of which the accused was convicted, provided of course that such a sentence was within the maximum limits of the sentence provided by law for that offence, and the trial Court had ordered the sentences to run concurrently and in cases where such a sentence went beyond the maximum limit of imprisonment provided for any of the offences of which the accused was convicted, the sentence for that offence would be deemed to be the maximum provided by law for that offence. A composite sentence of fine should be treated to be made up of separate sentences of fine, equal in amount, for each of the offences of which the accused had been convicted, provided that such amount is not more than the maximum allowed under that offence. *Case law discussed.* [Para 28]

Anno. Cr. P. C., S. 35 N 6, 10 ; S. 423 N 33 ; S 439 N 29 ; S 537 N 6.

(c) Essential Supplies (Temporary Powers) Act (1946), Ss. 3, 4 and 6—Validity.

Sections 3 and 4 are not *ultra vires* but S. 6 is *ultra vires*. The result is that the Cotton Cloth and Yarn Control Order, 1945, is valid : A. I. R. 1952 All. 866 (F. B.), *Foll.* [Para 29]

(d) Criminal P. C. (1898), S. 439 — Enhancement of sentence — Cotton Cloth and Yarn Control Order (1945), Cls. 13 (1) (c) & 22.

The accused was prosecuted and convicted under R. 81 (4), Defence of India Rules, for breach of Cl. 13 (1) (c), Cotton Cloth and Yarn Control Order (1945). The Magistrate had ordered under Cl. 18, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, that the property seized in the case, 133 petti-coats or *lehngas*, shall be forfeited to His Majesty and that they shall be disposed of according to the direction of the District Magistrate :

Held that a such an order could have been passed under Cl. 22, Cotton Cloth and Yarn Control Order, 1945. As, however, such an order would amount to the enhancement of the sentence, the High Court in revision could not pass this sentence under Cl. 22, Cotton Cloth and Yarn Control Order, 1945, on account of the conviction of the applicant for contravening the provisions of Cl. 13 (1) (c) of that order. [Para 30]

Anno. Cr. P. C., S. 439 N. 29.

G. S. Pathak, P. C. Chaturvedi and J. N. Takru, for Applicant ; D. G. A., D. P. Uniyal, for the State.

REFERENCES : Courtwar/Chronological/ Paras

('24) A. I. R. 1924 All. 492 : (25 Cri. L. J. 992) 19
('47) 1947 All. L. J. 593 : (A. I. R. 1948 All. 136 : 49 Cri. L. J. 103) 18, 28
('48) Cri. Revn. No. 249 of 1948, D/- 22-10-1948 (All.) 15
('52) Cri. Revn. No. 1187 of 1952 : (A. I. R. 1953 All. 42 : 1953 Cri. L. J. 197) 18
('52) Cri. Revn. No. 711 of 1950 : 1952 All. L. J. 412: (A.I.R. 1952 All. 866: 1952 Cri. L. J. 1676 (F.B.) 29
('98) 22 Bom. 760 21, 28
('97) 24 Cal 316 21, 28
('38) A. I. R. 1938 Cal. 439 : (39 Cri. L. J. 684) 27
('07) 8 Cri. L. J. 75 : (18 Pun. W. R. 1908 Cr.) 25
('07) 30 Mad. 48 : (5 Cri. L. J. 88) 21, 23
('10) 11 Cri. L. J. 243 : (5 Ind. Cas. 754 Mad.) 23
('28) A. I. R. 1928 Mad. 651 : (29 Cri. L. J. 847) 23
('30) A. I. R. 1930 Pat. 79 : (31 Cri. L. J. 173) 26
('33) A. I. R. 1933 Sind 9 : (34 Cri. L. J. 143) 24

Raghubar Dayal J. — Murlidhar Dalmiya is proprietor of firm Onkarnath Nandkishore at Kanpur. His godown was searched on 4-6-1946 and there were found 133 pieces of cotton cambric cloth, each of 10 yards sewn in the shape of 'lehangas'. None of these pieces had any marking in compliance with the directions of cl. 10 or 10B,

Government of India Cotton Cloth and Yarn Control Order, 1945. He was thereafter prosecuted and convicted under R. 81 (4), Defence of India Rules, for breach of cls. 13 (1) (c) and 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945, and cl. (4), U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945 :

[2] We may quote the various clauses for whose breach the applicant has been convicted. Clause 13 (1) (c) is :

"Where the markings to be made and the time and manner of marking them in respect of any class or specification of cloth or yarn have been specified under Cls. 10 or 10B no person other than the manufacturer thereof shall have in his possession or under his control any such cloth or yarn which is not so marked, unless it be for bona fide personal requirements."

[3] Clause 18 (2) is :

"No dealer or other person not being a manufacturer shall, save with the permission of the Textile Commissioner, at any time hold stocks of cloth or yarn in excess of his normal requirements."

[4] Clause 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945 is :

"Subject to the provisions of cl. 16 no person other than a dealer shall obtain or attempt to obtain or store for sale or, distribution controlled cotton cloth or cotton yarn and save as hereinafter provided, no dealer shall obtain or attempt to obtain or store for sale or distribution or sell or distribute to any person controlled cotton cloth or cotton yarn except under and in accordance with the conditions of a licence in the appropriate form granted under this Order."

[5] Controlled cotton cloth is defined in cl. 2 (a) of this Order thus :

"Controlled cotton cloth means any type of cloth manufactured either wholly from cotton or partly from cotton and partly from any other matter and containing not less than 10 per cent. of cotton by weight; but does not include —(1) ready-made clothing other than dhoties and sarees."

[6] The definition of 'cloth' in cl. 3 (a), Government of India Cotton Cloth and Yarn Control Order, 1945, is identical with the definition of "Controlled Cotton Cloth" in cl. 2 (a), U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, and need not be quoted.

[7] The conviction of the applicant for breaches of cl. 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945, and cl. 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, cannot be maintained, even if what was recovered from his possession comes within the definition of the words 'controlled cloth or cotton cloth'.

[8] He would have committed a breach of cl. 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, if he had obtained or stored this cloth for sale when he had not obtained a license for it under this Order. It is admitted that he had not obtained any licence under this Order but had applied for one. It is now conceded in this Court on behalf of the State that he did apply for a licence under this Order within a month of the coming into force of this Order. The order came into force on 1-10-1945 and he applied on 27-10-1945. Prior to that he held a Registration Certificate granted under the U. P. Cotton Cloth and Yarn (Control) Order, 1943. In view of these facts and in view of the provisions of cl. 9, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, it would be deemed that he held a licence under this Order on 4-6-1946 when this controlled cotton cloth was recovered from his godown.

Clause 9 is :

"A registration certificate granted under the United Provinces Cotton Cloth and Yarn Control Order, 1943, or subsisting on the date of this Order shall be deemed to be a licence granted under this Order (i) until a licence under this Order is granted or refused, provided that application for such licence is made within a month from the date on which this Order comes into force or (ii) for a period of one month from the date when this Order comes into force, if no application for a licence under this Order is made before the termination of such period."

The applicant having applied for a licence within a month of the coming into force of this Order, his application not being either granted or refused till 4-6-1946, and he having held a registration certificate granted under the U. P. Cotton Cloth and Yarn Control Order, 1943, is to hold a licence granted under this Order and his registration certificate would be deemed to be such licence.

[9] Clause 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945, will be contravened by the applicant if it be established that the amount of cloth recovered from his possession, that is, 1330 yards of cambric cloth, was in excess of his normal requirements as a dealer. The applicant is a dealer under this Order, as dealer defined in cl. 3 (b) means "a person carrying on the business of selling cloth or yarn or both, whether wholesale or retail." There is nothing on the record to show what were the normal requirements of the applicant for the purpose of his business and, in the absence of any such evidence, it cannot be held that 1330 yards of cloth was in excess of his normal requirements. He cannot, therefore, be held to have committed a breach of cl. 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945.

[10] It is not disputed that this cloth recovered from his house did not have the necessary markings and that, therefore, he would contravene cl. 13 (1) (c) if it be held that what was recovered from his possession came within the definition of the word "cloth" in the Government of India Cotton Cloth and Yarn Control Order, 1945. There is no question here of his possessing this cloth for *bona fide* personal requirements. It is contended for the applicant that what was recovered from his place was ready-made clothing as it consisted of 'lehengas' and, therefore, it did not come within the definition of 'cloth'.

[11] We have seen the articles recovered from the applicant's godown, and are of opinion that they do answer the definition of the word 'cloth' in cl. 3 (a), Government of India Cotton Cloth and Yarn Control Order, 1945, and cannot be said to be "ready-made clothing".

[12] The expression 'ready-made clothing' is not defined in the order. We are of opinion that it must mean clothing which is ready for immediate use and which is meant for such use. It cannot mean an article which may not be meant for immediate use in the form in which it is, but just happens to be in the shape of any article of apparel. In Shorter Oxford English Dictionary "Ready-made" is defined as "Of made and manufactured article : *In a finished state*; immediately ready for use; now spec. (Specially) of articles which are offered for sale in this state."

[13] The articles recovered from the accused's possession just consist of ten yards pieces of white cambric cloth roughly sewn together with a loop of *markin* (inferior cloth) at one end for passing through the waist-cord. In as many as 74 out of 133, loops did not even have the opening for putting in the waist-cord. The impression on our minds is that the cloth had been put in this shape as an attempt to evade the Control Order if possible, and not with a view to provide ready-made lehngas for immediate use in the form in which they are to be delivered. It may be open to a person to do his best to evade the law if he can do so lawfully and such attempt to evade the law would not be punishable, but the case of the applicant is not such a case. They are not such which can be supposed to be used in that form by any woman. The whole thing, if a lehnga, in that form and of that cloth is likely to be used, will have to be resewn. Cambric cloth is fairly thick stuff, and a lehnga having two folds of this cambric cloth would be a pretty heavy thing without any particular use for a second fold of the cloth. The statement of Babu Lal D. W. 4 that the stitches of these lehngas were not of the type generally used in ordinary lehngas and that they could be removed very easily and that married Hindu ladies generally use coloured lehngas, fully supports our opinion that the articles recovered cannot be said to be readymade 'lehngas.' They, do not, therefore, come within the readymade clothing which is exempted from the definition of cloth, as given in this order.

[14] Sri C. E. David, Deputy Collector, in whose presence the godown was searched, states that the bale containing these so-called lehngas was placed under 4 or 5 bags of *saresh*, a sticking material. This shows the applicant's *mala fides*, with which really we are not concerned in this case. Of course the circumstance goes to strengthen the view that the recovered articles were not genuine lehngas and were not meant as such.

[15] Reference has been made to the decision of a single Judge of this Court in *Banarsi Das* v. *Rex*, Cri. Revn. No. 249 of 1948 (ALL.) where he held similar articles to be garments and, therefore, not cloth whose transmission by post was forbidden. The expression "garments" is not identical with "readymade clothing." Readymade clothing, as already mentioned, is clothing with a certain special feature and that the particular feature is that it should be readymade, which means that it should be an article of clothing in such form that it be ready for immediate use as that particular article of clothing. Cloth put in the form of any garment would easily answer the expression "cloth made up into garments" and, therefore the decision in that case does not go against our interpretation of the expression "readymade clothing."

[16] We are, therefore, of opinion that the so-called lehngas recovered from the applicant's possession are not readymade clothing and are, therefore, "Cloth" as defined in cl. 3 (a), Government of India Cotton Cloth and Yarn Control Order, 1945. The applicant, therefore, committed a breach of cl. 13 (1) (c) of that order which was punishable under R. 81 (4), Defence of India Rules.

[17] It was argued that the sanction of the District Magistrate to the prosecution of the applicant under cl. 23, Government of India Cotton Cloth and Yarn Control Order, 1945, was bad as it did not appear that he had been informed about the actual description of the articles recovered and that, therefore, it cannot be said that he sanctioned the prosecution after full knowledge of the facts. We do not agree with this contention. Exhibit P26 would show that he was informed that cloth pieces of 10 yards each camouflaged as petticoat had been recovered.

[18] The other point taken before us was that the applicant had been given a combined sentence for his committing breaches of three different provisions of the two Control Orders and that such a combined sentence vitiates the entire trial in view of the case reported in *Brij Nandan* v. *Emperor*, 1947 ALL. L. J. 593. It may be mentioned that the learned Magistrate had framed two charges for offences under R. 81 (4), Defence of India Rules, one with respect to the contravention of cl. 13 (1) (c), Government of India Cotton Cloth and Yarn Control Order, 1945, and the other with respect to the contravention of the provisions of cl. 18 (2) of the same order and of cl. 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945. The final order of the learned Magistrate was that the applicant was convicted of having committed an offence under the various clauses and was sentenced under R. 81 (4), Defence of India Rules, to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000 or undergo further rigorous imprisonment for two months. We are of opinion that the case of *Brij Nandan reported in* 1947 ALL. L. J. 593 is distinguishable.

There the learned Magistrate trying the several accused for offences under ss. 147, 452 and 323 read with S. 149, Penal Code, simply recorded an order convicting them without specifying the offences of which he was convicting them and then passed a single sentence. Such an order of the Magistrate was held to be illegal in view of the non-

compliance with the provisions of sub-s. (2) of s. 367, Criminal P. C., which required the judgment to specify both the offence of which an accused is convicted and the sentence awarded for that offence. It was held, in these circumstances, that the Magistrate did not appear to have applied his mind to the case of each applicant in judging the extent of each applicant's guilt and determining what sentences should be passed upon them for each offence and that, therefore, the error committed could not be cured by s. 537, Cr. P. C.

One of us distinguished that case on this ground in *Kashi Ram* v. *State*, CRI. REVN. NO. 1187 of 1952, and held that it could not always be said that a composite punishment for the various offences which had been specified in the judgment and found to have been committed by a particular accused vitiated the trial and that the imposition of a composite punishment was merely an irregularity covered by s. 537, Cr. P. C. We are of the same opinion and hold that the mere fact that separate sentences for the different offences of which an accused is convicted have not been expressly passed in a case does not vitiate the trial, though it is essential that separate sentences should be expressly mentioned in the judgment with respect to each offence of which the accused is found guilty. The omission to do so is an irregularity which can be cured in view of the provisions of s. 537, Cr. P. C., if there had been no failure of justice.

[19] The question arises as to what interpretation should be given to such a composite sentence and what would be the proper order in case, on appeal or revision, the conviction of the accused with respect to certain offences is set aside while his conviction with respect to other offences is confirmed. It is argued for the applicant that the sentence awarded ostensibly for the various offences should be taken to be an aggregate sentence of the various sentences which the Court intended to award with respect to each offence and that, therefore, when an accused is acquitted of some of the offences the sentence originally awarded must be reduced to some extent as a token of the fact that his sentence had not been enhanced as otherwise maintaining the same sentence for fewer offence would mean that the accused was to undergo some sentence which must be taken to have been passed by the Court for the offences of which he had been acquitted and which went to make up the aggregate sentence passed.

Such a view does find support from some cases, but we do not agree with that view and are of opinion that such a composite sentence of imprisonment should be taken to mean that that identical sentence was awarded for each of the offences of which the accused was convicted and that all such identical sentences for all the offences were ordered to run concurrently. This seems to us to be the most logical interpretation as otherwise the appellate or the revisional Court cannot be in a position to determine the specific punishments which the trial Court is supposed to have contemplated to award for each offence and whose total was simply mentioned as the sentence awarded to the accused. It can be said that ordinarily Courts do make the separate sentences concurrent and that it is only in special cases that the Courts order sentences to run consecutively. Section 35, Criminal P. C., provides that when a person is convicted at one trial of two or more offences, the Court may sentence him for such offences to the several punishments prescribed therefor which such Court was competent to inflict and that such punishments, when consisting of imprisonment or transportation, shall commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

This means that when a Court intends to award separate sentences for the various offences to run consecutively it is to express the order in which the sentences for the various offences would run. When the Court passes just one sentence for the various offences, it would be too much to suppose that the Court had separate sentences for each offence in mind and failed to give expression to its intention about the extent of the sentences and also failed to mention the order in which the sentences for the various offences were to run. It would be more probable in such a case that the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done. No difficulty arises in interpreting one sentence awarded as a sentence for each offence with the direction that the sentences were to run concurrently. A difficulty may arise when the sentence awarded be in excess of the maximum sentence which could have been awarded for any of the offences of which the accused had been convicted, because in that case it would not be proper to hold that the Court intended to pass an illegal sentence and did pass an illegal sentence.

In such a case it can be held that the sentence passed for such an offence was the maximum fixed under law for that offence and that the Court ordered such maximum sentence to run concurrently with the higher sentence passed for other offences. This view agrees with the view expressed by this Court in *Sohan Ahir* v. *Emperor*, A. I. R. 1924 ALL. 492, where Daniels, J., interpreted a sentence of 18 months' rigorous imprisonment under ss. 326 and 148, Penal Code, as meaning that the Magistrate passed concurrent identical sentences under each section. When the composite sentence consists of or includes fine the amount of fine should be taken ordinarily to be the total of the fines the trial Court intended to impose for various offences and it may be presumed in the absence of any special circumstances

that an equal amount of fine was imposed for each offence. It would follow that the acquittal of the accused for some offence must mean corresponding reduction in fine.

[20] We may now refer to some cases of other High Courts on the point.

[21] In *Paramasiva Pillai* v. *Emperor*, 30 Mad. 48, an accused convicted under Ss. 147, 323 and 379, Penal Code, was sentenced to undergo two months' rigorous imprisonment and to pay a fine of Rs. 50. On appeal he was acquitted of the offence under S. 379, Penal Code, but the entire sentence was upheld in connection with his conviction under Ss. 147 and 323, Penal Code. It was held :

"In such cases some reduction of sentence by the appellate Court must be made, unless the Court thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of the sentence."

The cases relied upon for this purpose were *Queen-Empress* v. *Hanma*, 22 Bom. 760, *Ramzan Kunjra* v. *Ramkhelawan Chowbe*, 24 Cal. 316 and another unreported case of 1905, in which it was held that such an order amounted to an enhancement of the sentence passed for the offence, the conviction for which alone was maintained. The two cases of Bombay and Calcutta relied upon do not support the view expressed in this case.

[22] In both these cases the trial Court had awarded separate sentences for each of the offences the accused was convicted of, and in appeal the accused though acquitted of one of the offences, was sentenced to the aggregate term of the sentences awarded by the trial Court for the two offences. It is obvious that the sentence for the particular offence, conviction with respect to which was maintained, was enhanced by adding the sentence awarded by the trial Court for the other offence of which the accused was acquitted to the sentence awarded by that Court for the offence conviction for which was maintained by the appellate Court. It may be mentioned that both these cases were decided before 1898 and that till 1898 the Code of Criminal Procedure of 1882 or 1872 or 1861 did not empower Courts to order the various sentences awarded for several offences of which an accused was convicted to run concurrently. Section 35, Criminal P. C. Act 5 of 1898, gave this power to the Court for the first time.

[23] In the two Madras cases *In re Mari*, 11 Cri. L. J. 243 (Mad.) and *Kailappa Goundan* v. *Emperor*, A. I. R. 1928 Mad. 651, the composite sentence was not reduced. In the former, it was observed :

"But here the true inference to be drawn from the sentences is that the Magistrate did not mean to pass any sentence for the offence of hurt and that being so there was nothing to reduce."

In the other case, it was observed:

"In this case there were three counts and the lower appellate Court thought that there was no distinct charge in respect of the separate counts and set aside the conviction in respect of two and declined to interfere with the sentence in respect of the third. This does not amount to an enhancement of the sentence."

It appears to us that in effect the two cases did not actually follow the case of *Paramasiva Pillai* v. *Emperor*, 30 Mad. 48.

[24] In *Emperor* v. *Dharamdas Lilaram*, A.I.R. 1933 Sind 9, the legality of convicting an accused of two offences but passing one sentence was considered. The question was not clearly answered. It was observed that it was desirable that the Court should at least record what punishment it awards for each of the two distinctive offences, and the Court split up the sentence passed into two sentences whose total came to the original sentence and the Court passed separate sentences making them concurrent, the longer sentence being equivalent to the sentence awarded by the trial Court. This case is not of much help except as supporting the view that the passing of a composite sentence is not absolutely illegal.

[25] In *Ishar Das* v. *Emperor*, 8 Cri. L. J. 75 (Lah.), it was observed :

"The argument that to uphold the sentence under one section alone amounts to an enhancement of sentence is one that is not supported by any authorities and does not appeal to us. The sentence was a joint sentence and we consider that it can be maintained in full on the conviction under S. 420 being upheld."

In this case each of the two accused was convicted by the trial Court of three offences and was awarded one sentence. Conviction of each with respect to one offence was maintained and the sentence was reduced.

[26] In *Bechu Singh* v. *Emperor*, A. I. R. 1930 Pat. 79 the trial Court had convicted the appellants of offences under Ss. 147 and 323, Penal Code, and passed a sentence of imprisonment and fine under S. 147 only and passed no sentence under S. 323. The appellate Court acquitted the accused of the offence under S. 147 and, upholding the conviction under S. 323, maintained the sentence which had been passed under S. 147. It was argued in the High Court that the order passed by the appellate Court amounted to enhancing the sentence. It was observed by Macpherson J. :

"Manifestly it does not follow that if the conviction on one of several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a reduction of sentence. It depends on the circumstances of the particular case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of sentence."

The sentence of fine was set aside because it was found that the other co-accused who were convicted of the offence under S. 147 only had been sentenced to fine only by the trial Court. The case does not support, therefore, the view that in all cases maintaining the same sentence, even though an accused is acquitted of one of the offences convicted of, amounts to enhancement.

[27] In *Superintendent & Remembrancer of Legal Affairs, Bengal* v. *Hossein Ali*, A.I.R. 1938 Cal. 439, a Magistrate convicted the accused under Ss. 363 and 498, Penal Code, but passed a sentence

of 1½ years under S. 363 and awarded no separate sentence under S. 498. The appellate Court found the accused guilty under S. 498, but not under S. 363. It then felt difficulty in passing a proper sentence as the Magistrate had not passed any sentence under S. 498. It was held that the Sessions Judge had jurisdiction to pass an appropriate sentence under S. 498, subject to the limit of one year and six months which the Magistrate had imposed, in view of S. 423, Criminal P. C., which allowed the appellate Court to alter the finding maintaining the sentence or, with or without altering the finding, to reduce the sentence. It was considered that the Sessions Judge had merely altered the conviction under ss. 363 and 498 to a conviction under S. 498 only. We do not agree with the reasoning, but are of opinion, in view of the interpretation given above, that the Sessions Judge could have passed a sentence under S. 498 upto 18 months, as held in this case.

[28] It would appear from the above that none of the cases in which it was held that the maintenance of the sentence of imprisonment passed by a trial Court ostensibly as a joint sentence for the various offences proved against the accused amounted to an enhancement of the sentence refers to anything in the Code of Criminal Procedure or in the Penal Code to support the conclusion, references being only to some cases decided prior to 1898 when the law was different, and that even two of those cases, namely, those reported in *Queen-Empress* v. *Hanma*, 22 BOM. 760 and *Ramzan Kunjra* v. *Ramkhelawan Chowbe*, 24 CAL. 316 did not really lay this down. No case other than the one reported in *Brij Nandan* v. *Emperor*, 1947 ALL. L. J. 593, is referred to in support of the contention that the mere passing of one sentence in cases in which an accused was convicted of several offences would vitiate the trial. We, therefore, hold that the single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, unless there had been a failure of justice and that the maintenance of that sentence by an appellate or revisional Court, even when the accused is acquitted of the offences convicted of, will not amount to an enhancement of the sentence and that such a sentence should be interpreted to mean that the trial Court awarded identically the same sentence for each of the offences of which the accused was convicted, provided of course that such a sentence was within the maximum limits of the sentence provided by law for that offence, and that the trial Court had ordered the sentences to run concurrently and that in cases where such a sentence went beyond the maximum limit of imprisonment provided for any of the offences of which the accused was convicted, the sentence for that offence would be deemed to be the maximum provided by law for that offence. We further hold that a composite sentence of fine should be treated to be made up of separate sentences of fine, equal in amount, for each of the offences of which the accused had been convicted, provided that such amount is not more than the maximum allowed under that offence.

[29] It was also urged that ss. 3, 4 and 6, Essential Supplies Act, were *ultra vires* of the Central Legislature in view of its delegating its legislative power to the executive without laying down guiding principles for the exercise of that power. The contentions raised really were the same as were urged in *Bhushan Lal* v. *State*, CRI. REVN. NO. 711 of 1950 and were referred to the Full Bench for decision. The Full Bench has held that ss. 3 and 4 were not *ultra vires* and that S. 6 was *ultra vires*. *Brij Bhushan Lal* v. *State*, 1952 ALL. L. J. 412. The result is that the Government of India Cotton Cloth and Yarn Control Order, 1945, is valid.

[30] The learned Magistrate had ordered under cl. 18, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, that the property seized in the case, 133 petti-coats or *lehangas*, shall be forfeited to His Majesty and that they shall be disposed of according to the direction of the District Magistrate. It appears to us that this order cannot stand in view of our opinion that the applicant did not contravene cl. 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945. Such an order under cl. 18 could be passed in cases in which a person was convicted for contravening any of the provisions of this particular Order. It is true that a similar order could have been passed under cl. 22, Government of India Cotton Cloth and Yarn Control Order, 1945. As, however, such an order would amount to the enhancement of the sentence, we cannot pass this sentence now under cl. 22, Government of India Cotton Cloth and Yarn Control Order, 1945, on account of the conviction of the applicant for contravening the provisions of cl. 13 (1) (c) of that Order.

[31] In view of the above, we allow the revision to this extent that we set aside the conviction of the applicant under R. 81 (4), Defence of India Rules, with respect to his alleged contravening the provisions of cl. 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945, and cl. 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, and set aside the order of forfeiture of the property recovered.

[32] We dismiss the revision with respect to the accused's conviction and sentence under R. 81 (4), Defence of India Rules, with respect to his contravening the provisions of cl. 13 (1) (c), Government of India Cotton Cloth and Yarn Control Order, 1945, the sentence being of six months rigorous imprisonment and Rs. 333-5-4 fine.

[33] We direct that the property in suit be returned to the applicant and that the applicant

who is on bail should surrender and serve out the sentence.

B/D.H. *Order accordingly.*

A.I.R. 1953 Allahabad 251 *[Vol. 40, C.N. 114.]*

MUSHTAQ AHMAD J.

Mt. Thakur Dei Kunwar and others—Plaintiffs-Appellants v. *Bishwanath Singh and others —Defendants-Respondents.*

Second Appeal No. 789 of 1948, D/- 29-10-1951.

(a) Debt Laws — U. P. Regulation of Agricultural Credit Act (14 of 1940), S. 7—Sale of Zamindari share by *B* to *A*—Share declared to be 'protected land'—Suit for declaration by *A* that *B* was also owner of certain other share which would .in effect negative *B's* protected status — Maintainability — Specific Relief Act (1877), S. 42.

A obtained a decree for specific performance of an agreement to sell a zamindari share in village *X*, against *B*. When the decree was sought to be executed *B* raised an objection that the property covered by the decree was 'protected land' within S. 2 (12) of the U. P. Regulation of Agricultural Credit Act and, therefore, it could not be sold without the permission of sub-divisional officer. *B* applied for permission under S. 24 of the Act. The sub. divisional officer held that the property was a protected land but refused to allow its permanent alienation. During the pendency of an appeal against the order, *B* withdrew his application under S. 24 and thereupon the appeal was 'filed'. Meanwhile a sale deed had been executed in *A's* favour in pursuance of the decree. *A* then filed a suit for declaration that *B* was the owner of a zamindari share in village *Y* and the same had been wrongly recorded in the name of *C* who was a Hindu widow entitled to maintenance. The object of the suit was no doubt to have the order of the Sub-divisional Officer made ineffective by showing that if the zamindari shares in villages *X* and *Y* were taken into account they could not come within the definition of 'protected land' within S. 2 (12).

Held that the jurisdiction of the civil Court to entertain the suit was not barred by virtue of S. 7 of the U. P. Act. The question of title with reference to share in village *X* was an entirely independant question, in every way distinct from the question relating to property in village *Y*, even though the granting of the declaration may have a negative effect on the incidents of property in village *X*. [Para 12]

Held further that the suit was not barred by S. 42, Specific Relief Act. The plaintiff being interested in seeking a declaration of a third party's title could only sue for a declaration of title and for no other relief. [Para 13]

Annotation : Specific Relief Act, S 42 N 3.

(b) Civil P. C. (1908), S. 100 — Finding of fact— Finding that certain persons are owners of only half share in certain property is a finding of fact which cannot be disturbed in second appeal. [Para 14]

Annotation : C. P. C. Ss. 100 & 101 N 52.

Kanhiya Lal Misra — for Appellants.

Mukhtar Ahmad—for Respondents.

Judgment. — This is a plaintiff's appeal in a suit for declaration that defendant 1 is the owner of a five anna zamindari share and certain houses in village Bhandewa, district Azamgarh. According to the allegations in the plaint, the name of Mt. Sukhna Kunwar defendant 4 who, as a Hindu widow, is entitled to a mere maintenance, is wrongly entered in the khewat against this zamindari property.

[2] There were two brothers, Ran Bahadur and Ram Padarath, the former left a widow Mt. Sukhna Kunwar, defendant 4, and the latter two sons, Bishnath Singh defendant 1 and Har Bhan Singh. Bishnath Singh has two sons, Chandra Bhukhan and Durga Prasad, defendants 2 and 3 respectively. The last two defendants presumably live with their father, defendant 1, as members of a joint Hindu family, and the declaration of title sought in the plaint was obviously intended to be in favour of these defendants also.

[3] In July 1943, defendant 1 had agreed to sell a three anna 8 pie zamindari share in village Bahora (to be distinguished from Bhadewa, the village in dispute) to the plaintiffs-appellants. In the same year, the latter brought suit NO. 422 of the Court of the Munsif, Azamgarh against the defendants 1 to 3 for specific performance of the said agreement. This was decreed on 29th August 1944.

[4] When the plaintiffs sought to have a sale-deed executed in execution of the decree, the defendants raised an objection that the property covered by the decree was 'protected land' within the meaning of s. 2 (12), U. P. Regulation of Agricultural Credit Act, 14 of 1940 and that, therefore, the same could not be sold without a permission from the Sub-Divisional Officer. Then defendant 1, either by himself or along with defendants 2 and 3, applied for such permission. The Sub-Divisional Officer, finding that defendants 1 to 3 did not own the property now in dispute which was held by defendant 4 in her own right and not only in lieu of maintenance, declared the property covered by the decree aforesaid as "protected land", but he refused to allow its permanent alienation by defendants 1 to 3 by his order dated 29th March 1945. An appeal against this order was filed by the present plaintiffs to the Collector, but, before it was decided, defendant 1 or defendants 1 to 3, whoever had applied for permission under S. 24 of the Act, withdrew that application. On this the Collector passed an order that the appeal be "filed".

[5] Meanwhile the learned Munsif, in the course of execution of the decree for specific performance had directed the execution of a sale-deed which was in fact executed. It was after this that the present suit was filed for the reliefs I have already mentioned.

[6] One of the assertions in the plaint was that the five anna share entered in the name of defendant 4 really belonged to defendants 1 to 3. There was a reference also in the plaint to the abortive application made by the defendants 1 to 3 to the Sub-Divisional Officer for permission to sell the three anna eight pie share in village Bahora in accordance with the agreement aforesaid. The object underlying this obviously was to suggest that such permission had been wrongly refused and that, as a matter of fact, the defendants 1 to 3, as owners also of the property now in dis-

pute, could not claim the privilege of a proprietor of 'protected land' as they paid local rate exceeding RS. 25 per annum. It was, therefore, claimed that in determining the status of defendants 1 to 3 the five anna share recorded in the name of defendant 4 should also be treated as property owned by these defendants, so that, if the local rate payable in respect of both the items of property were taken into account, they could not come within the definition of 'protected land' in S. 2 (12) of the Act.

[7] The defence taken was that defendant 4, in whose name the property in dispute, namely, the five anna share in village Bhadewa stood, was the real owner of that property with which the defendants 1 to 3 had nothing to do, that the jurisdiction of the civil Court was barred by S. 7, U. P. Act 14 of 1945, and that the suit was barred by S. 42, Specific Relief Act.

[8] The trial Court decreed the suit, holding that the defendants 1 to 3 were the owners of the entire property, including the five anna share in the name of defendant 4, that the suit was cognizable by the civil Court and that it was not barred by S. 42, Specific Relief Act.

[9] The lower appellate Court reversed this decree and dismissed the suit, holding that the defendants 1 to 3 were owners of only a half share in the property in dispute, that the jurisdiction of the civil Court was barred under S. 7 of the aforesaid Act and that the suit was also barred by S. 42, Specific Relief Act.

[10] It is only the findings on the legal issues that have been challenged before me by the learned counsel for the plaintiffs-appellants. He argued in the first instance that the civil Court had jurisdiction to entertain the suit. The ground on which the lower appellate Court had repelled this contention is, to my mind, not easily intelligible. It observed:

"If the appellate order of the revenue Court meant the dismissal of the appeal and refusal to give permission of sale that order could be challenged in the manner laid down in S. 31 of the Act. The jurisdiction of the civil Court to question that order is expressly barred by S. 7 of the Act."

[11] In the first place, the appellate order referred to in the above passage had itself been made in an appeal filed under S. 31 of the Act. There is no provision in the Act under which it could be challenged by a further appeal. In the second place, the present suit was not to question that order but for an entirely different relief which I have already specified. This relief was for a declaration of the title of defendants 1 to 3 to a certain property which was not part of the property covered by the agreement entered into by defendants 1 to 3 to sell property to the plaintiffs and, therefore, not covered by the decree dated 29th AUGUST 1944, for specific performance of contract, but was in respect of a property distinct from the subject-matter of the said agreement and the said decree. It may not be denied that the object underlying the suit was to deprive the defendants 1 to 3 of the privileges conferred by ACT 14 of 1940 by getting it affirmed by the civil Court that the properties held by them did not come within the purview of 'protected land' within this Act. All the same there was no declaration sought in the suit that a previous order declaring a certain property as 'protected land' under S. 4 or under S. 6 of the Act had been wrongly made. The simplest approach to appreciate this position would be to ask one-self whether the declaration prayed for in the present suit in respect of the five anna share in Bhadewa could, in any way, be affected by the position of defendants 1 to 3, qua the property in Bahora to which the agreement to sell and the decree for specific performance related. In my view, it is manifest that the declaration desired could be made, whatever the position was with regard to the latter property. It is one thing to say that the object or motive underlying the suit was to have a certain order of the Sub-Divisional Officer made ineffective ultimately, but it is quite a different thing to say that the suit itself was to question any declaration made by that officer either under S. 4 or under S. 6 of the Act.

[12] Learned counsel for the defendants-respondents, relying on the provisions of S. 6 of the Act, contended that it was open to the plaintiffs to have applied to the Assistant Collector in charge of the Sub-Division for a declaration that a certain land was or was not a 'protected land.' The answer is that the plaintiffs-appellants simply does not and need not want any such declaration. It is true that, if the property covered by the agreement was 'protected land,' such a position may cease to exist if the relief in the present suit, namely that the defendants 1 to 3 were the owners of the five anna share entered in the name of defendant 4 in Bhadewa was allowed in whole or in part. In these circumstances, I am definitely of the opinion that the question of title with reference to this property in Bhadewa is an entirely independent question, in every way distinct from the question relating to the property in Bahora, even though the granting of a declaration, as desired by the plaintiff, may have a negative effect on the incidents of the property in Bahora under the provisions of ACT 14 of 1940. This aspect alone does not bring the suit within the prohibition created by S. 7 of the Act.

[13] As regards the second question of the bar of S. 42, Specific Relief Act, the position is much simpler. The lower appellate Court accepted the plea as it thought that the plaintiffs could not ask for a declaration of a third party's title. The learned District Judge did note the instance of a suit under O. 21, R. 63, Civil P. C., in which a plaintiff does want a declaration of title of a third party. But instead of taking the same in negation of the bar he treated it as an exception to the rule. The matter did not, in my opinion, admit

of a solution on such a narrow basis. In every case, the test should be whether the plaintiff has an interest in seeking such a declaration. If that is the test, there should be no difficulty in applying it particularly in the present case. That there can be such instances of a declaration of a third party's title in the interest of the plaintiff himself has not been shown as an impossible proposition because of any statutory provision. I take it that the lower appellate Court negatived it merely because it was not the common rule. Nonetheless, each set of facts may admit only of a rule which is applicable to that alone and not to other combinations. I do not, therefore, see anything wrong in holding that, in a case like the present, the plaintiff could only sue for a declaration of title and for no other relief. Hence I disagree with the finding of the learned District Judge that the suit was barred by s. 42, Specific Relief Act.

[14] The learned Judge found that the defendants 1 to 3 were owners of only a half share in the property in dispute. That is a finding of fact which cannot be disturbed in second appeal.

[15] For these reasons I set aside the decree of the lower appellate Court, modify the decree of the trial Court by allowing the plaintiffs' claim only in respect of a half share in the property in dispute. In these circumstances each party shall bear its own costs throughout.

[16] Leave to appeal to a Bench is granted.

B/K.S. *Order accordingly.*

A.I.R. 1953 Allahabad 253 *[Vol. 40, C.N. 115.]*

AGARWALA J.

Jagdamba Misir, Decree-Holder-Appellant v. *Ram Jit Singh and others, Judgment-Debtors-Respondents.*

Second Appeal No. 1154 of 1947, D/- 1-5-1950.

(a) Civil P. C. (1908), O. 34, R. 14—"In satisfaction of claim arising under the charge."

Rule 14 does not apply to a case in which a charge has been created by the decree itself. In such a case, it cannot be said that the decree has been obtained for the payment of money in satisfaction of a claim arising under the charge. The properties charged under the decree are liable to be sold in execution thereof without a fresh suit. [Para 7]

Anno. Civil P. C., O. 34 R. 14 N. 3, 6.

(b) Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 3 — Charge under — Whether binding on successor.

When a charge is created by a Court under S. 3, U. P. Agriculturists' Relief Act, on the property of the judgment-debtor, it attaches to the rights and interest of the judgment-debtor in the property and is binding on the person who succeeds to the property on the death of the judgment-debtor whether by succession or by survivorship. [Para 4]

(c) Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 3 (2)—Court—Meaning of.

The Court of Small Causes is empowered to create a charge under S. 3 (2). [Para 8]

(d) Civil P. C. (1908), O. 34, R. 5—Effect of attachment.

The property which is charged under a decree can be sold in execution of the decree and the mere fact that an attachment has been prayed for and effected does not stand in the way of the decree-holder's right to have the charged property sold in execution of the decree. [Para 9]

Anno. C. P. C., O. 34 R. 5 N 20.

Ambika Prasad, for Appellant ; S. N. Singh, for Respondents.

REFERENCE. . . . . / Para

('26) 48 All. 4 : (A. I. R. 1926 All. 157 (2)) 4

Judgment. — This is a decree-holder's appeal arising out of an objection under s. 47, Civil P. C.

[2] The appellant obtained a decree for money from the Judge, Small Cause Court, Banaras, in 1937. The judgment-debtor respondent was an agriculturist. While passing the decree, the learned Judge, under the provisions of s. 3, Agriculturists' Relief Act, declared that one-half share belonging to the judgment-debtor, in the family properties which were specified, was charged with the payment of the decretal amount and granted instalments. The judgment-debtor died and his brother, who is the present respondent, succeeded to the property by right of survivorship, he being a member of a joint Hindu family with the deceased.

[3] No instalments having been paid, the decree-holder, in the year 1941, after having got the decree transferred to the Court of the Munsif for the purposes of execution, applied for execution of the decree by attachment and sale of certain property including the property charged under the decree. Ranjit Singh respondent objected that the property was joint Hindu family property, that he had succeeded to it by right of survivorship, and that it could not be sold in execution of the decree, and that, in any case, a regular suit for enforcing the charge should be brought, as the property could not be sold under the provisions of o. 34, Rr. 14 and 15 without obtaining a decree under o. 34, Rr. 4 and 5, Civil P. C. Both the Courts below have allowed the objection and dismissed the execution application.

[4] In my opinion, the view taken by the Courts below is wrong. When a charge is created by a Court under s. 3, Agriculturists' Relief Act, on the property of the judgment-debtor, it attaches to the rights and interest of the judgment-debtor in the property and is binding on the person who succeeds to the property on the death of the judgment-debtor whether by succession or by survivorship. When the interest of a coparcener in a joint Hindu family is attached before his death in execution of a decree passed against him, his interest can be sold even after his death, when the property is in the hands of a survivor because the latter takes the property subject to the rights of the creditor under the attachment, vide *Faqir Chand* v. *Sant Lal*, 48 ALL. 4.

[5] The same is true in a greater degree in the case of a charge. The survivor, therefore, takes

the interest of the deceased coparcener subject to the charge.

[6] When a decree for recovery of money is passed by the Court and a charge on the property is created for the realisation of the amount decreed, the intention of the Court presumably is that the property charged may be sold in execution of that very decree. It is not intended that there should be a fresh suit for the recovery of the amount decreed, unless the contrary be expressed in the decree.

[7] Order 34, R. 14 does not apply to a case in which a charge has been created by the decree itself. It applies to a case in which a decree has been obtained for the payment of money "in satisfaction of a claim arising under the mortgage". The mortgage in such a case must be one executed prior to the obtaining of the decree. Where the charge is created by the decree itself, it cannot be said that the decree has been obtained for the payment of money in satisfaction of a claim arising under the charge. The properties charged under the present decree were, therefore, liable to be sold in execution thereof and no fresh suit was necessary.

[8] It has been objected that as this was a small cause court suit, the small cause Court had no jurisdiction to create a charge. Section 3 (2), Agriculturists' Relief Act, empowers a Court "to create a charge". The 'Court' is defined as any civil Court. The Court of small causes is a civil Court and is, therefore, empowered to create a charge under the provisions of s. 3 (2).

[9] Lastly, it has been urged on behalf of the respondents that the decree-holder in the present case did not enforce the charge to apply for the attachment not only of the charged property, but non-charged property as well. It is contended that the decree-holder's action showed that he was not enforcing the charge at all. The property which is not charged under the decree cannot of course be taken in execution of the decree after the death of the judgment-debtor when the objector, the judgment-debtor's brother, has succeeded to that property by survivorship as there was neither a charge nor attachment in respect of that property. But the property which was charged under the decree can be sold in execution of the decree and the mere fact that an attachment has been prayed for and effected does not stand in the way of the decree-holder's right to have the charged property sold in execution of the decree.

[10] I, therefore, allow this appeal in part, modify the decree passed by the Court below and order that the objection shall stand dismissed qua the property which had been charged under the decree, that is to say, to the extent of the interest of the deceased judgment-debtor in that property. It shall stand allowed qua the rest of the property.

[11] The parties shall bear their own costs in all the Courts.

[12] Leave to appeal under the Letters Patent is refused.

B/D.H. *Appeal partly allowed.*

A.I.R. 1953 Allahabad 254 *[Vol. 40, C.N. 116.]*

(LUCKNOW BENCH)

MISRA J.

Soman and others — Defendants—Appellants v. *Kedar Nath — Plaintiff—Respondent.*

Second Appeals Nos. 221 and 222 of 1949, D/- 3-4-1951.

(a) Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 295A — Applicability — Tenancies already extinguished.

Section 295-A merely provides that all sub-tenants would be entitled to retain possession over their holdings for five years from the date of commencement of the Amending Act 10 of 1947. The section can have no operation so far as tenancies already extinguished are concerned. [Para 3]

(b) Tenancy Laws—U. P. Tenancy Act (17 of 1939), Ss. 180, (as amended in 1947), 242 – Suit pending in Civil Court—Effect of amendment — Proceedings held without jurisdiction—U. P. General Clauses Act (1 of 1904), S. 6.

Alterations in the form of procedure are always retrospective unless there is reason to hold otherwise. S. 180, U. P. Tenancy Act, 1939, as it now stands after the amendment of 1947, does not affect the rights of parties. It is well-known that no one has a vested right in procedural law. The amendment of S. 180 must, therefore, be held *prima facie* to be applicable to all pending as well as future actions. Section 6, U. P. General Clauses Act, 1904, does not alter the position.

Where therefore a suit for possession of number of plots and for damages by a hereditary tenant against persons claiming to be sub-tenants thereof was pending before a munsif on 14-6-1947 when the Amending Act of 1947 came into force and was not decided by the Court till 14-7-1947, the munsif ceased to have jurisdiction over the matter under the amended S. 180 and its decision was therefore without jurisdiction. [Paras 5, 6]

B. K. Dhaon—for Appellants ; Hyder Hussain — for Respondent.

REFERENCES : Courtwise / Chronological/ Paras.

('28) 50 All. 965 : (A. I. R. 1928 All. 437 F. B.) 5
('49) 1949 All. W. R. (H. C.) 121 : (A. I. R. 1949 All. 542) 5
('47) 1947 Oudh W. N. 42 : (A. I. R. 1947 Oudh 104 F. B.) 4
(1882) 21 Ch. D. 278 : (31 W. R. 327) 5
(1837) 112 E. R. 360 : (6 Ad. & E. 943) 5
(1868) 3 Ex. 141 : (37 L. J. Ex. 89) 5
(1860) 30 L. J. Ex. 40 : (3 L. T. 444) 5
(1869) 3 Q. B. 335 : (37 L. J. Q. B. 133) 5

Judgment.—This appeal arises out of two suits instituted by Kedar Nath, plaintiff-respondent, for recovery of possession over a number of plots in village Kundri and for damages. One of them was against Soman and three others and related to nine plots measuring 3.15 acres and Rs. 400 damages. The other was against Soman alone and related to two plots measuring 4.9 acres and Rs. 200 damages. The plaintiff claimed to be a hereditary tenant of the lands in suit. He characterized the defendants as trespassers who had entered into occupation since 1351F. The defendants contended that they were sub-tenants of

over thirty-two years standing since the time of plaintiff's cousin, Indarjit, and that the plaintiff took over the plots from the aforesaid tenant-in-chief under some arrangement in 1351 and acknowledged the defendants' sub-tenancy on the same rent as before, namely, Rs. 61 per annum; and that the suit for possession and damages was not maintainable in the civil Court. The issue of sub-tenancy was referred to the revenue Court and was decided both by that Court and the Court of appeal against the defendants' contention. The Courts below also agreed in deciding the other issues against the defendants. The latter have come up now by way of second appeal.

[2] The appellant's learned counsel has raised two contentions on behalf of his clients :

(1) That the suit was not cognizable by the Revenue Court, and

(2) That the appellants were sub-tenants and entitled to the benefits of S. 47 (4) read with S. 295-A, U. P. Act.

[3] The second contention, in my opinion, has no force. Section 47 (4) makes an exception to the general rule enunciated in sub-s. (1) in favour of sub-leases made after 1st January 1902. It lays down that if a tenant-in-chief surrenders or abandons a holding or dies without leaving an heir, all covenants of the sub-lease shall be binding and enforceable as between the tenants landholder and the sub-tenant for the remainder of the term of the lease or for five years whichever period may be shorter, on the rent on which he held under the tenant or at the rent at which the tenant held the land if that rent be more than the rent paid to him by the sub-tenant. The defendants have failed to prove that they were sub-tenants with any unexpired period of tenancy. The utmost length to which it may be possible to go to uphold their rights is that they were sub-tenants from year to year of Indarjit who surrendered the holding in 1351F, corresponding to 1942-43. It follows that their sub-tenancy came to an end with the surrender. Section 295-A merely provides that all sub-tenants would be entitled to retain possession over their holdings for five years from the date of commencement of the Amending Act 10 of 1947. The section could have no operation so far as tenancies already extinguished are concerned.

[4] On the point of jurisdiction, the appellants, in my judgment, are entitled to succeed. The decision of the Courts below was obviously founded on the Full Bench case of *Ori Lal* v. *Ganeshi*, 1947 oudh W. N. 42, which lays down that a suit by a tenant who is dispossessed of the whole or portion of his holding by a person other than those referred to S. 183, U. P. Tenancy Act, lies in a Civil Court and is not a suit as contemplated by S. 180 of the Act. The view taken thus was that word 'tenant' used in S. 180 in the expression 'without' the consent of the person entitled to admit him as 'tenant' did not include a sub-tenant. The law on the subject was, however, altered by substantial amendments of S. 180 of the Act by Act 10 of 1947. Explanation 2 now appended to S. 180 makes it clear that a tenant entitled to sub-let the plot of land in accordance with the provisions of law for the time being in force may maintain a suit under that section against a person taking or remaining in possession of the plot otherwise than in circumstances for which provision is made in S. 183. Section 242 provides that suits and application of the nature specified in the fourth schedule must be heard and determined by a revenue Court and no Court other than a revenue Court, shall except by way of appeal or revision, take cognizance of any such suit or application or of any suit or application based on a cause of action in respect of which any relief could be obtained by means of any such suit or application and explanation 2 newly added to the section shows that if the cause of action is one in respect of which any relief may be granted by the revenue Court under S. 180 it is immaterial that the relief that may be asked for from the civil Court is greater than or additional to that which the revenue Court could have granted. The example which the section gives clarifies the position further by showing that if in a suit under S. 180 a person claims damages exceeding four times the annual rental value, he may not oust the jurisdiction of the revenue Court by framing his relief as such.

[5] The suits which give rise to these appeals were filed on 3rd April 1947, before the Amending Act of 1947 came into force. The Act was published in the U. P. Gazette on 14-6-1947, and the Amendment must be deemed, by reason of S. 5, General Clauses Act, to have come into force from that date. The suit was at the time still pending in the trial (Munsif, Bahraich). It was not decided by the trial Court till 14-7-1948. In other words the jurisdiction of the learned Munsif was taken away by the amended S. 180 read with S. 242 and the two cases were made exclusively cognizable by the revenue Court. Alterations in the form of procedure are always retrospective unless there is reason to hold otherwise. The statute as it now stands after the amendment of 1947 does not affect the rights of the parties. It is well-known that no one has a vested right in procedural law. The amendment of S. 180 must, therefore, be held *prima facie* to be applicable to all pending as well as future actions. The position is very different from that in *Basdeo Singh* v. *Bharat Singh*, 1949 ALL. W. R. (H. C.) 121, where the new procedure came into force after the termination of the case in the Court of first instance. It is urged on behalf of the respondent that the absence of a provision in the Amending Act enjoining the transfer of cases rightly filed in the civil Court to Courts of revenue on the coming into force of Act 10 of 1947 implied that pending suits should be disposed of in accordance with the law which prevailed at the date of the filing of the plaint

and the Legislature did not intend to divest the civil Courts of jurisdiction to decide such cases. I am unable to agree with this contention. The argument is based principally on s. 6, U. P. General Clauses Act, which lays down that the repeal of an Act shall not affect any remedy or any investigation or legal proceeding commenced before the repealing Act shall come into operation in respect of any such right, privilege, application, liability, penalty, forfeiture or punishment under the repealed enactment. It has to be kept in mind, however, that this section applies in the first place to cases where an enactment is repealed. In the second place, it does not in any case operate to confer jurisdiction where jurisdiction has by operation of the new enactment been taken away and vested elsewhere than in the Court where the suit was instituted. The cases cited on behalf of the respondents were *Ram Singha* v. *Shankar Dayal*, 50 ALL. 965 (F. B.); *Hitchcock* v. *Way* (1837) 112 E. R. 360; *Restall* v. *London & South Western Rly.*, (1868) 3 EX. 141; *Butcher* v. *Henderson*, (1869) 3 Q. B. 335; *Hurst* v. *Hurst*, (1882) 21 ch. D. 278; and *Wright* v. *Hale*, (1860) 30 L. J. EX. 40. None of them is in point because the alteration in law in each of them except in the case of *Hitchcock* v. *Way* took place after the termination of the suit in the Court of first instance, and in *Hitchcock's case* the amendment of the law related to vested right and not to procedure. As stated in Halsbury's Laws of England Vol. 31, Para. 673, there is no rule that where a person has commenced an action, he has a vested right in the then state of law. There is no insuperable objection in the present case to construing the language of the statute so as to make it apply to pending proceedings. In fact the language used by the Legislature both in s. 180 and s. 242 of the Act as it now stands warrants such a course.

[6] It follows from what has been said above that by reason of the amending Act, the learned Munsif lost jurisdiction to determine the suits which give rise to these appeals. The jurisdiction to try them vested in the revenue Court from 14-6-1947. The decree of the trial Court was therefore, without jurisdiction.

[7] I allow the appeals, set aside the decisions of the Court below and remand the two cases to the Court of the learned Munsif, Bahraich, with the direction that the plaints be returned to Kedar Nath, respondent, for presentation to the proper Court. The parties will bear their own costs. The stay order is vacated.

B/D.R.R. *Appeal allowed.*

A.I.R. 1953 Allahabad 256 *[Vol. 40, C.N. 117.]*

(LUCKNOW BENCH)

MALIK C. J. AND CHANDIRAMANI J.

Shambhu Datta, Appellant v. *Mst. Ram Raji, Respondent.*

Second Appeal No. 193 of 1944, D/- 17-10-1949.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 36 and 35 — Section 36 applies only where widow inherits as a widow of her deceased husband—It has no application where she is in possession in her own right under a fresh contract and not as widow of her husband—In such a case upon her death tenancy does not devolve in order of succession laid down in S. 35 on heir of last male tenant. [Para 6]

R. N. Shukla and Kalbe Mustafa, for Appellant; R. B. Lal, for Respondent.

REFERENCE..... Para

('48) S. C. A. No. 421 of 1943, D/- 20-12-1948 (All). 6

Judgment. — This is a plaintiff's appeal. The suit was for possession of certain tenancy plots by the ejectment of the defendant. One Ram Charan was a tenant of holding situated in village Khamaria Chak Rakhauna in the district of Bahraich belonging to the Kapurthala estate. He died about the year 1895 and was succeeded by his widow, Mt. Radha. Under the Oudh Rent Act (22 of 1886) a widow was entitled to remain in possession of her husband's tenancy for the unexpired portion of seven years for which the tenancy was created. Mt. Radha, however, continued to remain in possession of the property right up to 1912. In the year 1912, there was a fresh contract of tenancy and Mt. Radha and Bhagwati Prasad, her brother's son, became tenants under a contract with the landlord. From time to time this contract has been renewed and the amount of rent fixed has been enhanced. Bhagwati Prasad died in 1927 and Mt. Radha in 1940. The defendant, Mt. Ram Raji, as widow of Bhagwati Parasad, continued to remain in possession even after the death of Mt. Radha in 1940. The plaintiff is Ram Charan's first wife's daughter's son and he is, therefore, no heir either to Mt. Radha or to Bhagwati Prasad. It was claimed on behalf of the plaintiff that he was entitled to inherit this tenancy on the death of Mt. Radha under s. 36, U. P. Tenancy Act. The case came for decision before a learned single Judge of this Court and, in view of the decisions of the Board of Revenue and certain observations in a judgment of a learned single Judge of this Court, the learned Judge referred the case for decision by a Bench.

[2] Section 36, U. P. Tenancy Act, provides for succession to a female tenant holding an interest inherited as a widow, etc., and the relevant portion of it is as follows :

"When a female tenant, other than a tenant mentioned in S. 34, who either before or after the commencement of this Act has inherited an interest in a holding as a widow ..... dies such holding or such part of such holding shall, notwithstanding anything in S. 45, devolve in accordance with the order of succession laid down in S. 35 on the heir of the last male tenant, other than a tenant who inherited as a father's father under the provisions of that section ...."

The question for decision, therefore, is whether the holding that is now claimed by this plaintiff was in the possession of Ram Charan and was inherited by Mt. Radha on his death in 1895. The

section provides for succession to a holding inherited by a widow. If it is the same holding that was inherited by Mt. Radha, the plaintiff's suit should obviously succeed. In case, however, this is a different holding and not the holding which Mt. Radha inherited from her husband, then s. 36 will clearly not apply.

[3] The decisions of the Board of Revenue do not relate to a case where there was a fresh contract entered with a widow after the expiry of the original term provided under s. 48, Oudh Rent Act. Those were all cases of a widow holding over after the expiry of the original period of tenancy. It is possible to take the view that in the case of a tenant holding over the nature of the tenancy is not changed and the widow, though she remained in possession after the expiry of the term mentioned in s. 48, continued to remain in possession of the property which she had inherited from her husband and as representing the estate of her husband. The case before the learned single Judge of this Court was also a case where a widow had been holding over after the expiry of the period mentioned in s. 48. These cases were, therefore, not relevant.

[4] Learned counsel for the appellant has not been able to cite any decision in which, in spite of a fresh contract of tenancy, it was held that the fresh contract should be ignored and it should be assumed that the widow had remained in possession of the tenancy that she had inherited from her husband.

[5] Under the Oudh Rent Act (22 of 1886) an heir of a deceased tenant was entitled to remain in possession of the holding for the unexpired period of seven years under s. 48 of the Act. The law was amended by Act 4 of 1921 which increased the period from seven to ten years and provided for a fresh period of five years for the heir of the deceased tenant with the result that he was entitled to remain in possession of the tenancy for a period of five years, no matter what the unexpired portion of the tenancy might have been. It made a further change and provided that if the heir remained in possession for a further period of three years after the expiry of the five years, he would be deemed to be a statutory tenant.

[6] In the case of *Sital* v. *Surajdin*, S. C. A. NO. 421 of 1943, D/- 20-12-1948 (ALL.) as the widow had remained in possession from 1916 in which year her husband died right up to 1940 when she died, the learned single Judge assumed that after the expiry of five years and after she had remained in possession for a further period of three years after 1922 she must have become a statutory tenant in her own right, but the learned Judge was of the opinion that even to such a case s. 36 would apply. That question has not arisen before us in this case. In this case there was a fresh contract of tenancy in the year 1912 long before the Act of 1921 had come into force with the result that the tenancy which the widow had inherited from Ram Charan came to an end in that year. It is, therefore, not necessary to express any opinion on the point decided in *Sital's case*.

[7] The decision of the learned single Judge, therefore, is not relevant to the point that has arisen for decision in this case. The appeal has no force and is dismissed with costs.

B/R.G.D. *Appeal dismissed.*

A. I. R. 1953 Allahabad 257 *[Vol. 40, C. N. 118]*

(LUCKNOW BENCH)

MISRA AND BEG JJ.

Ejaz Ahmad—Applicant v. *Kunwar Maheshwar Bakhsh Singh and another—Opposite Party.*

Criminal Ref. No. 46 of 1950, D/- 26-9-1951.

Penal Code (1860), S. 188—"Promulgated"—Meaning of—Final order under S. 145 (6), Criminal P. C.

The word "promulgation" is not used in any narrow or technical sense in S. 188. When a judgment or order is passed in open Court, it constitutes a formal declaration to the public of the decision of the Court in the case in which the order is given or the judgment is passed. The delivery of the final order in the case under S. 145 (6), Criminal P. C., would constitute promulgation within the meaning of S. 188 as the final order is pronounced in open Court. In order to constitute promulgation under S. 188 affixation of the order on the spot or on the property which is the subject-matter of dispute or the promulgation of the order by a beat of drum is not necessary : A.I.R. 1930 Cal. 63, 13 Cal. 175 and 16 Cal. 9, *Rel. on.* [Para 5]

Anno. Penal Code, S. 188 N. 2.

G. Imam — for Applicant; S. C. Das — for Opposite Party.

REFERENCES: Courtwise/Chronological/	Paras.
('86) 13 Cal. 175	5
('89) 16 Cal. 9	5
('30) A. I. R. 1930 Cal. 63 : (31 Cri. L. J. 945)	5

Beg J. — This is a reference by the learned Sessions Judge of Hardoi recommending that an order dated 21st March 1950, passed by Sri Huzur Uddin Ahmad, Magistrate, First Class, Hardoi, discharging the accused in a case launched against him under s. 188, Penal Code, be set aside.

[2] The facts necessary for the appreciation of the point involved in this case may be briefly stated as follows :

[3] In 1933 Kunwar Maheshwar Bakhsh Singh sold certain zamindari to Sri Krishna Das. After that sale, Maheshwar Bakhsh Singh got ex-proprietary rights in plots NOS. 689, 764, 1568, 870 and 763 situate in village Samodha. In execution of some decree for arrears of rent the vendee Sri Krishna Das was delivered possession over these plots and Kunwar Maheshwar Bakhsh Singh was dispossessed from them. On 5th February 1947, one Ejaz Ahmad, an agent of Sri Krishna Das filed a complaint under s. 145, Criminal P. C., against Kunwar Maheshwar Bakhsh Singh, Chhedi and 16 others. On 6th March 1945, the Sub-Divisional Magistrate, Sandila, in whose Court the said case was pending, passed a preliminary order under s. 145, Criminal P. C. This order was duly

promulgated as provided in S. 145 (3), Criminal P. C. The Magistrate after recording the evidence of the parties ultimately passed the final order under S. 145 (6) on 9th June 1947, declaring the applicant to be entitled to possession of the property until evicted therefrom in due course of law and forbidding all disturbance of such possession until eviction.

Maheshwar Bakhsh Singh and Chhedi are alleged to have disobeyed the said order of the Sub-Divisional Magistrate of Sandila and accordingly he directed their prosecution under S. 188, Penal Code. The complaint made by the Sub-Divisional Magistrate was eventually sent to the Court of Sri Huzur Uddin Ahmad for trial and disposal.

[4] The learned Magistrate started taking the evidence of the prosecution. Before the evidence of the first witness was finished, an objection was taken on behalf of the accused that in view of the fact that the final order under S. 145 (6) was not promulgated, the case against the accused was bound to fail. The learned Magistrate entertained this objection, heard the arguments and agreeing with the contention put on behalf of the accused passed an order of discharge on 21st March 1950. Sri Ejaz Ahmad filed a revision against the said order before the learned Sessions Judge of Hardoi, who has made a reference to this Court for setting aside the order of the Magistrate discharging the said accused.

[5] On behalf of the accused, their learned counsel has argued that a condition precedent to conviction of an accused under S. 188, Penal Code, is that the order of the public servant which was alleged to have been disobeyed must have been duly promulgated. As there was no promulgation in the present case, the conviction of the accused under S. 188 was not possible. A large number of authorities were cited by the learned counsel appearing on either side, but none of them seems to be on all fours with the present case. A perusal of S. 188 indicates that the following ingredients are essential to the offence under that section : 1. Promulgation of an order by a public servant lawfully empowered to promulgate it. 2. Knowledge of such order by the person alleged to have disobeyed it. 3. That result of this disobedience being obstruction, annoyance, danger to human life or other consequences mentioned in that section.

The learned Magistrate held that the last two conditions were fulfilled in the present case. He was, however, of opinion that the said order was not duly promulgated and therefore a conviction under S. 188, Penal Code, was not possible. The word "promulgation" is not defined anywhere in the body of the Criminal Procedure Code. According to Webster's Dictionary the word "promulgate" means "to make known by open declaration as laws, decrees, or tidings," or "to make known to public the terms of (a proposed law)". The word "promulgation" according to the same dictionary means "publication" or "open declaration". In the present case we are of opinion that the delivery of the judgment in the case under S. 145, Criminal P. C., would constitute promulgation within the meaning of S. 188, Penal Code. It is significant to note in this connection that whereas S. 145 has prescribed a mode of promulgation for the preliminary order, it has prescribed no such mode for the final order under sub-S. (6) of the said Section.

It may be that the reason for this difference between the preliminary order and the final order is that whereas the preliminary order is not pronounced in open Court, the final order is actually so pronounced. The preliminary order being an interlocutory order, is merely recorded on the file of the case and neither the parties nor the public have therefore an opportunity of hearing it in open Court. Hence the Legislature perhaps thought it proper to prescribe a particular form of promulgation for such an order. On the other hand, as the final order is pronounced in open Court, that itself was considered to constitute sufficient promulgation. When a judgment or order is passed in open Court, it constitutes a formal declaration to the public of the decision of the Court in the case in which the order is given or the judgment is passed. The learned counsel appearing for the accused argued that in order to constitute promulgation under S. 188, Penal Code, there must be an affixation of the order on the spot or on the property which is the subject-matter of dispute or the promulgation of the order by a beat of drum. If this interpretation of S. 145 were to be accepted, then it is obvious that there can never be any prosecution under S. 188 for an offence of disobeying an order under S. 145 (6), Criminal P. C., as the section itself makes no provision for the promulgation of the final order in any manner suggested by the learned counsel.

The result of such an interpretation would be that whereas a contravention of the preliminary order would be punishable, a contravention of the final order would not be punishable at all, though in fact the final order is more important than the preliminary order. We are of opinion that the word "promulgation" is not used in any narrow or technical sense in S. 188. The question whether the requirement of promulgation prescribed in S. 188 has been complied with would depend on the particular circumstances of each case. In some cases a proclamation by a beat of drum might be considered to be a proper mode of promulgation of orders passed by Magistrates not in open Court but framed in their office. Such for example would be orders under S. 144, Criminal P. C. The public would be unaware of such orders unless they are announced in some form in some open place either by beat of drum or by some other form of proclamation. In other cases the requirement might be satisfied by affixing the

order on some conspicuous place or by publishing the same in the Gazette or some other paper. It seems to us that word promulgation as used in s. 18, C. P. Code (sic) is an elastic term and is deliberately not defined in the Penal Code. So long as an order is openly declared for the purpose of notifying it to the public or any section of the public the requirement of law relating to promulgation would be satisfied.

In the present case it is admitted that the Magistrate passed the order in open Court. This Court was open to the public. It is also admitted that the accused got knowledge of the said order. Under the above circumstances, we have no doubt that the requirement of promulgation was fully satisfied. We may also mention that although this specific point has not arisen previously, there are a large number of cases in which the conviction of the accused under s. 188, Penal Code, for disobedience of the final order passed under s. 145 has been sustained by the Courts: *vide Satya Charan* v. *Emperor*, A. I. R. 1930 Cal. 63 and *Goluck Chandra* v. *Kali Charan* 13 Cal. 175. The question regarding promulgation has really arisen in connection with cases where the law has prescribed a definite mode of promulgation. In such cases, where there has not been a strict compliance with the mode prescribed for the order, an argument has been raised on behalf of the accused that in the absence of compliance with the exact form of promulgation prescribed, the order itself is bad, and, therefore, the conviction of the accused illegal.

An instance of such a case is to be found in *Parbutty Charan* v. *Queen-Empress*, 16 cal. 9, in which it was held that

"the terms of S. 134 of the Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order, where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within S. 188, Penal Code" (vide head-note).

Thus even where a definite mode of promulgation is prescribed, the Courts have not hesitated to construe the word "promulgation" in s. 188, Penal Code, liberally for the purpose of determining whether there has been sufficient compliance with the aforesaid requirement.

[6] In view of the above consideration, we are of opinion that the learned Magistrate was wrong in discharging the accused at a preliminary stage on the ground that the requirement of promulgation is wanting in the present case.

[7] We accordingly accept this reference, set aside the order passed by the learned Magistrate, and direct that the accused be tried according to law.

B/D.H. *Reference accepted.*

A.I.R. 1953 Allahabad 259 *[Vol. 40, C.N. 119]*

AGARWALA J.

Malkhan, Applicant v. *State.*

Criminal Revn. No. 1609 of 1950, D/- 28-9-1951.

(a) Criminal P. C. (1898), Ss. 107, 145—Application under S. 107—Power to proceed under S. 145.

Clause 10 of S. 145 expressly reserves the power of a Magistrate to proceed under S. 107 notwithstanding the provisions of S. 145. Where, therefore, no application under S. 145 has been presented and the only application presented is under S. 107, the Magistrate must decide the case having regard to the provisions of S. 107. It is open to him to initiate proceedings under S. 145 of his own accord if he is satisfied from the police report or other information that the dispute likely to cause breach of peace exists concerning any land. But so long as he does not proceed under S. 145, he must decide the application made to him under S. 107 : A. I. R. 1949 Pat. 482, *Disting.* [Para 4]

Anno. Criminal P. C., S. 145 N. 4, 60.

(b) Criminal P. C. (1898), Ss. 107, 145—Distinction.

The vital difference between Ss. 107 and 145 is that under S. 107 commission of the breach of peace is alleged to arise from the side of the person against whom an application is made and, therefore, the Magistrate must be satisfied that the person accused was likely to commit a breach of peace or to do any wrongful act that may occasion a breach of peace; while under S. 145 what is necessary to be established is that there is a dispute which is likely to cause a breach of peace. The breach of peace may be occasioned by any party to the dispute. Where it is not clear that the opposite party in an application under S. 107 is likely to commit a breach of peace, but the Magistrate is satisfied that there is a dispute concerning land which is likely to cause a breach of peace, the breach of peace being committed either by the applicant or by opposite party, there is a case for proceedings under S. 145. [Para 4]

Anno. Criminal P. C., S. 145, N. 4, 60.

S. N. Varma, for Applicant ; *A. G. A., for the State.*

REFERENCE

Para

('49) A. I. R. 1949 Pat. 482 : (51 Cri L J 92) 4

Order. — One Asa Ram of village Taharpur Bhabisa in police circle Kandhla approached the District Magistrate with an allegation that the applicant and other persons threatened to take forcible possession over his Khudkasht lands by disturbance of peace and prayed that the applicant and other persons may be bound down under s. 107, Criminal P. C.

[2] The District Magistrate sent for a report from the Tahsildar who, after holding an enquiry made a report supporting the case of the complainant. The District Magistrate then ordered the Station Officer, Kandhla, to take necessary steps against the applicant and other persons under s. 107, Criminal P. C. The police submitted a report to the Sub-Divisional Officer who started proceedings under s. 107 against the applicant. The learned Magistrate being satisfied about the danger of peace issued a preliminary order and notice under s. 112. He also took action under s. 117, Criminal P. C., because in his opinion the case was one of emergency. Then after taking evidence of both sides he confirmed the preliminary order.

[3] The applicant's case was that he was a tenant of the plots in dispute on behalf of the

complainant on a 'batai' rental from the beginning of 1355F, that he was not at all likely to commit any breach of peace and that, on the other hand, the complainant wanted to eject him by force. The complainant's story was believed and the defence case was disbelieved. The applicant appealed against the order of the Magistrate to the Sessions Judge who dismissed the appeal.

[4] In this revision it has been urged that the Magistrate should not have proceeded against the applicant under S. 107, Criminal P. C., but should have taken recourse to S. 145, Criminal P. C. In support of this contention, my attention has been drawn to the case of *Ram Charan Singh* v. *Basudeo Dusadh*, A. I. R. 1949 Pat. 482, in which case Dass J. expressed the opinion that :

" Where there is a dispute concerning land which is likely to cause an apprehension of a breach of the peace, the proper procedure is to apply S. 145 and decide the question of possession once for all. It is illegal on the part of the Magistrate to convert the proceeding under S. 145 into a proceeding under S. 107 without coming to a finding on the question of possession after taking evidence in the proceeding under S. 145."

In that case a proceeding was started under S. 145, Criminal P. C. Here the facts are different as no proceedings under S. 145 were started. There was a proceeding under S. 107 alone before the Court below. Clause 10 of S. 145 expressly reserves the power of a Magistrate to proceed under S. 107 notwithstanding the provisions of S. 145. Where, therefore, no application under S. 145 has been presented and the only application presented is under S. 107, the Magistrate must decide the case having regard to the provisions of S. 107. It is open to him to initiate proceedings under S. 145 of his own accord if he is satisfied from the police report or other information that the dispute likely to cause breach of peace exists concerning any land. But so long as he does not proceed under S. 145, he must decide the application made to him under S. 107. The vital difference between Ss. 107 and 145 is that under S. 107 commission of the breach of peace is alleged to arise from the side of the person against whom an application is made, and under this section, therefore, the Magistrate must be satisfied that the person accused was likely to commit a breach of peace or to do any wrongful act that may occasion a breach of peace; while under S. 145 this is not necessary to be proved. What is necessary to be established is that there is a dispute which is likely to cause a breach of peace. The breach of peace may be occasioned by any party to the dispute. Where it is not clear that the opposite party in an application under S. 107 is likely to commit a breach of peace, but the Magistrate is satisfied that there is a dispute concerning land which is likely to cause a breach of peace, the breach of peace being committed either by the applicant or by the opposite party, there is a case for proceedings under S. 145.

[5] In the present case, both the Courts below found that the applicant in revision was likely to commit a breach of peace. He was, therefore, rightly bound down under S. 107.

[6] There is no force in this revision. It is dismissed.

B./D.H. *Revision dismissed.*

A.I.R. 1953 Allahabad 260 *[Vol. 40, C. N. 120]*

V. BHARGAVA AND CHATURVEDI JJ.

Sundar Lal Saxena, Petitioner v. *The Hindustan Commercial Bank Ltd. and another, Opposite Party.*

Civil Misc. Writ No. 571 of 1952, D/- 3-11-1952.

Industrial Disputes Act (1947), S. 10 — "Refer the dispute"—(Constitution of India, Art. 226.)

Where the notification of the Government did not itself specify the names of the individuals whose cases had to be considered by the Tribunal but left the specific cases to be cited by the employees, it became the duty of the Industrial Tribunal to determine whether the individuals, whose names were cited before it by the employees, were or were not workmen.

If the Tribunals held that the petitioner was not a workman, it must be held that his case was not referred to the Industrial Tribunal at all, as it was not covered by the notification. The determination of the question whether the petitioner was a workman was not the determination of a preliminary or collateral fact but was the determination of a fact which was itself one of the subject-matters of the dispute referred for adjudication. The decision on such a matter by a tribunal in the exercise of its jurisdiction could not be challenged by a writ of certiorari. Even a wrong determination of that fact would not amount to exercise of jurisdiction not vested in it, or refusal to exercise jurisdiction vested in it. [Paras 4, 4a]

Ganga Pd. Khare, for Petitioner.

REFERENCES/Courtwise/Chronological	Paras.
('52) A. I. R. 1952 S. C. 319 : (1952 S. C. J. 483)	5
('52) Civil Misc. Writ No. 570 of 1952	3
(1939) 3 All E. R. 548 : (1939-2 K. B. 838)	11
(1906) 2 K. B. 501 : (75 L. J K. B. 745)	7
(1926) 2 K. B. 192 : (95 L. J. K. B. 827)	6
(1932) 2 K B 621 : (101 L. J. K. B. 793)	12
(1819) 4 Moo. P. C. 50 : (129 E. R. 789)	9
(1888) 21 Q. B. D. 313 : (57 L. J. Q. B. 513)	5, 11
8 Q. B. R. 529	8

V. Bhargava J. — This is a petition for issue of a writ of certiorari under Art. 226 of the Constitution.

[2] The petitioner was employed as a sub-agent at the Kanpur main office of the Hindustan Commercial Bank, Ltd. This main office was different from the head office of the Bank. On 6-10-1947, the petitioner was suspended by the Bank. The dispute relating to this suspension was placed by the U. P. Bank Employees Union before the U. P. Government which, under S. 3, Industrial Disputes Act, 1947, referred it for decision to an adjudicator. The adjudicator held the petitioner to be a workman and gave an award declaring that the petitioner was entitled to the withdrawal of the order of suspension and further that he was entitled to his full salary with all allowances, except the conveyance allowance, and all privileges

with regard to the provident fund, leave bonus etc., during his period of suspension. This award was enforced and the petitioner was re-employed by the Bank. He was paid all his dues, except the amounts which accrued to him as annual increments in salary and the consequential increase in the dear food allowance. Certain other relief arising out of an award of the All India Industrial Tribunal (Bank Disputes), Bombay, was also not granted to him. The petitioner then represented his case again but this time to the Union Government through the U. P. Bank Employees Union. While these proceedings were going on, the petitioner was dismissed by the Bank on 9-9-1950. The petitioner thereupon took his case of wrongful dismissal also to the Central Government.

Under a notification, dated 21-2-1950, the Government of India referred an industrial dispute to the Industrial Tribunal at Calcutta for adjudication and it is the case of the petitioner that, under this order, his case was also referred to that Tribunal. The Tribunal, however, held that the petitioner was not a workman within the meaning of that word as used in the Industrial Disputes Act, 1947, and, consequently, refused to pass any orders in favour of the petitioner. The petitioner went up in appeal to the Labour Appellate Tribunal of India which also dismissed his appeal on the same ground. The petitioner has filed this petition in this Court, challenging the correctness of this order of the Labour Appellate Tribunal on the ground that the Tribunal had wrongly refused to exercise its jurisdiction for awarding the reliefs to the petitioner which he had claimed in the proceedings before the Calcutta Tribunal and the Labour Appellate Tribunal.

[3] When this petition came up for admission, a preliminary question arose as to whether, in this case, there had been any refusal by the Labour Appellate Tribunal, or, by the Industrial Tribunal at Calcutta, to exercise jurisdiction vested in them so that a writ of certiorari could be issued. The question was argued at great length by Shri D. Sanyal in connection with civil Misc. Writ No. 570 of 1952 and his arguments were adopted by the learned counsel for the petitioner in this case also. We have found it convenient to deal with the matter in detail in this writ petition and to follow the decision in this case in that petition.

[4] Under the notification dated 21-2-1950, the dispute, that was referred to the Tribunal at Calcutta by the Central Government, related to matters mentioned in Sch. II of the notification as follows :

"(1) Retrenchment, discharge or dismissal of workmen after 18th June 1949 (specific cases to be cited by employees).

(2) Stoppage of increments and withholding of promotions, (specific cases to be cited by employees).

Note.—This list is not intended to be exhaustive."

It would be clear from the notification that the only disputes, which were referred to the Industrial Tribunal at Calcutta, related to retrenchment, discharge, or dismissal of workmen, or, the stoppage of increments, or, withholding of promotions of those men. In the second item, the word 'workmen' has not been specifically used but the language makes it clear that the second clause also related to the stoppage of increments and withholding of promotions of workmen referred to in the first clause. The question, therefore, is whether the dispute of the petitioner was also one of those which were referred to Calcutta Tribunal by the Central Government. The notification did not itself specify the names of the individuals whose cases had to be considered by the Tribunal. The notification left the specific cases to be cited by the employees. If any particular case was cited by the employees, it is clear that it was the function of the Industrial Tribunal itself to determine whether the individual, whose name was mentioned before it, was or was not a workman. It has been contended before us that, under S. 10, Industrial Disputes Act, 1947, it was for the Central Government itself to specify whether the persons, whose cases were being referred for adjudication to the Industrial Tribunal were or were not workmen.

It is not necessary for us to express any opinion on the question whether it was incumbent on the Central Government to make such specification. If it be the contention of the petitioner that the notification of 21-2-1950 was not in accordance with the provisions of S. 10, Industrial Disputes Act, 1947, he cannot claim any writ of certiorari from this Court, directing the Industrial Tribunal at Calcutta or the Labour Appellate Tribunal to give an adjudication in his case. On this contention, the proper remedy for the petitioner would be to move the Central Government to make a separate reference of his case. On the other hand, if it be held that the reference to the Industrial Tribunal at Calcutta in the notification, dated 21-2-1950, was a proper reference under S. 10, Industrial Disputes Act, 1947, the contention that the individual workmen, whose cases were referred, had to be specified by the Central Government must be ignored. Once the Central Government did not itself specify the names of the workmen and, in the notification, dated 21-2-1950, laid down that the specific cases were to be cited by the employees themselves, it became the duty of the Industrial Tribunal to determine whether the individuals, whose names were cited before it by the employees, were or were not workmen. In this case, both the Industrial Tribunal as well as the Labour Appellate Tribunal have held that the petitioner was not a workman. On this finding, it must be held that his case was not referred to the Industrial Tribunal at all, as it was not covered by the notification, dated 21-2-1950; and, on this ground, the orders of the Industrial Tribunal at Calcutta and the Labour Appellate Tribunal at Calcutta refusing to issue directions to the em-

ployers in favour of the petitioner cannot be interfered with.

[4a] Mr. Sanyal urged that the decision whether the petitioner was a workman or not can be scrutinised by this Court in connection with this petition under Art. 226 of the Constitution and if this Court be of the view that the decision was incorrect, this Court can issue a writ of certiorari. The contention was that the determination of the question whether the petitioner was a workman was the determination of a preliminary or collateral fact on which depended the exercise of jurisdiction by the Industrial Tribunal at Calcutta and the Labour Appellate Tribunal and a decision on such a preliminary or collateral fact can always be re-examined in proceedings for issue of a writ of certiorari under Art. 226 of the Constitution. We cannot, however, accept the contention that the determination of this question was the determination of a preliminary or collateral fact on which depended the exercise of jurisdiction by the two Tribunals. In fact, the question whether the petitioner was or was not a workman was involved in the decision by the Tribunals of the very dispute that had been referred under the notification, dated 21-2-1950. As stated above, the Government in its notification had not named the individual workmen whose cases were to be referred to the Tribunal. According to the notification, the employees were to mention the cases of these workmen.

It is obvious that it could not have been left to the employee to determine whether he was a workman or not, and the Government itself had not decided the question. The only authority, therefore, that was to decide the question could be the Tribunal itself and nobody else. The question, therefore, could not be said to be a collateral matter, but was one which was referred to the Tribunal for its decision and was intrinsic to the matter which was for decision before the Tribunal. In order to grant any relief to a particular individual, it was essential for the Tribunal to find a number of facts. The first fact to be found by the Tribunal was whether the individual was a workman; the next was whether there had been a retrenchment, discharge or dismissal of such a workman; and, in the alternative, there had to be a determination of the question whether there was stoppage of increments or withholding of promotions. These were all questions that were specifically referred for adjudication by the Industrial Tribunal at Calcutta and, therefore, the determination of the question whether the petitioner was a workman was not the determination of a preliminary or collateral fact but was the determination of a fact which was itself one of the subject-matters of the dispute referred for adjudication. The decision on such a matter by a tribunal in the exercise of its jurisdiction cannot be challenged by a writ of certiorari. The Tribunal had jurisdiction to determine whether the petitioner was or was not a workman and as long as it had jurisdiction to determine this fact, it could determine that fact rightly or wrongly. Even a wrong determination of that fact would not amount to exercise of jurisdiction not vested in it, or refusal to exercise jurisdiction vested in it.

[5] In *Ebrahim Aboobakar* v. *Custodian General of Evacuee Property, New Delhi,* A. I. R. 1952 S. C. 319, their Lordships of the Supreme Court had occasion to deal with the question whether a decision on a question of fact by a tribunal can be challenged by a writ of certiorari. Their Lordships held :

"It is plain that such a writ cannot be granted to quash the decision of an inferior Court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Want of jurisdiction may arise from the nature of the subject-matter, so that the inferior Court might not have authority to enter on the enquiry or upon some part of it. It may also arise from the absence of some essential preliminary or upon the existence of some particular facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it. But once it is held that the Court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a Court has jurisdiction to decide rightly as well as wrongly."

Their Lordships, after explaining this principle, proceeded to approve of the views expressed by Lord Esher, Master of the Rolls, in *Reg.* v. *Commrs. for Special Purposes of the Income-tax,* (1888) 21 Q. B. D. 313, where it was held that the formula enunciated above is quite plain but its application is often misleading. The learned Master of the Rolls classified the cases under two categories as follows :

"When an inferior Court or tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may, in effect, say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. 'But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction', on finding that it does exist, to proceed further or do something more.

When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. 'In the second of the two cases I have mentioned it is erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends'; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

The application of this classification made by the Lord Master of the Rolls, to the case before us makes it clear that this case falls in the second category and not in the first category. This is not a case where it was necessary to see that a certain state of facts existed and the Industrial Tribunal at Calcutta could not proceed further unless their existence was proved. This happens to be a case where, under the provisions of S. 10, Industrial Disputes Act, 1947, and the notification issued by the Central Government under that section, the duty to determine whether the petitioner was or was not a workman was left to the Industrial Tribunal. The Tribunal may have made that determination rightly or wrongly but since it was left to the Tribunal to make the determination in exercise of its jurisdiction, that determination cannot be challenged on the ground that it has resulted in refusal by the Tribunal to exercise jurisdiction vested in it.

[6] In *The King* v. *Justice of Lincolnshire*, (1926) 2 K. B. 192, Lord Atkin, considering the same matter, approved of the principle mentioned in Halsbury's Laws of England as follows:

"Under various statutes certain notices are requisite before the commencement of proceedings; and the omission to serve such notices deprives the inferior Court of jurisdiction and affords ground for certiorari. The case is more difficult where the jurisdiction of the Court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower Court has to try, that Court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess. The lower Court must, indeed, decide as to the collateral fact, in the first instance; but the superior Court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower Court if such decision is erroneous, or at any rate, if there is no evidence to support it. On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower Court has to inquire into, certiorari will not be granted, although the lower Court may have arrived at an erroneous conclusion with regard to it."

In the case before us also, the question whether the petitioner was or was not a workman was a part of the very issues which the Industrial Tribunal had to decide under the notification, dated 21-2-1950, which granted jurisdiction to it.

[7] In *Rex* v. *Woodhouse* (1906) 2 K. B. 501, Vaughan-Williams L. J. held as follows:

"Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to retry a question which the Judge was competent to decide."

[8] In *The Queen* v. *Board of Works for the district of St. Olave's, Southwark*, 8 Q. B. R. by Ellis and Blackburn, 529, the question that arose was whether one Defree was or was not an officer entitled to compensation. The inferior Tribunal, which had to determine what compensation Defree was entitled to, had also to decide whether he was an officer of the commissioners. The Tribunal held that he was an officer and thereafter awarded him compensation. It was held that the question whether Defree was or was not an officer entitled to compensation was not a preliminary fact but the very fact which the Tribunal had to enquire into. Having jurisdiction to enquire, they held that he was an officer and was entitled to compensation and that such a determination was not removable by certiorari, This case is very similar in facts to the case before us. In the present case, the Industrial Tribunal at Calcutta had to determine whether the petitioner was or was not a workman and if they had held that he was a workman, they could adjudicate upon the dispute regarding his dismissal and withholding of various payments. On the other hand, the Tribunal held that he was not a workman, and, therefore, the Tribunal rightly refused to proceed further with the determination of the claims of the petitioner against the employers.

[9] In *Brittain* v. *Kinnaird*, (1819) 4 MOO. P. C. 50, the question, which came up for consideration, related to a case which was before the Magistrates. The Magistrates were entitled to record a conviction provided the vessel to which the proceeding related was held to be a boat. The Magistrates held that the vessel was a boat and thereupon proceeded to make the conviction. On the proceedings for issue of a writ of certiorari, Lord Dallas C. J. held that the Magistrates had jurisdiction to enquire into the question whether the vessel was a boat and an adjudication by the Magistrates on that question was not open to challenge by a writ of certiorari.

[10] All these cases cited above clearly support the view taken by us that, in this case, the question whether the petitioner was or was not a workman was a question for decision within the jurisdiction of the Industrial Tribunal at Calcutta and the Labour Appellate Tribunal; and, whether that decision be right or wrong, that decision cannot be removed by a writ of certiorari.

[11] On behalf of the petitioner, reliance was placed on the remarks of Lord Luxmoore *In re Ripon (Highfield) Housing Order, 1938*, (1939) 3 ALL E. R. 548. Lord Luxmoore, in his judgment, nowhere differed from the views of the various Judges in the cases mentioned above; and, in fact, he applied the test which had been laid down by Lord Esher, Master of the Rolls, in the case of *Reg.* v. *Commrs. for Special Purposes of the Income-tax*, (1888) 21 Q. B. D. 313. The case before him arose out of proceedings under the Housing Act, 1936. The Act permitted local authorities to make an order for compulsory purchase of land, after confirmation by the Minister of Health, for

housing purposes. Section 75 of the Act placed a limitation on this power as follows :

"Nothing in this Act shall authorise the compulsory acquisition, for the purposes of this part of this Act, of any land which is the property of any local authority, or which is the property of statutory undertakers, having been acquired by them for the purposes of their undertaking, or which at the date of compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house."

[12] The question arose whether the land, in respect of which the order had been made by the Ripon Borough Council was or was not a part of a park. The order having been made by the Ripon Borough Council, after confirmation by the Minister for Health, a move was made for a writ of certiorari to remove the order on the ground that the land was part of a park and the order had been wrongly made. The Court in dealing with the petition for writ, had to decide whether it could or could not determine the fact whether the land formed part of a park. Lord Luxmoore held that such a determination by the Court dealing with a petition for writ was permissible.

His Lordship distinguished the decision of Swift J. in *Re Bowman, South Sheilds (Thames Street) Clearance Order, 1931,* (1932) 2 K. B. 621, and held as follows :

"I think that the remarks of Swift J. must be read in the light of the facts of case before him, and especially with regard to the provisions of S. 1 of 1930 Act, which appear in express terms to make the local authority the judge of whether or not the houses in question are fit for habitation, for the material words of that section are as follows : '(1) Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied (that the houses in the area are unfit); then an order may be made'. This provision differs materially from the present case. Section 75 of the 1936 Act does not refer in terms to the local authority being satisfied that the land is not part of a park. The making of the order for compulsory purchase is prohibited if the land is part of a park, a matter which can only be proved or disproved by evidence."

This view expressed by Lord Luxmoore shows that the 'ratio decidendi' in that case was that the Act did not leave the determination of the question whether the land was part of a park to the local authority or the Minister. It only laid down a statutory prohibition against acquisition of land which formed part of a park and, consequently, the fact whether it was or was not part of a park could be determined by the Court dealing with the petition for a writ of certiorari. He did not disagree with the remarks of Swift J. that the position is different in cases where the statute, in express terms, makes local authority the judge of the question, on a decision of which the local authority could pass the orders under the statute. In the case before us, we have already indicated that the notification of 21-2-1950, read with S. 10, Industrial Disputes Act, 1947, clearly laid upon the Industrial Tribunal at Calcutta the duty to determine whether the petitioner was or was not a workman and consequently, even if a wrong decision was given, that decision cannot be interfered with by a writ of certiorari.

[13] Learned counsel for the petitioner pressed various grounds before us to show that the decision that the petitioner was not a workman was incorrect. One of the grounds was that there had been a previous decision by an adjudicator appointed in pursuance of the order passed under the Industrial Disputes Act, 1947. Another ground was that, on the facts before the Tribunal, the finding that the petitioner was not a workman was unjustified. These are only questions relating to the correctness or incorrectness of a decision by the Tribunal in exercise of the jurisdiction vested in it, and, as we have said above, we cannot investigate these circumstances.

[14] This petition is, therefore, not maintainable and is dismissed.

A/D.H. *Petition dismissed.*

A. I. R. 1953 Allahabad 264 *[Vol. 40, C. N. 121.]*

(FULL BENCH)

SANKAR SARAN, BIND BASNI PRASAD AND KAUL JJ.

Suraj Mal—Applicant v. *The Board of Revenue, U. P. Allahabad and others — Opposite Party.*

Civil Misc. No. 7795 of 1951, D/- 29-11-1952.

† Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 243—Judgment without hearing parties—(Revenue Court Manual, R. 170) — (Civil P. C. (1908), O. 41, R. 30).

When a single Member of the Board of Revenue has given a judgment modifying or reversing the order or decree under consideration and for concurrence sends it to another Member of the Board of Revenue, the latter cannot give a judgment without giving the parties or their pleaders an opportunity of a hearing as required by R. 30 of O. 41, Civil P. C.: 1951 All. L. J. 548 : A. I. R. 1952 All. 90, OVERRULED. [Para 12]

Anno. C. P. C., O. 41, R. 30 N. 1.

Sri Harish Chandra Sharma, for Applicant; S. C., for Opposite Party.

REFERENCE : Para

('51) 1951 All. L. J. 548 : (A. I. R. 1952 All. 90). 2, 10, 11

Bind Basni Prasad J. — This is an application under ART. 226 of the Constitution arising out of an appeal which has been decided by the Hon'ble Board of Revenue of Uttar Pradesh (hereinafter referred to as "the Board"). The relevant facts are that a suit under S. 59, U. P. Tenancy Act, 1939, (hereinafter referred to as "the Act") was filed by the opposite party NO. 2 against the applicant and opposite party NOS. 3 to 7 claiming that he was the sole tenant of the land in dispute. The applicant contended that he was a joint tenant with opposite parties NOS. 2 to 5. Opposite party NOS. 7 and 8 were the zamindars. The trial Court dismissed the suit, but on appeal the Additional Commissioner allowed the appeal and decreed the suit holding that opposite party NO. 2 alone was the tenant of the land in dispute.

The applicant filed second appeal NO. 691 of 1949-50 before the Board and it came up for hearing on 15-3-1951, before Sri T. N. Srivastava, one of the Judicial Members of the Board. After hearing arguments, he delivered a judgment on the same date by which he allowed the appeal and set aside the decree of the learned Additional Commissioner restoring the decree of the trial Court. As required by R. 170 of the Revenue Court Manual, the judgment was sent for concurrence to Sri R. N. Singh, another Judicial Member of the Board, who without hearing the parties wrote his judgment on 7-4-1951, disagreeing with Sri T. N. Srivastava and proposing the dismissal of the appeal. The judgments of both the Hon'ble Members were then sent to a third Judicial Member viz., Sri A. Rauf who by his judgment, dated 12-4-1951, concurred with the judgment of Sri T. N. Srivastava. These three judgments were then sent to Sri J. O. N. Shukla, the fourth Judicial Member who by his judgment dated 25-4-1951, disagreed with the judgment of Sri T. N. Srivastava and agreed with Sri R. N. Singh. It appears that there was a meeting of the Members on 28-4-1951, and it was agreed that the Additional Commissioner's judgment should be upheld. The appeal was accordingly dismissed.

[2] The contention on behalf of the applicant is that, having regard to the provisions of O. 41, R. 30, Civil P. C., (hereinafter referred to as "the Code) the judgments of Sarvashri R. N. Singh, A. Rauf and J. O. N. Shukla are no judgments because they were delivered without giving an opportunity to the parties to be heard. This point came up before a Bench of this Court in *Ram Manohar* v. *Board of Revenue, U. P., Allahabad*, 1951 ALL. L. J. 548, and the contention that the other member should have heard the parties was repelled. In view of this decision, the Division Bench has referred the following point for decision by a Full Bench :

"When a single member of the Hon'ble Board of Revenue has given a judgment modifying or reversing the decree under consideration and sends it to another member of the Board of Revenue, can the latter give a judgment without hearing the parties or their pleaders as required by R. 30 of O. 41, Civil P. C. ?"

[3] I am conscious of the fact that the procedure which the Hon'ble Members of the Board of Revenue have followed has been long in vogue in the Board. I am reluctant to disturb such a long standing practice unless the law compels me to do so. The point involved is essentially one of procedure. I have arrived at the conclusion that such a procedure is not warranted by the law.

[4] Section 243, U. P. Tenancy Act, 1939, which applied at the time when the appeal was heard by the Board provides as follows :

"243. (1) The provisions of the Code of Civil Procedure, except

(a) provisions inconsistent with anything in this Act, so far as the inconsistency extends;

(b) provisions applicable, only to special suits or proceedings outside the scope of this Act; and

(c) the provisions contained in List I of the Second Schedule,

shall apply to all suits and other proceedings under this Act, subject to the modifications contained in List II of the Second Schedule.

(2) The rules mentioned in the Second Schedule of this Act shall be interpreted, in the case of Agra, as referring to rules contained in the First Schedule to the Code of Civil Procedure 1908, as altered or added to by the High Court of Judicature at Allahabad under S. 122, Civil P. C. 1908, and in the case of Oudh as referring to rules contained in the First Schedule to that Code as altered or added to by the Chief Court of Oudh, under S. 122 of that Code."

[5] From List I of the Second Schedule it will be seen that no rule of order 41 or 42 of the Code of Civil Procedure has been exempted in its application to cases under the Act. Order 41 deals with appeals from original decrees and order 42 with appeals from appellate decrees. Order 42 contains only one rule which provides as follows :

"The rules of O. 41 and O. 41A shall apply, so far as can be, to appeals from appellate decrees".

For detailed provisions to be followed in second appeals, we must, therefore, turn to O. 41.

[6] Now List 2 of sch. 2 of the Act contains the modifications subject to which certain provisions of the Code apply to cases under the Act. Section 98 of the Code provides for decisions where appeal is heard by two or more Judges. Serial NO. 5 of List 2 contains the following modification to S. 98:

"Nothing in this section shall require two members of the Board to sit together in the exercise of appellate or revisional jurisdiction under this Act."

[7] Serial NO. 14 of List 2 contains the following modification to Rr. 30 and 31 of O. 41 of the Code:

"No judgment of the Board need be dated or signed, or pronounced in open Court."

Rule 30 of O. 41 of the Code provides as follows:

"The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders."

[8] The important point to note in the above rule is that it requires the parties to be heard before the appellate Court gives the judgment. This provision has not been exempted nor modified in its application to the appeals under the Act.

[9] I may refer also to R. 170 contained in the Revenue Court Manual. It provides:

"When the Board has distributed its appellate business among the members, the order of a single member is the order of the Board, but no decree or order coming under the consideration of the Board in appeal shall be modified or reversed without the concurrent judgment of two Members of the Board."

[10] This exhausts all the relevant provisions of law bearing upon the point under consideration, which have been placed before us. The position is that according to S. 98 of the Code, as applied after modification to appeals under the Act, it is not necessary for two members of the Board to sit together to hear an appeal. A single member may hear an appeal. If he dismisses an

appeal, then his judgment according to R. 170 of the Revenue Court Manual will be the judgment of the Board. But if he proposes to reverse or modify a decree, then there must be the "concurrent judgment" of another member of the Board. Under R. 30 of O. 41 of the Code, there can be no judgment by an appellate Court without 'hearing the parties.' The other member to whom the appeal is referred is a member of the 'appellate Court.' All members who participate in the decision of an appeal whether agreeing with or dissenting from the judgment of the member who originally heard the appeal, are according to R. 30 of O. 41 of the Code bound to give an opportunity of hearing to the parties.

This rule is based upon the elementary principle of judicial procedure that no judgment should be given by a Court or a tribunal without giving an opportunity of hearing to the parties. The hearing of the parties goes a great way in the elucidation and thrashing out of the points involved in a case. It gives satisfaction to the parties. Justice should not only be done, but it should appear to be done. As the law is at present, a member of the Board may sit, hear, and decide, an appeal or revision singly. If he proposes to dismiss it his judgment will be the judgment of the Board. But if he proposes to reverse or modify a decree or an order, he must refer it to another member and the latter cannot give his judgment without giving an opportunity of hearing to the parties. The two members may not sit together to decide the appeal or revision, but each of them must give the parties an opportunity of hearing, separately though it may be before recording the judgment. In *Ram Manohar* v. *Board of Revenue, U. P., Allahabad*, 1951 ALL. L. J. 548, the effect of O. 41, R. 30, Civil P. C., was considered.

Reading it along with R. 170 of the Revenue Court Manual, Sapru J. observed:

"It is urged that the expression 'appellate Court' here means both the Members of the Board. We are unable to read any such meaning into the words 'appellate Court' as used in this Rule. The appellate Court was, according to R. 170, the Member hearing the parties but his judgment or order had to be concurred in by the other Member. This is the position as we see it under this rule."

With the greatest respect I find myself unable to agree with the above reasoning.

[11] The expression 'appellate Court' is not defined in R. 170 or anywhere else. On the other hand, there is intrinsic evidence in R. 170 itself to show that a single Member who hears the appeal is not the 'appellate Court,' for it is provided in that rule that if the single Member proposes to reverse or modify the decree or order under consideration then his judgment would not be the judgment of the Board. For his judgment to be effective the 'concurrent judgment' of another member of the Board is essential. In the absence of a definition of the expression 'appellate Court' in the Revenue Court Manual or in the Code, it must be given its plain ordinary meaning. It means all the members of the Board who participate in the decision of the appeal or the revision according to the rules. The other member of the Board to whom the single Member of the Board hearing the appeal or revision sends his judgment for concurrence is as much a part of the 'appellate Court' as the single member himself. For these reasons, I would dissent from the view expressed in *Ram Manohar's case*, 1951 ALL. L. J. 548.

[12] I would answer the question referred by the Division Bench as follows:

"When a single Member of the Board of Revenue has given a judgment modifying or reversing the order or decree under consideration and sends it to another Member of the Board of Revenue, the latter cannot give a judgment without giving the parties or their pleaders an opportunity of a hearing as required by R. 30 of O. 41, Civil P. C."

[13] **Kaul J.** — I agree.

[14] **Sankar Saran J.** — I agree and have nothing to add.

A/D.H. *Answer in the negative.*

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(LUCKNOW BENCH)

MISRA AND CHANDIRAMANI JJ.

Rex v. *Mohd. Etizad Rasul Khan, Opposite Party.*

Criminal Misc. No. 45 of 1949, D/- 12-5-1949.

Contempt of Courts Act (1926), S. 1 — Contempt of Court—Publication calculated to obstruct or interfere with due course of justice — Suit for possession — Plaintiff endeavouring to take possession by making collections from tenants by publication of his title—If contempt of Court.

Nothing is more incumbent upon the Courts of justice than to preserve their proceedings from being misrepresented for there may be a contempt of Court in prejudicing human mind against a party before his cause is heard: (1742) 26 E. R. 683, *Foll.* [Para 10]

Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court : (1900) 2 Q. B. 36, *Foll.* [Para 11]

Publicising does not consist merely in publishing something through the medium of a newspaper or in making a speech from a public platform. The rule extends to any conduct which tends to inculcate a belief in the public or any section of it that a particular state of affairs prejudicial to the other party to the litigation in fact exists which affairs are in issue between the parties to the cause: A. I. R. 1931 All. 420, *Rel. on.* [Para 11a]

In spite of the pendency of his suit for possession, the plaintiff endeavoured to take possession of the estate by making collections from tenants, and in order to facilitate his doing so he sent out his men to spread the belief in the tenantry that he was the person who was held entitled to the estate. The plaintiff was himself responsible for the collections and the issue of receipts to the tenants describing him as the owner of the estate villages inculcating the belief that the defendants' possession was found to be without any right :

Held, that the aforesaid acts of the plaintiff were calculated to create an atmosphere of prejudice against the defendants and to interfere with the course of justice and fair trial of the suit. Whether or not any actual prejudice has been caused or actual interference has taken place was immaterial, for the test is not whether the actions or the conduct of the party which is accused of contempt have

in fact caused any obstruction or interference to the administration of justice but whether they are calculated to do so or are likely to have that effect : A. I. R. 1941 Oudh 14; A. I. R. 1937 Bom. 305 and A. I. R. 1948 Oudh 131, *Rel. on.* [Para 10]

The grave consequences which must follow on the acts and conduct of the plaintiff in making the collections and publicising his title in negation of the title of the defendants amounts to a deliberate contempt and it should not be allowed to go unpunished simply because the defendants can make their loss good by filing suits for rent against those who have paid rents to the plaintiff. The adoption of a cool and calculated conduct in defiance of the law cannot be regarded as a merely technical offence and ought not to be overlooked. (Plaintiff fined Rs. 1000 in addition to costs.) [Paras 10, 13]

Anno. Contempt of Courts Act, S. 1 N. 3.

Nasir Ullah Beg, Govt. Advocate, for the State; Niamat Ullah; E. R. Kedwai, Nafir Uddin and Ali Hasan, for Jamal Rasul Khan and others; Akhtar Husain and Bishun Singh, for Opposite Party.

REFERENCES : Courtwise/Chronological	Paras.
(1836-37) 1 Moo. Ind. App. 19 : (5 W. R. 26 P. C.).	8
('45) 72 Ind. App. 226 : (A. I. R. 1945 P. C. 147 : 47 Cri. L. J. 61).	13
('31) A. I. R. 1931 All. 420 : (33 Cri. L. J. 259).	11a
('35) 57 All. 573 : (A. I. R. 1935 All. 117).	11a
('37) A. I. R. 1937 Bom. 305 : (38 Cri. L. J. 942).	10
('31) 58 Cal. 884 : (A. I. R. 1931 Cal. 257 : 32 Cri. L. J. 675).	13
('35) A. I. R. 1935 Cal. 419 : (36 Cri. L. J. 1053 F. B.).	14
('38) A. I. R. 1938 Cal. 772 : (I. L. R. (1938) 2 Cal. 447).	11a
('44) A. I. R. 1944 Lah. 196 : (46 Cri. L. J. 174 S. B.).	14
('40) 41 Cri. L. J. 584 : (A. I. R. 1941 Oudh 14).	10
('47) 1947 Oudh W N 549 : (A. I. R. 1948 Oudh 131 : 49 Cri. L. J. 212).	10
(1877) 46 L. J. Ch. 375 : (36 L. T. 332).	12, 13
(1889) 58 L. J. Q. B. 490 : (61 L. T. 343).	13
(1742) 26 E. R. 683 : (2 Atk. 469).	10
(1900) 2 Q. B. 36 : (69 L. J. Q. B. 502).	11
(1888) 21 Q. B. D. 236.	12

Order.—These contempt proceedings are closely connected with Jehangirabad Taluqa case which is being tried in the Court of the learned Civil Judge, Lucknow.

[2] The late Maharaja of Jehangirabad Sir Ejaz Rasul Khan died on 21-5-1947. The plaintiff Kr. Shaikh Mohammad Etizad Rasul Khan is the owner of Taluqa Rasulpur in his own rights. He is also the nephew of the late Maharaja and claims to be the preferential heir to the estate of Jehangirabad as against the minor defendants Jamal Rasul and Irran Rasul, who claimed to be late Taluqdar's sons from his second wife Maharani Zubeda Khatoon. The late Maharaja executed a registered deed of gift in favour of Jamal Rasul in 1944 and transferred to him thereby a number of villages of which he gave possession, and mutation in respect of which was made shortly thereafter. Later, on 1-4-1945 he bequeathed his entire movable and immovable property to the minors describing both as his legitimate sons and heirs, The will was deposited with the District Registrar and was registered after the late Taluqdar's death on 23-5-1947.

[3] On the date of death of Maharaja Sir Ejaz Rasul Khan, the Court of Wards took possession of the estate on behalf of the two minors under S. 14, and mutation of names was effected in their favour at the instance of the Court of Wards on 30-9-1947 without any objections from the plaintiff or anyone else. The succession dispute between Kr. Shaikh Mohammad Etizad Rasul Khan and the two minors came to a head in 1948. The Taluqa suit for possession was instituted on the 16th of March of that year while the Court of Wards was still in charge. The estate was released in favour of the minors on 1-6-1948. There was already a committee of guardians appointed by the will of the late Maharaja. That committee was entrusted formally with the guardianship of the minors by the District Judge, Bara Banki.

[4] The course of conduct that Kr. Etizad Rasul Khan adopted thereafter is in controversy between the parties. It was alleged on behalf of the minors that immediately after the release of the Taluqa the plaintiff started making collections of rent from the tenants on the allegation that he was the nephew of the late Maharaja and entitled to succeed to the Jehangirabad estate as against the defendants who were mere imposters. On the allegation the defendants filed two applications in the Court of the learned Civil Judge, Lucknow on 4-6-1948. In the first application they prayed that proceedings for contempt of Court be taken against the plaintiff in respect of his conduct in forcibly realising rent and in posing as Raja's successor. It was said that the plaintiff's actions tended to interfere with the course of justice. By the second application the defendants prayed for a temporary injunction to restrain Kr. Mohammad Etizad Rasul Khan from interfering with their possession. The Court granted a temporary injunction and the order in that behalf was issued forthwith. The process server, however, could not serve the notices of the two applications and the injunction order on Kr. Etizad Rasul Khan personally on 5-6-1948. He, therefore, affixed them at his residence in the presence of his Ziledar. There was some doubt cast upon the honesty of the process server, but with that aspect of the matter we need not concern ourselves here. Notices had eventually to be served on Kr. Mohd. Etizad Rasul Khan's counsel.

In reply to the allegations of contempt, the plaintiff denied the charge and pleaded that the tenants voluntarily paid rent to him without any solicitation or persuasion on his part. Initially there was no specific allegation against the plaintiff about publicising his title. At a later stage of the case such allegations appear to have been made, and they were to the effect that the plaintiff publicised his title both personally and through his men and publicly denied the title of the defendants. It was said that this action on the part of the plaintiff constituted undue interference with the course of trial of the Taluqa suit and, therefore, rendered the plaintiff liable for contempt on this ground as well.

[5] The parties tried to substantiate their respective cases by filing affidavits and documents. They dispensed with the right to cross-examine the deponents of the affidavits on either side. It would seem from the proceedings of the lower Court that after the release of the estate on 1-6-1948 the plaintiff admitted that he collected as much as RS. 64,000 from the tenants of the Jehangirabad estate up to 5-6-1948. Subsequent to the issue of injunction, collections are also alleged to have been made, and proceedings under o. 39, R. 2, C. P. C. for disobedience of the interim order for injunction are pending separately in the Court of the learned Civil Judge, Lucknow. In view of them we have to be somewhat guarded in this judgment for we particularly desire that our decision should not prejudice the issues there involved.

[6] The learned Civil Judge found it difficult to believe that a large number of tenants should have voluntarily paid their rent to the plaintiff within the four or five days during which the collections were admittedly made. He was, therefore, not prepared to accept Kr. Mohammad Etizad Rasul Khan's defence at its face value, but even on the assumption that the payments were made by the tenants in their enthusiasm for the plaintiff's cause the learned Judge thought that the plaintiff's conduct in accepting rent from a large body of tenants amounted *prima facie* to publicising his title and it was likely to prejudice the defendants inasmuch as it would tend to create upon the tenantry in general an impression that the defendants, who were in possession and in whose favour mutation already stood, had no title and were not entitled to realise rent from them. Being of that view he made a report to this Court for necessary action under s. 3, Contempt of Courts Act.

[7] Notice was in due course issued to Kr. Mohammad Etizad Rasul Khan to show cause why action should not be taken against him for committing the offence of contempt of Court for the various acts complained of, which were calculated to create an atmosphere of prejudice against the defendants such as to interfere with the course of fair trial and in any case for his conduct in accepting the rent from a large body of tenants which *prima facie* amounted to publication of his title and was likely to seriously prejudice the defendants and interfere with the administration of justice. It may be mentioned that the charge regarding publicising of title was not at first clearly mentioned in the notice and in order to guard against any prejudice being caused thereby to the opposite party an amended charge was served on him and since Mr. P. L. Banerji who appeared for Kr. Etizad Rasul Khan complained that his client was not till then aware of any such allegations and had, therefore, not produced evidence to meet the case on that point, the parties were allowed on 13-4-1949 to produce additional documentary evidence and further affidavits if they so desired. Both parties took advantage of that order and they filed some more affidavits and documents. (After discussing the evidence, the judgment proceeded) : After going through this mass of contradictory swearing we may say at once that generally speaking we are not well impressed by the evidence produced on behalf of the plaintiff.

[8] The true facts can, we think, be ascertained beyond possibility of doubt by accepting that evidence which is in consonance with facts which are beyond dispute, and with this end in view we have endeavoured to see as to which of the two cases accords with the established facts and is in consonance with the ordinary course of human affairs and usual habits of life. This is a well established mode of sifting evidence in cases where perjury and fraud must exist on one side or the other : see in this connection *Meer-usud-oollah* v. *Mst. Beeby Imaman*, 1 MOO. IND. APP. 19 at pp. 44 and 45.

[9] We find that the following facts are of crucial importance and cannot be doubted—(1) that within five days of the release of the Jehangirabad estate in favour of the minor defendants the plaintiff succeeded in collecting as much as RS. 64,000 from the tenants of the various villages, The total demand for the half year, we are told, was only two and a half lakhs, and it does not appear to us to be true that the estate tenants had such enthusiasm for the plaintiff that within a very short space of time that elapsed between the 1st and the 5th June 1948 they would without any effort on the part of the plaintiff and his men come of their own accord to pay their dues to a person who was at the time merely a claimant and whose title still remained to be established judicially, (2) that the plaintiff's Karindas issued receipts to the tenants describing the Raja of Rasulpur as the zamindar of the property. These receipts had two kinds of rubber seals impressed on them. The one which was circular in form was the seal of Rasulpur estate. The other which was oblong was the seal of Rasulpur-cum-Jehangirabad estates. This fact shows that it was openly asserted to thousands of the tenants who made the payments that Etizad Rasul represented himself to be the rightful successor and they impliedly created an impression that he was entitled to possession, (3) that in a number of rent suits filed by the minor defendants against the tenants who made payments to the plaintiff the tenants have set up the plea of payment in good faith to Kr. Mohammad Etizad Rasul Khan. It would appear from this fact that after the release the tenants were induced into the belief that the persons whom they previously considered to be the zamindar to whom they paid the rent through the Court of Wards were no longer entitled to collect and that the right to do so thenceforth belonged to the plaintiff.

Such a belief, it appears to us, could not be engendered without active and sustained effort by the plaintiff in that behalf either personally or through his men. This conclusion is strengthened by the following considerations, (a) that there existed a registered deed of gift in favour of Jamal Rasul, defendant 1, and a will which was deposited with the District Registrar and subsequently registered which was in favour of two minors, namely Jamal Rasul and Irfan Rasul, (b) that the defendants' names were entered in the revenue records as owners of the various villages comprised in the Taluqa and that the mutation proceedings in their favour went uncontested, and (c) that the Court of Wards held the estate on behalf of defendants 1 and 2 and that the tenants to whom receipts were issued mentioning that the rents were being collected on behalf of Raja Jamal Rasul and Irfan Rasul must have been generally aware of this fact. It is true that in some isolated instances the receipts did not state the names of the two minors, but such cases appear to have been rare.

[10] We think, therefore, that in the circumstances of the case the defendants' version so far as the following facts are concerned is sufficiently established (1) that in spite of the pendency of his suit for possession Kr. Mohammad Etizad Rasul Khan endeavoured between the 1st and the 5th of June 1948 to take possession of the estate by making collections from tenants and in order to facilitate his doing so he sent out his men to spread the belief in the tenantry that he was the person who was held entitled to the estate of his uncle, (2) that Kr. Mohammad Etizad Rasul Khan was himself responsible for the collections and the issue of receipts to the tenants describing him as the owner of the estate villages and in inculcating the belief that the defendant's possession was found to be without any right, and (3) that the aforesaid acts of Kr. Mohammad Etizad Rasul Khan were calculated to create an atmosphere of prejudice against the defendants and to interfere with the course of justice and fair trial of the suit. Whether or not any actual prejudice has been caused or actual interference has taken place is, as held in *Radha Krishna* v. *Raja Ram*, 41 Cri. L. J. 584 (Oudh), immaterial, for the test is not whether the actions or the conduct of the party which is accused of contempt have in fact caused any obstruction or interference to the administration of justice but whether they are calculated to do so or are likely to have that effect: see *Demibai Gengji* v. *Rowji Sojpal*, A. I. R. 1937 Bom. 305 and *Mohammad Ibrahim* v. *Bhopal Singh*, 1947 Oudh W. N. 549. As observed by Lord Hardwicke in *Roach* v. *Garvan (or Hall)*, (1742) 26 E. R. 683, nothing is more incumbent upon the Courts of justice than to preserve their proceedings from being misrepresented for there may be a contempt of Court in prejudicing human mind against a party before his cause is heard.

[11] In *Reg.* v. *Gray*, (1900) 2 Q. B. 36 at p. 40, Lord Russell summarized the law of contempt thus :

" Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."

[11a] Publicising, it is clear, does not consist merely in publishing something through the medium of a newspaper or in making a speech from a public platform. The rule extends to any conduct which tends to inculcate a belief in the public or any section of it that a particular state of affairs prejudicial to the other party to the litigation in fact exists which affairs are in issue between the parties to the cause. The case of *Guru Charan Prasad* v. *"Aj" Newspaper Benares City*, A. I. R. 1931 ALL. 420, is in point, for there the publication of a will which was contested in a pending suit was held to amount to a contempt of Court because the object of the publication in the advertisement column was to make the public believe in the genuineness of the will and to act upon it.

In *Rajendra Singh* v. *Uma Prasad*, 57 ALL. 573, a notice was sent by the plaintiff's advocate threatening the defendant that unless he withdrew certain plea taken by him in defence in a mortgage suit he would be prosecuted for defamation. The learned Judges held that notice amounted to a direct interference with the administration of justice inasmuch as it attempted to prevent the defendant from pressing a plea which may be one of a substantial character. In *Suresh Chandra* v. *Biswa Nath*, A. I. R. 1938 Cal. 772, during the pendency of a suit instituted on behalf of the public that certain lands were public pathways the plaintiff published a notice calling a meeting and stating therein that the land belonged to the general public from time immemorial and that the public was being deprived of its use. At the meeting a resolution was passed, and later an article was published in a newspaper asserting the fact of ownership of the public and protesting against the defendants' acts in closing the pathway. It was held that these acts amounted to contempt for they undoubtedly conveyed the impression of a public denunciation of the petitioner's conduct and such a denunciation might well deter inhabitants of the locality from bearing testimony in support of the petitioner's case. It is unnecessary to multiply authorities, for we are clear that it is contempt to publicise any matter which has a tendency to prejudice the public for or against a party before the cause is finally determined.

[12] Mr. Piarey Lal Banerji who appeared for Kr. Mohammad Etizad endeavoured to press on us the reasonableness of his clients defence, namely that in spite of the fact that the estate was taken under the Court of Wards under s. 14

the tenantry retained its sympathy for the plaintiff, and as soon as the estate was released, it proved its partiality for his claim by making voluntary payments to him, that the form of receipt issued by the plaintiff's Karindas to these tenants is scarcely of any significance and that the plea of the tenants in the rent suits that they paid the estate dues to the plaintiff in good faith was in pursuance of s. 247, U. P. Tenancy Act, and did not necessarily represent that they were induced into the belief that the plaintiff was the rightful claimant. We are not impressed by these arguments and are not able to stretch our credulity so far as to believe that thousands of tenants would without special effort flock to the plaintiff's residence each eager to pay him the rent and that the plaintiff acted merely as a passive receiver of rent.

Mr. Banerji also urged that a mere realisation of rent during the pendency of a suit for possession would not and has never been regarded as bringing a party within the mischief of the law of contempt. His contention was that the decided cases only relate to interference of possession of properties in *custodia legis* and not to interference with those which are in the private possession of the opponent. It was said that there is in the latter case a remedy open to a party to put right the wrong complained of and in such a case the extraordinary remedy of instituting proceedings for contempt should not be allowed to be taken. Reference was in this connection made to the case of *In re Maria Annie Davies*, 21 Q. B. D. 236 and *Costa Rica* v. *Erlanger; In re Clement*, (1877) 46 L. J. Ch. 375. We would here like to say that it is not the collection made by the plaintiff which *per se* constitutes contempt. It is the circumstances in which the collections were made that have very largely affected our decision.

[13] As regards the argument that the contempt jurisdiction should not be exercised where an alternative remedy is available to opposite party it would seem that the case of *Ali Mohammad Admalli* v. *King Emperor*, 72 Ind. App. 226 (P.C.) provides a complete answer for there referring to *Clement's case*, ((1877) 46 L J Ch 375) their Lordships of the Judicial Committee observed that

"the question of committal or non-committal for contempt of Court is one for the exercise of the discretion of the Court and the fact that there is another remedy available is a matter for the Court to consider when exercising its discretion."

In the present case it appears to us that the grave consequences which must follow on the acts and conduct of the plaintiff in making the collections and publicising his title in negation of the title of the defendants amounts to a deliberate contempt and it should not be allowed to go unpunished simply because the defendants can make their loss good by filing suits for rent against those who have paid rents to the plaintiff. The adoption of a cool and calculated conduct in defiance of the law cannot, in our opinion, be regarded as a merely technical offence and ought not to be overlooked. There is a distinction between the present case and the class of cases to which *Hunt* v. *Clarke*, (1889) 58 L J Q B 490, or *Anantalal Singh* v. *Alfred Henry Watson*, 58 Cal. 884, belong for here the contempt is real and serious.

[14] Mr. Banerji cited the case of *In the matter of Tushar Kanti Ghosh*, A. I. R. 1935 Cal. 419 (F.B.), for the proposition that new heads of contempt should not be invented in order to expand the scope of the Court's summary jurisdiction and of *Homi Rustomji* v. *Sub-Inspector Baig*, A. I. R. 1944 Lah. 196 (S.B.), for the proposition that it is not appropriate to launch contempt proceedings for the decision of serious controversies on facts. The decisions in both these cases turned on their own facts. Contempt consists of conducts of various descriptions. There can be no limitations to human ingenuity to devise ways and means for prejudicing the other party in the conduct of his case and it would be obviously impossible to lay down exhaustively what particular actions would or would not in given circumstances fall within the mischief of the law of contempt. The rule laid down in the Lahore case, it appears to us, cannot be extended to a case like the present where the complaint is real and is not designed to obtain decisions on serious controversies of facts. The plaintiff's denial of the crucial facts was designed to befog the real facts and to hide a well thought-out plan for prejudicing a fair trial of the succession dispute. We hold that Kr. Mohammad Etizad Rasul Khan is guilty of contempt of Court.

[15] The only question which remains to be decided is that of punishment. For this purpose it is necessary to mention that an apology has been offered by the plaintiff in his written statement filed in this Court. That apology, we are constrained to say, is neither full nor unreserved. The written statement challenges every point raised on behalf of the applicants. It stoutly denies that any contempt of Court has taken place and it finally ends up by saying that in the event of the plaintiff's defence being unacceptable his apology should be accepted. The effect of this halting apology is further diminished by the proceedings of 4-5-1949 in which Mr. Piary Lal Banerji on behalf of his client stated that :

"The apology contained in the reply filed on 13th April 1949 is not intended to cover the case of publicising but only the case of collection of rent. The apology has been made on the assumption that the collection of rent may in law *per se* amount to contempt."

The contempt, as we have stated above, is of a serious nature and in our opinion the plaintiff must be ordered to purge it adequately. We think that in the interest of administration of justice Kr. Etizad Rasul Khan should be fined Rs. 1000 and he should also pay the costs of the Government-advocate for five days amounting to Rs. 800 at the rate of Rs. 160 per day. We order accordingly and refuse to accept the apology.

[16] Before we take leave of this case, we ought to mention that it was urged on behalf of the minor applicants that Kr. Mohammad Etizad Rasul Khan should be called upon to deposit in Court the sums realised by him from the estate after the release or at lease the admitted sum of Rs. 64,000. We have carefully considered this aspect of the matter but have come to the conclusion that so far as the amounts realised by the plaintiff are concerned the applicants should be left to their legal remedies.

B/V.B.B. *Application allowed.*

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MALIK C. J. AND V. BHARGAVA J.

Messrs. L. N. Gadodia & Co. — Applicant v. *The Commr. of Income-tax, United and Central Provinces and Berar, Lucknow—Respondent.*

Misc. Case No. 257 of 1944, D/- 11-5-1950.

(a) Excess Profits Tax Act (1940), S. 4—Income received by assessee firm as selling agent of another corporation held not salary but income, profits or gains.

The case of the assessee firm which had secured a selling agency of a certain corporation was that the income derived by it from this selling agency business was not the income, profits or gains from a business but was the payment of salary for services rendered by the company in the capacity of a servant, the master being the Corporation and that, therefore, it was outside the scope of the Act:

Held upon construction of the terms of the agreement that the selling agency business was being run by the Company as agents running their own business and not as servants of the Corporation, and the income, profits or gains from it were the income, profits or gains from that business and not the salary received as a servant. Consequently, all income, profits or gains from the selling agency business were liable to be assessed to Excess Profits Tax. [Paras 4, 5]

Anno. Excess Profits Tax Act, S 4 N 1.

(b) Excess Profits Tax Act (1940), S. 4 — Salary or income, profits or gains.

Management and running of a retail cloth shop was entrusted by the owners of the shop to the assessee firm. There was no agreement between the owners and the assessee, showing the nature of relationship that existed between them. There was nothing to show what was the nature of responsibility of the assessee. The remuneration of the assessee was dependent on the discretion of the owner. The assessee had no definite share in the income of the shop:

Held that the position of the assessee was that of an employee; and what they received was the salary for the work of running and managing the shop and was not income, profits or gains derived from this business of the retail shop and was not, therefore, liable to Excess Profits Tax. [Para 6]

Anno. Excess Profits Tax Act, S 4 N 1.

G. S. Pathak, S. N. Mulla and D. P. Uniyal — for Applicant; S. C. Das — for Respondent.

REFERENCE

Para.

(1920) 2 K. B. 677 : (89 L. J. K. B. 579). 4

V. Bhargava J. — This is a reference under s. 66 (1), Income-tax Act, read with s. 21, Excess Profits Tax Act. The question referred to us for opinion runs as follows:

"Whether in the circumstances of this case the applicant firm is liable to be assessed to Excess Profits Tax for the chargeable accounting period 30-10-1940 to 19-10-1941 on the income, profits and gains derived by it from:

(a) the selling agency of the Cawnpore Cotton Mills Co. (branch of the British India Corporation, Ltd.) and

(b) the running or the management of the retail cloth shop of the Cawnpore Cotton Mills Co.?"

[2] Messrs. L. N. Gadodia & Company, which is a registered partnership firm, secured the selling agency business of the Cawnpore Cotton Mills Company, which is a branch of the British India Corporation, Limited, by means of a written agreement drawn up on 1-3-1938. The case of the firm is that the income derived by it from this selling agency business is not the income, profits or gains from a business but is the payment for services rendered by the Company in the capacity of a servant, the master being the British India Corporation, Limited. The claim thus was that all the income received from this selling agency business was salary which was outside the scope of the Excess Profits Tax Act. The Excess Profits Tax Officer, the appellate Assistant Commissioner, Excess Profits Tax, the Income-tax Appellate Tribunal held that the receipts from this business were business profits and consequently assessed Excess Profits Tax on it.

[3] In addition to this selling agency business, a retail cloth shop was also run at Kanpur which was managed by this firm. For the chargeable accounting period, the Company was paid a sum of Rs. 27,030-15-0 purporting to be payment for meeting costs of advertisement and salaries of travelling representatives in respect of the running and management of this retail shop. The Excess Profits Tax Officer treated this amount also as income, profits or gains from business and assessed this amount to Excess Profits Tax. The contention of the firm was that this amount was paid to it to meet the expenses so that it was not the income, profits or gains at all; and, in the alternative, it was contended that, in any case, this amount must be treated as salary paid to the firm for managing and running the retail shop and it did not represent the income, profits or gains from the business of this shop. The appeal to the Appellate Assistant Commissioner, Excess Profits Tax, failed and so did the appeal to the Income-tax Appellate Tribunal. The Income-tax Appellate Tribunal, in addition, held that, even if this amount be deemed to have been paid to the Company to meet the expenses incurred by the firm in running the retail shop, the amount would be liable to be added to the income, profits or gains of the Company, because this amount was already included in the expenses shown by the Company in its accounts, so that if this amount is not taxed separately as income, profits or gains, the expenses set off in the accounts should be reduced by this amount and the income, profits or gains calculated according to the accounts should thereby be increased to the extent of this amount.

[4] The answer to the question referred to us depends principally on the determination of the question whether the income of the Company from the selling agency business and the running or the management of the retail cloth shop is to be deemed to be the profits of the business of the Company, or whether it should be treated as salary paid to the Company which was functioning as a servant of the British India Corporation Limited. Under s. 4, Excess Profits Tax Act, only the income, profits or gains from a business are liable to Excess Profits Tax whereas the income received as salary is outside the scope of that Act. It was contended by Mr. Pathak on behalf of the firm that in this case there was no material for the Tribunal to come to a finding that the selling agency business was a business of the Company as an agent and that the only possible finding in this case was that there existed a relationship of a master & servant between the British India Corporation, Limited, and the firm, Messrs. L. N. Gadodia and Company, so that whatever was received by the Company was received as salary. He argued that the criterion for determining whether a firm is acting in the capacity of a servant or in the capacity of running its own business as an agent should be the amount of control that was exercised by the principal firm. He referred to the agreement between the Corporation and Messrs. L. N. Gadodia & Company to show that in the following matters, the latter came completely under the control of the former: (a) All sales were to be effected by Messrs. L. N. Gadodia & Company at current market rates subject to the approval of the Managing Directors of the Corporation or the Management of the Cawnpore Cotton Mills Company: (b) the services of Mr. D. Sharma were not to be dispensed with by Messrs. L. N. Gadodia & Company without the prior sanction of the Corporation: (c) Messrs. L. N. Gadodia & Company were, at all times, to use their utmost endeavours to dispose of the entire production of Bazar Yarns and Cloth by the Cawnpore Cotton Mills Company at market rates ruling at the time of sale : and (d) The proprietors of Messrs. L. N. Gadodia & Company or their representative, Mr. D. Sharma, were required to attend daily, or as required, at the office of the Corporation. From these four ingredients of the agreement an inference was drawn that Messrs. L. N. Gadodia & Comany in running this selling agency business were under the control of the Corporation in the detailed management of the agency business and, therefore, they must be deemed to have been acting in the capacity of a servant of the Corporation and not as agents running their own agency business. Reliance was placed on the following remarks of Lord Sterndale, Master of the Rolls, made during arguments in the case of *Robbins* v. *Commrs. of Inland Revenue*, (1920) 2 K. B. 677 at p. 679: "The test is whether the employer has the right to determine how the employee shall do his work in details." That was, however, a case where Robbins, the assessee, was required to give his whole time exclusively to pushing energetically the sale of goods of a company called in the agreement, for shortness, "Felt." The agreement further provided that "Felt" was to pay rent of the main office of Robbins in London. He agreed to pay for heating, cleaning, lighting, office furniture, supplies and postage—in fact, everything except travelling expenses; and also the salary of one stenographer or office girl—for London office, at an amount not to exceed a certain sum mentioned. It was provided in the agreement that "Felt" would pay the employer's contribution under the National Insurance Act. It was on these facts that it was held by Lord Sterndale that Robbins was acting as an assistant to "Felt" in order to carry on "Felt's" business, and the business which was being carried on was not his; the profits which were being made were not his. What was his was the remuneration that he got for his assistance in "Felt's" business. These ingredients are not present in this case. Messrs. L. N. Gadodia and Company were not required to devote their whole time to the business of the selling agency and were entitled to carry on even other independent business. They were only subject to control by the Corporation in a few matters. The agreement itself contains the following ingredients which would indicate that in the matter of the detailed running of the selling agency business Messrs. L. N. Gadodia & Company had the authority to act quite independently of any instructions from the Corporation: (1) The detailed running of the selling agency business vested entirely in Messrs. L. N. Gadodia & Company who had the power to choose their employees, to appoint and dismiss them. They had the choice of the parties with whom to enter into contracts for selling goods. They could appoint their own travelling agents and they were, in no way, subject to the control of the Corporation in the matter of establishment and organisation to be maintained by them. These powers of theirs were only subject to two conditions, viz., that the sale contracts entered into by them with other parties were subject to the approval of the Corporation and one of their employees, Mr. D. Sharma Manager, was not to be removed from service without the previous sanction of the Corporation; (2) the discount and brokerage on all transactions were to be paid by Messrs. L. N. Gadodia and Company out of their commission, (3) they were entitled to receive a commission even on direct sales effected by the Corporation to any customer, either in or out of Kanpur ; (4) they were liable to make payment for all the goods on delivery thereof whether or not the goods were actually paid for by the purchaser with whom they might have entered into contract of sale with the approval of the Managing Directors of the British India Corporation, Limited ; (5) they had to take delivery of all goods

sold for ready delivery within 15 days from the date of any sale being effected and, failing this, the value of all such goods was to be debited to their account ; (6) in the event of unsold stocks of yarn or cloth reaching the equivalent of four months' production, the Corporation were at liberty to arrange for the sale thereof at current Market rates and would recover from the deposit of Messrs L. N. Gadodia & Company all expenses, commission and other charges which might be incurred in connection with such sales and no commission would be payable to them on such sales.

[5] These terms contained in the agreement would clearly show that the selling agency business was being run by Messrs. L. N. Gadodia & Company as agents running their own business and not as servants of the Corporation. It is true that the contract between the two parties even required the attendance of the proprietor of Messrs. L. N. Gadodia & Company or of Mr. D. Sharma daily, or as required, at the office of the Corporation but this amount of control does not indicate that the running of the selling agency business was not in the hands of Messrs. L. N. Gadodia & Company and they had to act merely as servants under the instructions of the Corporation. The conditions relating to the payment of commission to Messrs. L. N. Gadodia & Company on direct sales, their liability for payment for all the goods on delivery thereof irrespective of the price being realised from the purchasers, their liability to take delivery in respect of accepted sales even if the purchasers failed to do so and their liability to meet expenses, commission and other charges which might be incurred in connection with direct sales by the Corporation in the event of unsold stocks of yarn or cloth reaching certain figures are all inconsistent with the relationship between a master and a servant. In these circumstances, it is not possible for us to hold that the Tribunal had no material to come to a finding that the selling agency business of the Cawnpore Cotton Mills Company run by Messrs. L. N. Gadodia & Company was their business and that the income, profits or gains from it were the income, profits or gains from that business and not the salary received as a servant. Consequently, all income profits or gains from the selling agency business were liable to be assessed to Excess Profits Tax.

[6] The facts relating to the running or management of the retail cloth shop of the Cawnpore Cotton Mills Company are, however, different. The statement of the case shows that this retail shop was owned by the Cawnpore Cotton Mills Company though the management of the shop was entrusted to Messrs. L. N. Gadodia and Company. There was no written agreement relating to this business so that there was nothing to show what the relationship was between this firm and the owner of the shop and it was not known what sort of responsibility lay on the firm in the running or management of the shop. It was admitted that no fixed remuneration was to be paid to the firm and on behalf of the firm it was contended that it was entirely in the discretion of the management of the Corporation or of the Cawnpore Cotton Mills Company that the allocation of the profits of the retail shop was made. It was argued that if the Corporation did not pay the firm any portion of the profits of the retail shop, the firm would not be entitled to any payment. These contentions were not found by the Tribunal to be wrong and the Tribunal proceeded to hold that, in spite of these contentions being accepted, the position of Messrs. L. N. Gadodia & Company could not be that of an employee. In this case when it was admitted that the shop belonged to the Corporation and even the remuneration to Messrs. L. N. Gadodia & Company who were managing the shop depended entirely on the discretion of the Corporation, it does not appear to us possible to hold that the retail shop was a business of the firm and not of the Corporation. The firm had no definite share in the profits which they could claim from the Corporation. The profits of the shop belonged entirely to the Corporation and were at their disposal. The firm only received what the Corporation chose to give to it. This position can only be consistent with the position of the firm as the employee and the corporation as the master and not with the position of the firm running the shop as their own business. The sum of Rs. 27,030-15-0 given by the Corporation to the firm, even if it be treated as an amount paid to the firm for the running or management of the retail shop, has to be treated as salary paid to the firm for doing the work of running or management of the retail shop and not as income, profits or gains derived by the firm from this business of the retail shop.

[7] The second aspect in which this amount has been considered by the Tribunal also needs to be considered. The Tribunal have found that this amount was in excess of even the total expenses incurred during the chargeable accounting period on advertisement and salaries of travelling representatives for the entire business done by Messrs. L. N. Gadodia & Company in running the selling agency business as well as the retail shop. Obviously, therefore, the whole of this amount could not be reimbursement of the expenses incurred on costs of advertisement and salaries of travelling representatives in respect of this retail cloth shop. The amount required to reimburse the expenses would have to be taken into consideration in determining the income, profits or gains derived by the firm from the selling agency business but any amount received in excess of this reimbursement must be treated as salary received by Messrs. L. N. Gadodia & Company acting as servants of Messrs. British India Corporation, Limited, for managing this shop. The Tribunal have not given any finding of fact indicating the

exact amount of expenses which were reimbursed out of this sum of Rs. 27,030-15-0. A determination of that amount is necessary and we have to hold that the income, profits or gains from the selling agency business must be increased to the extent of the amount out of Rs. 27,030-15-0, required to reimburse the expenses mentioned above, for the purpose of assessing the Excess Profits Tax payable by the firm.

[8] Our answer to the question formulated by the Tribunal accordingly is that, in the circumstances of this case, for the chargeable accounting period 30-10-1940 to 19-10-1941 (a) the applicant firm is liable to be assessed to the Excess Profits Tax on the income, profits or gains derived by it from the selling agency business of the Cawnpore Cotton Mills Company; and (b) the applicant firm is not liable to be assessed to Excess Profits Tax on the income, profits or gains derived from the running or management of the retail cloth shop of the Cawnpore Cotton Mills Company, but the income, profits or gains derived by it from the selling agency business of the Cawnpore Cotton Mills Company are liable to be increased by the amount which was received by the firm for actual reimbursement of the expenses incurred by it on advertisement and salaries of travelling representatives. In the circumstances of this case, we make no order as to costs.

B/G.M.J. *Reference answered.*

A.I.R. 1953 Allahabad 274 *[Vol. 40, C.N. 124.]*

MALIK C. J. AND BIND BASNI PRASAD J.

Mohd. Sharif Khan, Applicant v. *U. P. Government, Opposite Party.*

Civil Revn. No. 250 of 1948, D/- 19-12-1949.

† U. P. Temporary Accommodation Requisition Act (25 of 1947), S. 3 — Public purpose, meaning of — Requisition of house for private residence of public servant is public purpose — (Words and Phrases—Public purpose).

The expression 'public purpose' in S. 3, U. P. Temporary Accommodation Requisition Act, 1947, has been used as opposed to private purpose.

A 'public purpose' must ordinarily mean something for the benefit of the public or a section of the public as opposed to private purpose which must mean for the benefit of an individul. [Paras 6, 11]

The requisitioning of houses for private residence of public servants is a public purpose. There is no distinction between the acquisition of land for the construction of the houses for a member of public servants and the requisition of houses for the same purpose. Even when the requisitioning of a house is for the private residence of an individual public servant it would be one for a public purpose : (1826) 3 Add. 210 and A. I. R. 1914 P. C. 20, *Rel. on*; A. I. R. 1925 Mad. 837, *Ref.* [Paras 12, 14]

B. C. Saxena and Shambhu Nath Seth, for Applicant; Standing Counsel J. Swarup, for Opposite Party.

REFERENCES : Courtwise/Chronological/	Paras.
('15) 39 Bom. 279 : (A. I. R. 1914 P. C. 20).	7, 11
('26) 49 Mad. 237 : (A. I. R. 1925 Mad. 837).	13
(1826) 3 Add. 210 : 162 E. R. 456.	6

Malik C. J. — A house in the city of Pilibhit was in the occupation of Mohammad Umar, Circle Inspector of Police on payment of Rs. 50 per month as rent. Mohammad Umar was transferred and was succeeded by Mustafa Khan. When Mustafa Khan wanted to occupy the house that was in the occupation of his predecessor-in-office, the owner of the house raised certain objections. The District Magistrate thereupon requisitioned the house under s. 3, U. P. Temporary Accommodation Requisition Act, 25 of 1947.

[2] In the year 1947, there being an acute shortage of houses which was, to a larger extent, due to influx of refugees and a movement of the population from the rural to the urban areas, the Provincial Legislature passed this Act giving the District Magistrate a right to requisition any accommodation for any public purpose by an order in writing. If after such order and within the period specified in the Act, possession was not given, the District Magistrate was authorised, under s. 11, to apply to the civil Court of competent jurisdiction for execution of the order passed by him under s. 3. The applicant not having given possession of the premises, the District Magistrate filed an application under s. 11 before the learned Civil Judge of Pilibhit for execution of the order under s. 3. Two objections were taken before the learned Civil Judge. The learned Civil Judge held that as he was an executing Court, it was not open to him to entertain those objections. Against that order an appeal was filed in this Court, being Execution First Appeal No. 141 of 1948, which was dismissed by us on 30-3-1948, on the ground that the order under s. 3 or the order under s. 11 were not appealable. This revision was, thereafter, filed on 7-4-1948 and it was admitted by a learned Single Judge of this Court and it has come up before us for final hearing. A preliminary objection has been raised by Mr. Jagdish Swarup that no revision lies.

[3] Learned counsel for the applicant has urged two points. Firstly, that the house not having been requisitioned for a public purpose, the order of the District Magistrate was without jurisdiction, and secondly, that the application for execution not having been filed by the District Magistrate but by the Collector, the application was not in order and the learned Civil Judge could not execute the order passed under s. 3.

[4] As regards the second point, we have looked into the original application. The original application is headed as follows : "U. P. Government through the District Magistrate, Pilibhit," and was signed by the District Magistrate as such. Attached to the original application was the execution form filled in Hindi and that has the following heading : "Sarkar U. P. zariya Sahib Collector, Pilibhit." From the fact that in the Hindi form the word 'Collector Pilibhit' was mentioned it does not necessarily follow that the application for execution was filed by the officer

concerned in his capacity as Collector and not as District Magistrate. It is clear from the application itself, which is in English, that the application was filed by him in his capacity as District Magistrate. I do not think there is, therefore, any force in this argument.

[5] As regards the other argument, learned counsel has urged that requisitioning houses for private individuals is not a public purpose. This may, of course, be correct. But here the house was not requisitioned for a private individual. The house was requisitioned for a Government servant who had not come to Pilibhit in his private capacity of his own choice but because he was posted there to carry on his duties as a public servant. To enable him to do his duties properly it was necessary that suitable accommodation should be found for him. The house was in the occupation of his predecessor and in the ordinary course of things it would have been occupied by him.

[6] The question that arises for consideration is whether, in the circumstances stated above, if a house is requisitioned for the residence of a Government servant, such requisition can be said to be for "a public purpose". A "public purpose" must ordinarily mean something for the benefit of the public or a section of the public as opposed to private purpose which must mean for the benefit of an individual. The point, therefore, narrows down to this that where a house is required for the residence of a Government servant, can it be said that the house is being requisitioned for "a public purpose." In this connection, it must be borne in mind that proper residence and other such amenities of life must be available to a public servant before he can be expected to discharge his duties properly. No doubt, the Government is not bound under the condition of service rules of an inspector of police to provide him with a residence, but at the same time when there is such scarcity of houses that it is impossible for any public servant transferred to a new place to get suitable accommodation for himself, the Government, in the interest of public work, has to come to his assistance. But for the situation which had made it necessary to pass the U. P. Temporary Accommodation Requisition Act 25 of 1947, the house which was in the occupation of his predecessor, would have been available in normal times to his successor.

In this connection I may quote the observations of Sir John Nicholl in the case of *Brett* v. *Brett*, (1826) 3 ADD. 210 at p. 213 : 162 E. R. 456 which are as follows :

"The key to the opening of every law is the reason and spirit of the law—it is the *animus imponentis*, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute : it is to be viewed in connection with its whole context meaning by this as well the title and the preamble as the purview or enacting part of the statute."

[7] What is 'a public purpose' came to be considered by their Lordships of the Judicial Committee in *Hamabai Framjee* v. *Secy. of State*, 39 BOM. 279. Their Lordships quoted with approval the view expressed by Batchelor J. to the following effect :

"General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

The question of erecting dwelling houses for private residences of officers of the Government had come up for consideration. Their Lordships approved of the decision of the High Court that would help the Government to maintain the efficiency of its servants is "a public purpose."

[8] I am satisfied that the order of the District Magistrate was not without jurisdiction and there is no force in the objection raised before the learned Civil Judge.

[9] I would dismiss the application.

[10] **Bind Basni Prasad J.**—Section 3 of the United Provinces (Temporary) Accommodation Requisition Act, 1947 (U. P. Act NO. 25 of 1947) runs as follows :

"If in the opinion of the District Magistrate it is necessary to requisition any accommodation for any public purpose he may, by order in writing, requisition such accommodation and may direct that the possession thereof shall be delivered to him within such period as may be specified in the order: Provided that the period so specified shall not be less than 15 days from the date of the service of the order."

[11] The crucial point in the case is whether the requisitioning of a house for the residence of a public servant is a public purpose. The expression 'public purpose' has been used in the above section as opposed to 'private purpose.' In *Hamabai Framjee* v. *Secy. of State*, 39 BOM. 279, their Lordships of the Judicial Committee, while interpreting the expression 'public purpose' occurring in a lease of land granted by the East India Company and in a Sanad or Government permit of land granted by the same Company, held that the providing of housing accommodation for Government officials by the erection of dwelling houses for their private residences at adequate rents, was a "public purpose". They observed that the scheme for the provision of a housing accommodation for Government officials would redound to public benefit by helping the Government to maintain the efficiency of its servants. The definition of a "public purpose" that

"the phrase, whatever else it may mean, must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals is directly and vitally concerned,"

was approved by their Lordships. Where a person has to live in a certain town to discharge his

public duties and not on account of any private reasons the provision of accommodation for him is a public obligation and it is the duty of the State to arrange for his accommodation on payment of reasonable rent by him.

[12] Learned counsel admits that the acquisition of land for construction of houses for the private residences of Government servants would be a public purpose. But he contends that if the land is acquired for construction of a house for an individual public servant then it would not be a public purpose. I am unable to distinguish between the acquisition of land for the construction of a house for an individual public servant then it would not be a public purpose. I am unable to distinguish between the acquisition of land for the construction of a house for an individual public servant and that for the construction of houses for a number of public servants. Nor can I see any distinguishing feature between the acquisition of land for construction of a house for the private residence of a public servant and the requisition of a house for the same purpose. The underlying object in both the cases is the same. If no arrangement for the accommodation of a public servant is made then he cannot live in that town to discharge his public duties. To enable him to carry on his duties he must have a house to live in.

[13] It has also been urged that the benefit to the public is remote by the provision of a house for the residence of a public servant. In *Veeraraghavachariar* v. *Secy. of State*, 49 Mad. 237 at p. 245 it was held that where the primary object is personal gain, whether that be of a private individual or of a company, the public benefit resulting from the action of such a person or company is too remote and the purpose cannot be said to be a public purpose. For instance, every merchant and every dealer can say that he benefits the public because he is catering or providing to the wants of the public. The merchant's first object is to make a gain for himself. The benefit that he may confer upon his constituents or patrons is very remote. Such purposes are not public purposes.

[14] In the present case the public servant has to make no personal gain by his residence in the house in question. He had to come to live in Pilibhit because of exigencies of public service. It cannot, therefore, be said that the object of his residing in this house was any personal gain. I have no doubt in my mind that the requisitioning of the houses for private residences of public servants is a public purpose.

[15] **By the Court.** — The application in revision is dismissed with costs. The stay order is discharged.

B./K.S. *Revision dismissed.*

A.I.R. 1953 Allahabad 276 *[Vol. 40, C. N. 125.]*

AGARWALA AND P. L. BHARGAVA JJ.

Sharan Behari Lal and others—*Appellants* v. *Kanhaiya Lal and another* — *Respondents.*

First Appeal No. 14 of 1944, D/- 19-12-1949.

Contract Act (1872), S. 23—Agreements prohibited by law or opposed to public policy — Mortgage in favour of legal practitioner — Validity — Allahabad High Court Rules, Part II R. 26—Legal Practitioners Act (1878), S. 6 — Bar Councils Act (1926), S. 15 — Letters Patent (All), Cls. 7 & 8.

Rule 26, Allahabad High Court Rules, framed by virtue of the powers conferred under S. 6, Legal Practitioners Act, 1878, and Cls. 7 & 8 of the Letters Patent is a rule of discipline or conduct for legal practitioners. It is not its intention to render void any individual contract which may be entered into by a legal practitioner. It does not prohibit either expressly or impliedly the making of a contract by a legal practitioner. Hence a mortgage taken by a legal practitioner in the course of his money-lending business and in contravention of R. 26 is not void as being prohibited by law or opposed to public policy within the meaning of S. 23, Contract Act. A.I.R. 1923 Oudh 3, *Rel. on.*; A. I. R. 1916 Oudh 219, *held not good law in view of* A. I. R. 1917 All. 462 F.B. and A. I. R. 1917 All. 447. (Paras 9, 10, 35, 36)

(Certain propositions deduced from case law for determining whether a particular contract is void as being prohibited by any law, laid down.) (Para 34)

Anno. Contract Act, S 23 N 6, 31.

Dr. N. P. Asthana, P. L. Banerji, V. D. Bhargava, K. B. Asthana and Amrit Lal Bhatia — for Appellants; S. B. Johari and Brij Lal Gupta—for Respondents.

REFERENCES: Courtwise/Chronological Paras.

('16) 1916-14 All L. J. 962 : (A.I.R. 1917 All 462 F.B.)	11, 34
('16) 14 All. L. J. 969 : (A. I. R. 1917 All. 447)	11, 34
('41) 1941 All L. J. 370 : (A. I. R. 1941 All. 318)	15, 28
('16) 40 Bom. 126 : (A. I. R. 1915 Bom. 280)	13, 34
('31) A.I.R. 1931 Bom. 269 : (133 Ind Cas 241)	14, 34
('33) A.I.R. 1933 Bom. 262 : (144 Ind Cas 781)	26, 34
('35) A.I.R. 1935 Mad. 440 : (58 Mad. 727 F.B.)	15, 27, 34
('16) 34 Ind. Cas. 360 : (A. I. R. 1916 Oudh 219)	15, 25
('23) A.I.R. 1923 Oudh 3 : (72 Ind. Cas. 877)	12, 34
('43) A.I.R. 1943 Sind 219 : (I.L.R. (1943) Kar. 350)	15, 29, 34
(1910) A. C. 514 : (79 L. J. K. B. 1050)	15, 23, 34
(1905) 2 Ch. 624 : (74 L. J. Ch. 673)	15, 22, 34
(1692) Carth 251 : (8 Kin 322)	18
(1813) 105 E R 222 : (1 M & S 593)	15, 16, 34
(1822) 106 E R 1214 : (5 B & Ald. 335)	15, 17, 34
(1836) 150 E R 707 : (2 M & W 149)	15, 18, 20, 33, 34
(1838) 132 E R 1034 : (5 Bing (N.C.) 76)	15, 21, 34
(1845) 153 E R 552 : (14 M & W 452)	31, 34
(1849) 116 E R 1109 : (12 Q. B. 905)	32, 34
(1858) 140 E R 1138 : (4 C. B. (N.S.) 395)	33, 34
(1924) 1 K B 138 : (93 L. J. K. B. 97)	15, 24, 34
(1815) 2 Rose 256	19, 20

Agarwala J. — This is a defendant's appeal arising out of a suit for recovery of money on the basis of a simple mortgage bond dated 23-12-1931, executed by Angan Lal, defendant 1, in favour of the plaintiff, who was at the date of the mortgage and still is, an advocate practising at Mathura. The appellants are subsequent transferees of the hypothecated property and were arrayed as defendants 2 to 5 in the suit. Defendant 1 did not contest the suit. Indeed, he appeared as a witness

for the plaintiff. The appellants contested the suit *inter alia* on the grounds, (1) that the mortgagor, Angan Lal, was on the date of the mortgage, dated 23-12-1931, a member of the joint Hindu family with his brother Kunj Lal and as such, could not mortgage any portion of the property, and (2) that the plaintiff, being a legal practitioner, was prohibited from entering into a trade or business and as the advancing of a loan on the basis of the mortgage is a contract by way of trade or business, the contract is unenforceable and is void under S. 23, Contract Act. The lower Court held that Angan Lal had separated from his brother in the year 1927 and that the rule prohibiting a legal practitioner from entering into a trade or business was a rule of discipline or conduct and did not render the individual contract void. The suit was, therefore, decreed.

[2] In this appeal, these two points have been re-agitated before us and no other point has been urged.

[After considering the evidence on the record, their Lordships held:]

[3] In our opinion, the view of the lower Court that on the date on which the mortgage in suit was executed, Angan Lal was separate from his brother, is perfectly correct.

[4] The next point urged is that the contract evidenced by the mortgage deed in suit is void under S. 23, Contract Act, as it is prohibited by law and is also against public policy. In this connection, reference is made to R. 26 of Chap. 26 of the High Court Rules, which was applicable to the plaintiff respondent, at the time when the mortgage was executed. The said rule is in these words:

"If any applicant for admission as a legal practitioner hold any appointment or carry on any trade or other business the High Court may refuse to admit him, or pass such orders on his application as it thinks proper.

Any person, who having been admitted as a legal practitioner, shall accept any appointment or shall enter into any trade or other business, shall give notice thereof to the High Court, which may thereupon suspend such legal practitioner from practice, or pass such orders as the said Court may think fit. If such legal practitioner be a pleader or mukhtar he shall give the notice through the District Judge in whose Court he is enrolled.

Ordinarily no legal practitioner can be permitted to take an active part in any trade or other business while at the same time carrying on a legal practice."

[5] It was conceded by the plaintiff-respondent that for the purposes of this case, it may be assumed that he did money-lending business on a large scale.

[6] This rule was framed in exercise of the powers given to the High Court by S. 6 of Act 18 of 1878 and paras 7 and 8, Letters Patent. Section 6, Legal Practitioners Act, empowered the High Court from time to time to make rules consistent with the Act as to the following matters namely,

"(a) the qualifications, admission and certificates of proper persons to be pleaders of the subordinate Courts and of the revenue-offices situate within the local limit of its appellate jurisdiction . . . ."

[7] Clause 7, Letters Patent empowers the High Court to frame rules and lay down directions subject to which Advocates, Vakeels and Attorneys shall plead or act. Clause 8, Letters Patent empowers the High Court to make rules for the qualification and admission of proper persons to be Advocates, Vakeels and Attorneys at Law of the High Court.

[8] The question is whether R. 26, quoted above prohibits the making of a contract in the nature of a trade or business and renders it void within the meaning of S. 23, Contract Act.

[9] The power conferred on the High Court, for the purpose of framing the rule, was limited to the specific object of prescribing the conditions, under which legal practitioners should be admitted and practise before it or in the Courts subordinate thereto, or under which they could be removed or suspended from practice. The High Court was not given the power of declaring void contracts entered into by legal practitioners in the course of trade or business, because that power appertains to the field of contracts and not to the practice of the profession of law. Since the High Court had no power to make a rule rendering a contract entered into by a legal practitioner void, if it made such a rule, the rule itself would be void; and so the rule in question cannot be read as impliedly rendering a contract void.

[10] The matter, however, can be looked at from another stand-point. The practice of the learned professions including that of law has always been considered to be superior in honour and dignity to the plying of a trade or the carrying on of a business. It has further been considered that in order to maintain the dignity and the traditions of the Bar one may not carry on a trade or business. The rule in question, therefore, is a rule of discipline or conduct for legal practitioners. It is not its intention to render void any individual contract which may be entered into by a legal practitioner.

[11] The remarks of the Full Bench case of this Court in *Mt. Bhagwan Dei* v. *Murarilal*, 1916 ALL. L. J. 962 F.B. are decisive of the question before us. In that case an assignment of mortgagee rights was taken by a patwari in the name of his mother and a suit on the basis thereof was brought. Rule 10 of the rules framed by the Board of Revenue provided that :

"Every patwari is forbidden to engage in trade or moneylending or under any circumstances to borrow money from any land-holder or cultivator of his circle; and to own or cultivate any land on any tenure within his circle."

The rule was framed by the Board in exercise of the powers granted to it for regulating

"appointment of Kanungos and Patwaris, their services, qualifications, duties, removal, punishment, suspension and dismissal."

Walsh, J. observed :

"With regard to the rules, I think it very doubtful whether the power to make rules relating to the appointment, dismissal and so forth of a patwari, under Section 234, confers any right to qualify the general law with regard to contracts or anything else, and I think the draftsman, who drew these rules, knew his business too well and

therefore omitted to do any such thing. In my view, a rule declaring contracts void would have been ultra vires, but that no such intention was ever contemplated is I think clearly indicated by the penalty provided by R. 11 which immediately follows the prohibition in R. 10."

On the same day, the same Full Bench decided another case reported in *Kamala Devi* v. *Gur Dial*, 14 ALL. L. J. 969, in which a Kanungo had purchased the equity of redemption of a property in the name of his wife in contravention of R. 311, Government Servants' Conduct Rules framed by the Local Government. It was held that the rule by itself did not make the transfer to the Kanungo's wife null and void nor could the transfer be considered void on the ground of public policy.

[12] In *Ram Singh* v. *Mst. Raghubansa*, A.I.R. 1923 oudh 3, Kanyaiya Lal J. C. had a case of a legal practitioner who had taken a mortgage in his wife's name. He held:

"There is a wide distinction between a contract which it may be improper for a pleader to enter into without the sanction of J. C.'s Court and a contract the toleration of which is so injurious to the public welfare that even as between the parties who have voluntarily entered into it, the Courts will refuse to enforce it. The question in such cases is really one of professional etiquette rather than of public policy and the contract cannot be regarded as invalid."

[13] In *Ram Krishna* v. *Narayan*, 40 BOM. 126, debts were contracted in a trade carried on against the Government Servants' Conduct Rules by a Government servant. The Government Servants' Conduct Rule in question was as follows:

"A Government servant may not, without the previous sanction of the Local Government engage in any trade or undertake any employment, other than his public duties."

It was held that these contracts could not be termed as immoral or improper within the meaning of Hindu Law and were not invalid.

[14] In *Dharwar Bank Ltd.* v. *Mohammed Hayat*, A. I. R. 1931 BOM. 269, a Government servant in contravention of rules had acquired property. It was held that such acquisition was not illegal because the Govt. Servants' Conduct Rules were not based on any statutory provision but were merely rules of conduct. It was pointed out that there was a clear distinction between the conduct of a person and the subject-matter of a contract:

"Though the conduct of a person might be opposed to public policy the subject-matter of the contract is not necessarily opposed to public policy in the absence of any statutory prohibition."

[15] On behalf of the appellants, however, our attention has been invited to the following cases: *Langton* v. *Hughes*, (1813) 105 E. R. 222; *Bensley* v. *Bignold*, (1822) 106 E. R. 1214; *Cope* v. *Rowlands*, (1836) 150 E. R. 707; *Fergusson* v. *Norman*, (1838) 132 E. R. 1034; *Victorian Daylesford Syndicate* v. *Doth*, (1905) 2 ch. 624; *Whiteman* v. *Sadler*, (1910) A. C. 514; *Anderson Ltd.* v. *Daniel*, (1924) 1 K. B. 138; *Sahibunnissa* v. *Abdul Ghafur*, 34 Ind. Cas. 360 (oudh); *Ramanayudu* v. *Suryadevara Seetharamayya*, A. I. R, 1935 Mad. 440 (F.B.); *Ramlal* v. *Ram Din*, 1941 ALL. L. J. 370 and *Sugnomal Kirpomal* v. *Moosaissa*, A.I.R. 1943 Sind 219.

[16] In *Langton* v. *Hughes*, (1813) 105 E. R. 222, there was a suit by a druggist for the recovery of price of articles sold to a brewer. The brewer had been prohibited by Statute 42 Geo. 3, c. 38, s. 20, from using anything but malt and hops in brewing beer. The druggist had sold, not malt and hops, but other articles with the full knowledge that they were to be used for brewing beer. It was held that the druggist could not recover the price of the articles sold.

[17] In *Bensley* v. *Bignold*, (1822) 106 E. R. 1214, a printer had failed to put his name upon the work which he had printed, as required by 39 Geo. 3, c. 79, s. 27. It was held that he could not recover for labour or materials used in printing the work. Best J. observed:

"The distinction between '*mala prohibita*' and '*mala in se*' has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interest of the State. The object of the 39 Geo. 3 was to provide the most effectual means of discovering the authors of every publication, in order that they might be made answerable for the contents, and for that purpose, it has directed, that all the parties concerned in bringing the publication into the world, whether printers or publishers, shall be made known. Here, the printer's name has not been printed upon the publication as required by the Act of Parliament, and that being so, there is no legal contract on which an action can be founded, inasmuch as the thing was done in direct violation of the law."

In this case the requirement of the law was in the general public interest and was not collateral to the contract. The law required that a certain thing shall be done in printing the work, namely, that the printer's name shall be put upon it. This requirement was for the benefit of the public in general. The printer, having acted in violation of statutory requirements, could not recover for labour or materials.

[18] In *Cope* v. *Rowlands*, (1836) 150 E. R. 707, a broker, without taking out a licence required by Statute, had entered into transactions on behalf of his principals. It was held that he could not maintain an action for the recovery of commission due to him. Parke B., observed:

"It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or Statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: *Bartlett* v. *Vinor*, (1692) Carth. 251. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is, whether the statute means to prohibit the contract?"

[19] After holding that since the statute prohibited the broker to act without taking out a licence, he could not recover his brokerage, his Lordship further observed:

"The distinction between this and the case of *Ex parte Dyster*, (1815) 2 Rose 256, which was cited on behalf of

the plaintiff, is very clearly explained by Lord Eldon in his judgment. The prohibition to act without admission, is statutory; the regulations adopted by the Mayor & Court of Aldermen in the case of admitted brokers are not; they are purely municipal, and have not the force of a general law; the only consequences of their violation are those which the regulations prescribe."

[20] The distinction between the present case and *Cope's case*, ((1836) 150 E. R. 707) is the same as existed between the *Cope's case* and the case of *Ex parte Dyster*, (1815-2 Rose 256).

[21] In *Fergusson* v. *Norman*, (1838) 132 E. R. 1034, a pawnbroker had advanced loans to a person without observing the formalities required by s. 6, Pawnbrokers' Act, e. g., the enactment was that every person who, after the commencement of this Act, shall, by way of pawn or pledge, take from any person whatsoever goods or chattels of any kind whatsoever, whereon shall be lent any sum exceeding 5s., shall forthwith, and before he shall make, and advance or lend money on such pawn or pledge, enter the same in a book in a particular manner. The section required other duties also to be performed; some of which were to inquire the place of abode of the party who brought the goods, whether he be a lodger or house-keeper, and to put a certain mark according to the fact, H. or L., on entering the loan. This section further directed that the pawnbroker shall, at the time of taking any pawn or pledge, give a duplicate in a particular manner. The pawnbroker had not observed those formalities in taking the pawns. It was held that he could not maintain a lien on them against the assignees of the pawner. Tindal C. J. observed :

"Upon looking at that section, the requisities that are made necessary are those that are to precede the contract, and to accompany and make it out; they are not, as has been contended, collateral to the contract itself. A distinction may easily be drawn as to those duties imposed on the pawnbroker which are entirely collateral to the individual contract; and it would be too much to say, because he had observed the enactment of the statute in such matters, that therefore, the contract made by him should be void. Suppose an instance in which his name was required to be put up over the door, and some mistake had been made. A penalty is given for not putting up the name; but it would not follow that contracts entered into by an individual whose name had been incorrectly spelled, would be therefore void."

Then quoting the section, His Lordship observed:

"It appears, therefore, that there are acts to be done by the pawnbroker before and at the time of entering into the contract; and it is quite evident that the statute was passed not only for the purpose of protecting the numerous parties who borrow money on small pledges, but also the public, against frauds committed on third persons, the real owners of goods, by pledging their property without their consent; for the pawnbrokers' entries would facilitate the detection of any fraud or robberies so committed. This, therefore, being the object and intention of the Legislature, and the requisite being such as are to be performed at the time of, and previously to, entering into the contract, I think the contract must be held to be void, notwithstanding there are specific penalties for the omission of such requisites."

[22] In *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, (1905) 2 Ch. 624, a money-lender having got himself registered under the Money-lenders Act, 1900, had advanced monies in the course of his business as a money-lender. It was held that he could not recover.

[23] In *Whiteman* v. *Sadler*, (1910) A. C. 514, a money-lender was held to have carried on business "in more than one name" within the meaning of s. 2, sub-s. 1 (b), Money-lenders' Act, 1900, and incurred the penalty imposed by s. 2, sub-s. (2) of the Act. The principle of law laid down by Parke B. in *Cope* v. *Rowlands*, (1836-150 E. R. 707) and by Tindal C. J. in *Fergusson* v. *Norman*, (1838-132 E. R. 1034) was approved but it was held that contravention of the statute did not render the contract void because the money-lender had acted in the registered name, although the registration was not correct.

[24] In *Anderson Ltd.* v. *Danial*, (1924) 1 K. B. 138, there was a sale of an article used as a fertiliser of the soil without giving to the purchaser an invoice stating what the respective percentages (if any) were of certain chemical substances contained in the article. This was in contravention of s. 6, sub-s. 1, Fertilisers and Feeding Stuffs Act, 1906; it was held that the sale was void altogether. Section 6, sub-s. 1 of the Act provided:

"If any person who sells any article for use as a fertiliser of the soil. . . . . fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act ; . . . . . he shall without prejudice to any civil liability, be liable on summary conviction to a penalty."

It was also observed that the object of the statute in requiring the vendor to give the statutory invoice and imposing on him a penalty in the event of his default was to protect the purchasers of fertilisers and the effect of non-compliance with the requirement was not merely to render the vendor liable to the penalty, but also to make the sale illegal and preclude the vendor from suing for the price.

[25] In *Sahib-un-nissa* v. *Abdul Ghaffur*, 34 Ind. Cas. 360 (oudh), a pleader in Oudh had advanced loan to one of his clients upon an usufructuary mortgage. In doing this, he acted against a rule framed under the Legal Practitioners Act, requiring him to give notice to the Judicial Commissioner of his intention to enter into trade or business or to advance money on interest to any person. It was held that the conduct of the practitioner was against public policy and the contract was void. This decision is entirely in conflict with the two Full Bench cases of this Court referred to above and cannot be considered as laying down good law.

[26] In *Sundrabai Sitaram* v. *Manohar Dhondu*, A. I. R. 1933 Bom. 262, a police officer had purchased property in contravention of a statutory prohibition contained in S. 33, Bombay District Police Act, which runs as follows :

"No police officer shall engage in trade or be in any way concerned either as principal or agent, in the purchase or sale of land within the district wherein he is employed or in any commercial transaction whatever, without the per-

mission of the Magistrate of the district or of Government."

It was held that the transaction of sale was void as the section must be construed as prohibiting the transaction. Apparently it was considered, in that case, that the statute contained an express prohibition for a police officer to be concerned in the purchase or sale of land within the district where he is employed, and that there was nothing to show that the prohibition was made simply by way of a rule of conduct for police officers, for the purpose of maintaining discipline. The learned Judges who decided that case pointed out that the case of a similar prohibition, if made by rules, would be different. The facts of that case, therefore, were entirely different from the facts in the present case.

[27] In *Chava Ramanayudu* v. *Seetaramayya*, A. I. R. 1935 Mad. 440, a promissory note was executed for advances to be made by the plaintiff for the partnership in an Abkari business with defendant 1 who had obtained a licence to run an Abkari business but had not obtained the Collector's permission to work the Abkari shop in partnership. Clause 27, General Sales Notification, provided :

"No privilege of supply or vend shall be sold, transferred or sub-rented without the collector's previous permission. Nor, if the Collector so orders, shall any agent be appointed for the management of any such privilege without his previous approval."

It was held that the effect of this provision in the Notification was that a partnership in Abkari business was prohibited unless the previous permission of the Collector had been obtained. It was also held that the contract of partnership in Abkari business was void. It will be observed that in this case there was a direct prohibition of the license being transferred or sub-rented.

[28] In *Ram Lal* v. *Ram Din*, 1941 ALL. L. J. 370, some Railway servants had taken a mortgage by conditional sale in contravention of s. 137 (3) (b), Railways Act which provided :

"A Railway servant shall not in contravention of any direction of the Railway Administration in this behalf engage in trade."

It was held by Ismail J., that an isolated transaction could not mean "engaging in trade or money-lending business" and so the transaction was not void. It is contended that by implication the learned Judge held that if the plaintiffs in that case had done regular money-lending business, the transaction would have been void. We do not consider that this is the effect of the decision.

[29] In *Sugnomal Kirpomal* v. *Moosaissa*, A. I. R. (30) 1943 sind 219, a licensed vendor had supplied intoxicating liquor on credit in contravention of a rule made under the Bombay Abkari Act. The rule was as follows :

"The licensee shall not sell liquor on credit nor shall he receive any wearing apparel or ornament, or any consideration except coin or currency notes for any liquor that he may sell, nor shall he give free doles of liquor to any person."

It was held that this rule was made for social and moral purposes and therefore the licensee could not recover the price of the liquor supplied by him on credit. The rule was made under s. 35 (a), Bombay Abkari Act which authorised the Commissioner to make rules prescribing the restrictions under and the conditions on which any license, permit or pass might be granted and such license might contain a condition prohibiting the sale of intoxicating liquor except for cash. It will be observed that the rule in question in that case was found to have been made for social and moral purposes, and the benefit of society in general.

[30] We may also notice a few other cases, though not cited at the bar.

[31] In *Smith* v. *Mawhood*, (1845) 153 E. R. 552, there was a sale of tobacco by a person contrary to the provisions of the Excise License Act, 6 Geo. 4, c. 81, which subjected to penalties any manufacturer of, or dealer in, or seller of, tobacco, who did not have his name painted on his entered premises in manner therein mentioned; or who shall manufacture, deal in retail or sell tobacco without taking out the license required for that purpose. It was held that the effect of the provisions was merely to impose a penalty on the offending party for the benefit of the revenue.

[32] In *Baily* v. *Harris*, (1849) 116 E. R. 1109, the case was of an assumpsit for goods sold and delivered. It was held that a contract of sale was not void merely because the goods were liable to seizure and forfeiture to the Crown and under the Excise Laws the maker of the goods was liable to a penalty.

[33] In *Smith* v. *Lindoo*, (1858) 140 E. R. 1138, a person without taking out a licence required by the Statute 6 Ann. c. 16, acted as a broker in the city of London and according to a usage of trade paid for the shares. It was held that though he could not recover his commission, the contract of purchase and sale itself was not void and that therefore, he could recover the money paid on behalf of his principal for the purchase of the shares. This case should be read as supplementing the decision in *Cope* v. *Rowlands*, (1836) 150 E. R. 707.

[34] It appears to us that the following propositions are deducible from the decided cases :

(1) The question whether a particular transaction falls within the purview of a prohibitory statute is manifestly one of construction, and the question to be asked in each case is whether the statute means to prohibit the contract, *Cope* v. *Rowlands*, (1836) 150 E. R. 707.

(2) When a transaction is forbidden, the grounds of the prohibition are immaterial. There is no difference between '*mala prohibita*' (that is, things which if not forbidden by positive law would not be immoral), and '*mala in se*' that is things which are so forbidden as being immoral, *Bensley* v. *Bignold*, (1822) 106 E. R. 1214.

(3) The imposition or non-imposition of penalty by the legislature for a specific act or omission is no sure criterion whether the legislature intended to prohibit the contract. Even in cases where a penalty is provided for the breach of statutory provision, the contract need not necessarily be considered to be void : *Smith* v. *Mawhood*, (1845) 153 E. R. 552 and *Baily* v. *Harris*, (1849) 116 E. R. 1109. The absence of a penalty does not prevent the contract from being held void : *Sundrabai Sitaram* v. *Manohar*, A. I. R. 1933 Bom. 262.

(4) If the context shows that the object of the legislature in imposing conditions for the conduct of any particular business or profession is the maintenance of public order or safety or health, whether or not it was also for the protection of revenue the non-observance of the conditions render the contract void: *Langton* v. *Hughes*, (1813) 105 E. R. 222; *Bensley* v. *Bignold*, (1822) 106 E. R. 1214; *Anderson Ltd.* v. *Daniel*, (1924) 1 K. B. 138; *Ramanayudu* v. *Suryadevara Seetharamayya*, A. I. R. 1935 Mad. 440 (F.B.) and *Sugnomal Kirpomal* v. *Moosaissa*, A. I. R. 1943 Sind 219.

(5) Where the prohibition or conditions imposed for the conduct of any particular business or profession are intended for the benefit of a particular class of persons dealing with those on whom the condition is imposed, the contract between such persons and the persons for whose benefit conditions are imposed is rendered void : *Cope* v. *Rowlands*, (1836) 150 E. R. 707; *Ferguson* v. *Norman*, (1838) 132 E. R. 1034; *Victorian Day Resford Syndicate* v. *Dott*, (1905) 2 ch. 624; *Whiteman* v. *Sadler*, (1910) A. C. 514 and *Sundrabai Sitaram* v. *Manohar Dhondu*, A. I. R. 1933 Bom. 262 but the further contract entered into with other persons for whose benefits the conditions are not imposed is not rendered void : *Smith* v. *Lindoo*, (1858) 140 E. R. 1138.

(6) Where the conditions are imposed merely for a collateral purpose for the convenient collection of the revenue, (1845) 153 E. R. 552, or for the maintenance of discipline in a class of persons or for the dignity or integrity of a certain profession and is not intended for the benefit of persons dealing with the person on whom the condition is imposed the contract is not void. Where those conditions are imposed by a rule framed under a power conferred for the purpose of laying down conditions for admission or appointment, dismissal or suspension, they are deemed to be for the collateral purpose of the maintenance of discipline or the dignity or integrity of the profession or service, and the contract is not rendered void, though the non-observance of conditions may entail punishment of the offender : *Bhagwan Din* v. *Murarilal*, 1916 ALL. L. J. 962; *Kamala Devi* v. *Gurdial*, 1916 ALL. L. J. 969; *Ram Singh* v. *Mt. Raghubansa*, A. I. R. 1923 Oudh 3; *Ramkrishna* v. *Narayan*, 40 Bom. 126 and *Dharwar Bank Ltd.* v. *Mahomed Hayat*, A. I. R. 1931 Bom. 269.

[35] In the present case it appears to us that the restrictions imposed upon the legal practitioners not to engage in trade or business are intended to maintain the dignity and integrity of the profession and are not intended for the benefit of those who may deal with legal practitioners but in their capacity as ordinary citizens. Take the illustration of a legal practitioner entering into speculative transaction and losing heavily in the share market in a series of transactions which may amount to trade or business. Can it be said that the person with whom the contracts were made is not entitled to recover sums of money which became due to him upon the contracts? He can recover only if the contract is not void. There is no doubt that he can recover. The contract is, therefore, not a void contract even though it has been made in the course of business or trade. The nature of the penalty that the legal practitioner engaging in trade or business incurs also gives an indication whether the law intends contracts to be treated as void or not. The only penalty is that the legal practitioner renders himself liable to be suspended or removed from practice. He does not incur any other liability, which also suggests that by the non-observance of the conditions imposed upon him he does not act against the State as a whole, but acts against the discipline, dignity or the honour of the profession to which he belongs. In this view of the matter, it is immaterial that the prohibition not to enter into trade or business is contained in a Statute, e. g. in s. 15, Bar Councils Act, or is contained in a rule framed by the High Court or some other body.

[36] We are, therefore, of opinion that the mortgage in suit was not void on any of the grounds suggested by the defendants-appellants. There is no force in this appeal, and it is dismissed with costs.

B/K.S. *Appeal dismissed.*

A. I. R. 1953 Allahabad 281 *[Vol. 40, C. N. 126.]*

(LUCKNOW BENCH)

CHANDIRAMANI J.

Ram Gopal and others, Plaintiffs-Appellants v. *Ajodhia Prasad and another, Defendants-Respondents.*

Second Appeal No. 336 of 1944, D/- 7-10-1949.

(a) Civil P. C. (1908), O. 34, R. 1 — Person setting up paramount title.

A person setting up a title paramount to that of the mortgagor and the mortgagee should not be joined as a party in the mortgage suit for he is neither interested in the mortgage security nor in the rights of redemption : 12 Cal. 414 (P. C.) ; A.I.R. 1916 P. C. 18 and A.I.R. 1918 All. 81, *Foll.* [Para 4]

Anno. C. P. C., O. 34 R. 1 N. 5 Pt. 4.

(b) Civil P. C. (1908), S. 47 — Claim questioning validity of mortgage decree.

Where the plaintiffs claim that they were the owners of the mortgaged property and that the mortgagors were not competent to make the mortgage and therefore the mort-

gagee's suit should not have been decreed, the claim questions the very validity of the decree; such a question is beyond the scope of S. 47 and can be decided by a suit. *Case law reviewed.* [Paras 5 and 7]

Anno. C. P. C., S. 47 N. 46 Pt. 5.

Sri Ram, for Appellants Nos. 1A, 1B and 2 to 4; Hyder Husain, for Respondent No. 1.

REFERENCES : Courtwise/Chronological/	Paras.
(84-85) 12 Ind. App. 171 : (12 Cal. 414 P. C.)	4
('16) 43 Ind. App. 187 : (A.I.R. 1916 P. C. 18)	4
('97) 19 All. 480 : (1897 All. W. N. 115)	5
('99) 21 All. 277 : (1899 All. W. N. 64)	5
('09) 31 All. 45 : (1 Ind. Cas. 704)	5
('17) 39 All. 47 : (A I.R: 1917 All. 460)	6
('18) 40 All. 584 : (A.I.R. 1918 All. 81)	4
('28) A.I.R. 1928 All. 704 : (110 Ind. Cas. 876)	6
('29) 51 All. 878 : (A.I.R. 1929 All. 602)	6
('35) A.I.R. 1935 All. 183 : (153 Ind. Cas. 577)	6
('09) 32 Mad. 429 : (2 Ind. Cas. 18)	5
('41) A.I.R. 1941 Mad. 898 : (198 Ind. Cas 158 F. B.)	5
('27) A.I.R. 1927 Oudh 120 : (2 Luck. 145)	6
('27) A.I.R. 1927 Rang. 273 : (5 Rang. 393)	6
('40) A.I.R. 1940 Rang. 161 : (190 Ind. Cas. 31)	5

Judgment. — This is the plaintiffs' appeal against the appellate decree of Mr. Tribeni Prasad, Civil Judge, Bahraich dated 22-7-1944.

[2] The plaintiffs stated that more than 20 years before the date of the suit, their father Mata Din and his five sons including 4 plaintiffs and defendant 2 Misri Lal, had a private partition of their property whereby their father gave up all his interest in family property which accordingly was equally divided between 5 sons. In 1920, defendant 1 fraudulently obtained a mortgage-deed from their father and their brother Misri Lal, defendant 2, in respect of the property in list B (Nos. 243, 275C) and that this mortgaged property has no connection whatsoever with the property in list A (Nos. 235, 257, 287 and 288).

On the basis of this mortgage-deed, defendant 1 filed a suit for sale in May 1937. In this suit, the plaintiffs as their father was dead, were impleaded as his legal representatives. The plaintiffs filed written statement claiming paramount title in respect of 4/5ths of the mortgaged property. No issue was, however, framed on this paramount title. The suit was decreed in october 1937 and an appeal against the preliminary decree was dismissed on 31-3-1938. A final decree was obtained in 1941 and in execution of the decree the plaintiffs objected under S. 47, Civil P. C. Their objection was dismissed in 1942.

The plaintiffs alleged that they feared that the executing Court might sell their property thinking that the property in lists A and B was the same, that in any case even if it be so, they had their right of ownership in respect of 4/5ths share in the property and thus it is not saleable in execution of the mortgage decree. They accordingly prayed for a declaration that the properties in lists A and B are entirely different and that in any case they have 4/5ths share in the properties in the lists A and B and that it cannot be attached or sold in execution of the mortgage decree.

The suit was contested on various grounds and one of them with which we are concerned now in appeal was that the claim of the plaintiffs could have been decided only under S. 47, Civil P. C., and a separate suit, therefore, was not maintainable. The learned trial Court thought that the claim of paramount title sought to be agitated in suit was a question relating to execution, discharge or satisfaction of the decree between parties to the suit and therefore the present suit was not maintainable. The suit was accordingly dismissed. The plaintiffs went up in appeal and the learned lower appellate Court has also agreed with the trial Court and accordingly the appeal was dismissed.

[3] In the present appeal it is urged that both the Courts below have gone wrong in thinking that the claim made by the plaintiffs raised a question relating to satisfaction, discharge or execution of the decree, that in fact their claim challenged the very validity of the mortgage decree and therefore such a question could not have been decided in execution proceedings under S. 47, Civil P. C. I have heard the learned counsel and am satisfied that this contention must prevail.

[4] Admittedly the plaintiffs were impleaded in the mortgage suit as legal representatives of their deceased father who was one of the mortgagors. In that capacity they could not possibly set up their paramount title against the mortgagor and the mortgagee. It is settled law that a person setting up a title paramount to that of the mortgagor and the mortgagee should not be joined as party in the mortgage suit for he is neither interested in the mortgage security nor in the rights of redemption . . . see *Nilkanth Banerji* v. *Suresh Chunder*, 12 Ind. App. 171 (P. C.) and *Radha Kunwar* v. *Reoti Singh*, 43 Ind. App. 187 (P. C.). In *Gobardhan* v. *Manna Lal*, 40 ALL. 584, it has been held that in a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to that of the mortgagor and the mortgagee is not a necessary party, and the question of paramount title could not be litigated in such a suit. It follows that even if title paramount had been set up in the suit of 1937 as in fact it was, it would have been unnecessary to decide it in that suit. In point of fact no issue on title paramount was framed or decided.

[5] The plaintiffs' claim in the present suit was that they were the owners of 4/5ths of the mortgaged property and the original mortgagors their father and their brother defendant 2 were not competent to make the mortgage and therefore the decree was one which ought not to have been made. The question raised was not one relating to execution, discharge or satisfaction of the decree but the very validity of the decree in execution was challenged. This is amply supported by *Ramaswamy Chettyar* v. *U Tun Tha*, A. I. R. 1940 Rang. 161.

In that case the mortgagee after the passing of the final decree applied for sale. During the pendency of the proceedings, the mortgagor died.

His legal representative who was brought on the record then raised an objection to the sale on the ground that the mortgaged property belonged solely to him and the mortgagor had no right, title or interest therein. It was held that the objection did not fall under s. 47, Civil P. C., and the objection being to the validity of the decree itself proper remedy was by way of separate suit. Reliance was placed on *Sanwal Das* v. *Bismillah Begum*, 19 ALL. 480; *Liladhar* v. *Chaturbhuj*, 21 ALL. 277; *Jagar Nath Singh* v. *Shiv Ghulam Singh*, 31 ALL. 45 and *Tirumlraju Bahadur Deva* v. *Mahant Dossji Varu*, 32 Mad. 429.

The learned Judge quoted a passage from *Sanwal Das* v. *Bismillah Begum*, 19 ALL. 480 wherein was pointed out the difference between the proceedings of sale in a simple money decree and the proceedings of sale in a mortgage-decree. It was pointed out that in selling the property under a simple money decree the Court has to enquire whether the property attached is the judgment-debtor but

"where, however, the decree is a decree for sale under the Transfer of Property Act now O. 34, Civil P. C., the Court executing the decree must sell the property described to be sold and leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser."

In *Hamidgani* v. *Ammasahib*, A. I. R. 1941 Mad. 898, a Full Bench of the Madras High Court approving *Tirumalraju Bahadur Deva* v. *Mahant Dossji Varu*, 32 Mad. 429 which was relied on in *Ramaswamy Chettyar* v. *U Tun Tha*, A. I. R. 1940 Rang. 161 held that a person who has been brought into Court in proceedings in execution of a mortgage-decree merely as the legal representative of the judgment-debtor is not compelled to have his own claims to the property in suit decided in the execution proceedings and he can establish his rights by a separate suit. It was also pointed out that in execution proceedings arising out of money-decrees, questions relating to property attached stand on an entirely different footing as they do not call into question the correctness of the decree.

[6] For respondents reliance was placed on *Niam Ata* v. *Girdhari Lal*, A. I. R. 1927 oudh 120; *Lachhoo* v. *Firm Munni Lal Babu Lal*, A. I. R. 1935 ALL. 183; *Imtiaz Bibi* v. *Kabia Bibi*, 51 ALL. 878; *Dulla* v. *Shib Lal*, 39 ALL. 47; *Piare Lal* v. *Kishan Lal*, A. I. R. 1928 ALL. 704 and *Chhettiar S. R. M. M. R. M. Firm* v. *Teo Ee San*, A. I. R. 1927 Rang. 273. The first four cases all related to money decrees in which legal representatives of the judgment-debtor claimed attached property to be his and not of the original judgment-debtor and it was held that such a question relates to execution, satisfaction or discharge of the decree under s. 47, Civil P. C.

Piare Lal v. *Kishan Lal*, A. I. R. 1928 ALL. 704 related to a mortgage-decree and there, legal representative of the transferee of a portion of the mortgaged property who himself was a party to the suit claimed his paramount title by purchase and said that the property sought to be sold was not included in the mortgage-decree. His objection was examined and dismissed under s. 47, Civil P. C. The person then filed a suit for declaration of his title. It was held that no suit lay. It is clear from the facts of this case that the validity of the decree itself was not challenged and so the question clearly was of s. 47, Civil P. C.

Chettiar S. R. M. M. R. M. Firm v. *Teo Ee San*, A. I. R. 1927 Rang. 273 was also the case of a personal decree and not of a mortgage-decree in which the legal representative of the deceased judgment-debtor raised an objection to the attachment of some property of the deceased in his possession and it was held that the objection claiming paramount title should be decided under s. 47, Civil P. C., and not by a separate suit. Authorities, therefore, relied upon by the Courts below and respondents are those in which the validity of the decree was not in question.

[7] It is clear that the claim of the plaintiffs in the present case questions the validity of the mortgage-decree itself in respect of the mortgaged property and such a question is clearly beyond the scope of S. 47, Civil P. C., and can be decided by a suit. Accordingly I allow this appeal, set aside the decree passed and direct that the suit shall be readmitted to its original number and shall be disposed of on merits according to law. Costs shall abide the result.

B/V.R.B. *Appeal allowed.*

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RAGHUBAR DAYAL AND V. BHARGAVA JJ.

Abdul Latif Khan—Judgment-debtor — Appellant v. *Mt. Sikander Begum — Decree-holder —Respondent.*

Execution F. A. No. 182 of 1946, D/- 8-12-1949.

(a) Civil P. C. (1908), S. 48 — Instalment decree with default clause—Execution application to recover entire amount—Limitation Act (1908), Art. 182 (7)—Evidence Act (1872), S. 115.

In the case of an instalment decree with a default clause, a mere communication to the judgment-debtor of the decree-holder's taking out execution by enforcing the default clause would not justify the conclusion that the judgment-debtor must have acted in some such manner that any further change of mind by the decree-holder would affect him prejudicially. It is for the judgment-debtor to show in every case that his conduct was influenced by the alleged representation of the decree-holder and that the change in the attitude of the decree-holder would affect him adversely. Where no allegation of prejudice is made by the judgment-debtor the decree-holder is not barred from having the benefit of executing his decree against the judgment-debtor as an instalment decree which has not come to an end by his previous applications for execution to recover the entire decretal amount.

[Paras 16 and 17]

Anno. C. P. C., S. 48, N. 12, Pts. 6 and 7; Lim. Act, Art. 182, N. 136, Pts. 10 to 13.

(b) Limitation Act (1908), Art. 182 (7)—Instalment decree with default clause—Execution application for entire amount.

In the case of an instalment decree with a default clause, an application for execution to recover the entire amount must be deemed to include a prayer for execution of the smaller amounts relating to the instalments which had fallen due. The decree is one, and one only. It remains an instalment decree so long as the default clause is not effectively enforced and the right of the decree-holder to execute the decree as an instalment decree comes to an end. Any application for execution, whatever be the nature of prayer, would be a valid application, for execution and will be sufficient to save limitation for subsequent application to recover the instalments. [Para 18]

Anno. Lim. Act, Art. 182, N. 136.

Ishaq Ahmad—for Appellant; *Waheed Ahmad Khan—for Respondent.*

REFERENCES : Courtwise/ Chronological Paras

('06) 28 All. 249 : (2 All. L. J. 828). 9, 15
('23) A. I. R. 1923 Bom. 201 (2) : (72 Ind. Cas. 290). 11
('25) A. I. R. 1925 Bom. 326 : (87 Ind. Cas. 769). 10
('31) A. I. R. 1931 Bom. 263 : (132 Ind. Cas. 437). 11, 15
('42) A. I. R. 1942 Mad. 679 : (203 Ind. Cas. 478). 14, 15
('43) A. I. R. 1943 Nag. 170 : (I. L. R. (1943) Nag. 334). 15
('41) 16 Luck. 495 : (A. I. R. 1941 Oudh 93). 12, 15
('42) 17 Luck. 449 : (A. I. R. 1942 Oudh 219). 13, 15

Raghubar Dayal J. — This is a judgment-debtor's appeal against an order of the Civil Judge, Bareilly, partly dismissing his objection to the execution of a decree against him in favour of the respondent to the effect that the application for the execution of the decree was time barred.

[2] The simple money decree in suit was passed on 11-5-1932 for Rs. 7500. The decree allowed instalments of Rs. 25 a month. It provided :

"If the defendant fails to pay three consecutive instalments, the plaintiff will be at liberty to realise the whole decretal amount in one lot."

Instalments falling due on 11-7-1932 or thereafter were not paid.

[3] The decree-holder applied on 5-9-1934 for the execution of the decree with respect to the entire decretal amount. This application was dismissed without satisfaction. Three other applications with similar prayers were similarly disposed of. The present application is the fifth application for execution, and was presented on 21-4-1945. It may be just noted here that these five execution applications were all presented within three years of the respective previous application.

[4] The objection of the judgment-debtor was that the execution application was time barred on account of the provisions of s. 48, Civil P. C. This objection was accepted by the learned Civil Judge, who held that the application for the realisation of the entire decretal amount was time barred in view of the right to apply for such execution having accrued more than 12 years prior to the institution of this application for execution. The decree-holder has submitted to this order.

[5] The learned Civil Judge, however, considered the application for execution to be within limitation with respect to all the instalments which had fallen due within 12 years of 21-4-1945, and ordered the execution to proceed with respect to Rs. 3600. He disallowed the application for execution with respect to the instalments which were to fall due after the presentation of the application for execution. It may be mentioned here that in the operative portion of the order the words "within twelve years of the date of the application" seem to have been omitted by inadvertence, though it directs the execution to proceed with respect to Rs. 3600 only.

[6] It is against this order that this appeal has been filed.

[7] The learned counsel for the appellant has argued that, once the decree-holder elected to execute the entire decree, his right to execute the instalment decree ceased. He further pointed out that, when no application for execution of the instalment decree was instituted within three years of the passing of the decree, the present application for execution as an application for execution of the instalment decree was time barred. Lastly, he urged that, if this application be taken to be within limitation to recover the instalments, execution could lie only with respect to the instalments which had fallen due within three years of the presentation of this application for execution.

[8] The order of the Court below appears to be correct. The contention that the mere presentation of an application for execution to recover the entire decretal amount would put an end to the instalment decree does not appeal to us. The argument really is that the decree-holder having made his choice once, cannot be allowed to revoke that choice or be given benefit which he could have got only by revocation of his choice. It is said that he is bound by what he once elects. In this connection reference has been made to a number of cases, but they do not appear to go so far as to lay down that a mere expression in an application for execution of a desire to execute the entire decree by enforcing the default clause would bar the decree-holder from executing the decree for the instalments only, treating the instalment decree as remaining alive.

[9] The first case is *Bhagwan Das* v. *Janki*, 23 ALL. 249. In this case the decree was for sale of mortgaged property and directed the amount of the decree to be paid by six annual instalments, and it provided that, in case of default in respect to any instalment, the decree-holder would be entitled to have it executed with respect to the whole amount. There was such default, and the decree-holder got an order absolute under s. 89, T. P. Act. He then applied for the execution of the decree in respect of the whole amount due & asked for the sale of the mortgaged property. The application was dismissed in default of prosecution. He then presented a second application after three years from the date of the last application. The execution application was disallowed as being time barred. It was contended that as the original decree allowed the amount to be paid by instalments the decree-holder could have received instalments and was entitled to apply for

execution for such instalments as had remained unpaid. This argument was refuted by these observations :

"This might have been a valid contention had the decree-holder not exercised the option of applying for enforcement of payment of the whole amount of the decree upon default being made in the payment of some of the instalments. As I have already said, he did exercise that option and applied for an order absolute under S. 89. Again when on 23-2-1901, he applied for execution of the decree in respect of the whole amount of it, he sought in the exercise of his option to put an end to the instalments provided for in the decree. Those instalments could be adhered to only in the event of the decree-holder not exercising the option which the decree gave him. He having elected to put an end to the instalment arrangement cannot now fall back on the provisions of the decree relating to payment by instalments. His right to execute the decree arose when default was made in the payment of instalments, and he exercised that right. Therefore it is no longer open to him to say that he could give effect to the provisions of the decree and receive instalments."

These observations do not apply fully to the facts of the present case. What happened in that case was that the original decree for instalments did come to an end once the decree-holder got the order absolute under s. 89, T. P. Act. Subsequent to the making of the order absolute, the rights of the decree-holder were confined to such rights as were given under that order absolute. These observations mean that, by getting the order absolute, the decree-holder had given effect to his choice and had deliberately and effectively put an end to the instalment decree. They cannot be taken to mean that merely because a decree-holder just desires to execute the decree in a certain manner by taking advantage of the default clause, he cannot ignore the default clause and fall back upon the original decree, when no such order had been passed by the Court as would put an end to the instalment decree. His application alone does not affect the judgment-debtor in any way.

[10] The next case is *Gulabrao Yeshwant* v. *Nagan Chelabhai*, A. I. R. 1925 Bom. 326. The application for execution with respect to the entire decretal amount was held to be time barred in view of s. 48, Civil P. C. After such a finding it was observed :

"He (decree-holder) cannot be allowed to continue to execute for the instalments as they fall due, as on default the decree was no longer an instalment decree."

No reasons are given for these expressions of opinion.

[11] The next case is *Pandurang Vishvanath* v. *Mahadeo Vishweshwar*, A. I. R. 1931 Bom. 263. This case supports the appellant's contention that when the decree-holder had relied on the default clause and applied for execution with respect to the entire decree previously, he could not be allowed to fall back on the instalment part of the decree. Reliance was placed on the aforesaid Allahabad and Bombay cases and also on the case of *Shrinivas* v. *Chanbasapagowda*, A. I. R. 1923 Bom. 201 (2), and no additional reasons were given for the view that the decree-holder having elected and applied twice to recover the entire amount should be held to have treated the instalment decree as at an end. The case reported in A. I. R. 1923 Bom. 201 (2) was not a case about an instalment decree with a default clause, but was a case in which a certain claim was disallowed in view of the provisions of O. 2, R. 2, Civil P. C.

[12] The next case which supports the appellant is *Gurdin Bhant* v. *Chhedi Bhant*, 16 Luck. 495. In this case Yorke J. observed with respect to the contention that the application for execution might not have been time barred with regard to the instalments falling due on certain dates :

"In my opinion, even to that extent his appeal would have been entirely without force because the moment the decree-holder exercised successfully the option to execute his decree for the whole amount, he at once converted the decree from being an instalment decree into an ordinary decree for the realisation of the full decretal amount. He could not again claim to realise any of the instalments as they fell due or rather within three years from the date on which they fell due."

No reasons for this view are given in the judgment.

[13] On the other hand, in *Peoples Bank of Northern India, Ltd.* v. *Aijaz Ali*, 17 Luck. 449, a different view was taken. In this case a number of applications. for execution, taking advantage of the default clause, were filed and were consigned to record. The judgment-debtor objected to the last application and contended that it was barred by limitation. It was argued that the decree ceased to be an instalment decree as soon as the default clause applied and that accordingly time must be held to run from then. It was also contended that once the decree-holder elected to ask for one kind of relief provided by the decree, he cannot afterwards change his mind and ask for the other. Bennett and Madeley JJ. held at page 455 :

"The question is one on which there has been much diversity of opinion, but the more recent decisions, particularly those of this Court and of the Allahabad High Court, support the view that a decree-holder applying for execution of such a decree can rely on the decree as a whole for the purpose of limitation, even though his application for the enforcement of the default clause may be barred. We do not consider that the decree-holder's claim is time barred on account of his failure to waive his right to claim the entire decretal amount on the first default."

[14] The next case is *Ismail Rowther* v. *Gomakkani Rowther*, A. I. R. 1942 Mad. 679. It was observed :

"The doctrine of election is not a mere legal prohibition to any party against ever changing his mind; it is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party. If I have two courses open to me, both of which affected some other party, and I make it known to him by some deliberate act of my choice that I am intending to adopt one of these courses and not the other, then I cannot be allowed subsequently to change my mind to his prejudice. He will naturally adjust his future actions to my previous conduct which has become known to him."

In that particular case, the decree-holder's application for execution was returned to him for the correction of certain defects and the decree-holder did not re-submit the application. No notice

of the application was sent to the judgment-debtor. It was held that the decree-holder could change his mind and could proceed to enforce the decree as an instalment decree. This case cannot be taken to be an authority for the view that the crucial thing which binds a decree-holder and stops him from changing his mind is the communication of his having put in an execution application for the enforcement of the default clause to the judgment-debtor. What was held really was that the decree-holder would not be allowed to change his mind if his previous conduct had prejudiced the judgment-debtor in any way. It seems to have been presumed that in all cases in which the judgment-debtor is informed of the decree-holder's desire to enforce the default clause any change of mind of the decree-holder to enforce the decree as an instalment decree would be prejudicial to the interests of the judgment-debtor. This question of prejudice is not to be considered at this stage when the question for determination is whether a decree-holder's application for execution by enforcing the default clause puts an end to the instalment decree. This case, therefore, does not support the contention that such a conduct of the decree-holder puts an end to the instalment decree. On the other hand, this case recognises the principle that, even after expressing his election to rely on the default clause, the decree-holder can fall back upon the instalment decree, though his right to do so is subject to there being no prejudice to the judgment-debtor.

[15] The last case on the point is *Firm Hardeo Dwarkadas* v. *Firm Birjraj Hariram*, A. I. R. 1943 Nag. 170. This case is on all fours with the present case. On the happening of certain defaults the decree-holder applied to recover the entire decretal amount. He failed to pay the process fee and his application was dismissed as infructuous. He then filed a second application to recover three instalments. This application was dismissed by the execution Court as barred by limitation. On appeal it was held to be within limitation. Reference was made to the cases reported in *Bhagwan Das* v. *Janki*, 28 ALL. 249; *Pandurang Vishvanath* v. *Mahadeo Vishweshwar*, A. I. R. 1931 BOM. 263; *Gurdin Bhant* v. *Chhedi Bhant*, 16 Luck 495; *Peoples Bank of Northern India* v. *Aijaz Ali*, 17 Luck 494 and *Ismail Rowther* v. *Gomakkani Rowther*, A. I. R. 1942 Mad. 679, which have been noticed above. It was observed :

"I do not understand on what principle it can be said that once the decree-holder has taken out execution to recover the entire decree he is subsequently debarred from taking out execution to recover the individual instalments. It is perhaps possible that the application to execute the entire decretal claim might amount to a representation to the judgment-debtor and cause the judgment-debtor to act in some way in which he would not otherwise have acted; if that were so, the decree-holder might be estopped from thereafter taking out execution to recover instalments. But, apart from any question of estoppel, I do not see why he should not be allowed to take out execution to recover the instalments merely because he has in the past attempted to recover the entire decretal amount, if taking out execution for the entire decretal amount he has recovered more than the instalments that were then due, the position might be different; but where he has recovered nothing in the past, I do not see on what principle he should be held to be barred from recovering instalments that have fallen due. The decree, which remains unaltered, is one primarily for payment in instalments, and the option to recover the entire decretal claim on the occurrence of the default is a provision inserted for the benefit of the decree-holder who may exercise that option or not as he chooses"

This, we may say with respect, lays down the law on the point correctly.

[16] A decree-holder could be stopped only from changing his mind if his conduct had prejudiced the judgment-debtor. Whether prejudice had been caused will in every case be a question of fact. The mere fact that an execution application is filed and is consigned to record on account of want of prosecution cannot in any way prejudice the judgment-debtor. Such applications in the majority of cases are filed just to save limitation. It is only when a judgment-debtor establishes that due to the presentation of such an application he felt that any payment of further instalments by him would not be accepted by the decree-holder in taking out execution for the entire decretal amount. No such allegation is made in the present case. We are of opinion that a mere communication to the judgment-debtor of the decree-holder's taking out execution by enforcing the default clause would not justify the conclusion that the judgment-debtor must have acted in some manner that any further change of mind by the decree-holder would affect him prejudicially. It is for the judgment-debtor to show in every case that his conduct was influenced by the alleged representation of the decree-holder and that the change in the attitude of the decree-holder would affect him adversely.

[17] We, therefore, hold that the decree-holder respondent is not barred from having the benefit of executing his decree against the judgment-debtor as an instalment decree which has not come to an end by his previous applications for execution to recover the entire decretal amount.

[18] It was argued that the previous applications for execution to recover the entire decretal amount were not applications to recover the instalments which had fallen due and that, therefore, there being no application for execution to recover the instalments, the execution application considered as an application for executing the decree with respect to instalments which had become due, and particularly with respect to instalments which had become due more than three years prior to the presentation of the application, was time barred. We do not agree with this contention. An application for execution to recover the entire amount must be deemed to include a prayer for execution of the smaller amounts relating to the instalments which had fallen due. The decree is one, and one only. It remains an instalment decree so long as the

default clause is not effectively enforced and the right of the decree-holder to execute the decree as an instalment decree comes to an end. Any application for execution, whatever be the nature of prayer, would be a valid application for execution and will be sufficient to save limitation for subsequent application. All execution applications by the decree-holder respondent as noted above, were filed within three years of the disposal of the previous application and, therefore, the present execution application is within time with respect to the instalments which had fallen due within 12 years prior to the presentation of this application.

[19] It follows that the order of the Court below is perfectly correct. The appeal is accordingly dismissed. No order is made with respect to costs, as nobody appears for the respondent.

B/V.R.B. *Appeal dismissed.*

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MUKERJI J.

Messrs. Kishan Chand Hari Kishun Chand, Defendant—Applicant v. *Diwan Chand Ghasi, Plaintiff—Opposite Party.*

Civil Revn. No. 594 of 1950, D/- 4-12-1952.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4)—Agreed rent.

Section 5 (4) makes it clear that an agreed rent can only be varied by a Court if it is satisfied that the transaction between the parties was unfair. The Court cannot assume a transaction to be unfair simply because it finds a great disparity between the agreed rent and the municipal assessment. [Para 10]

(b) Civil P. C. (1908), O. 20, R. 4 — Contents of judgments.

A Court is not entitled to put something into the judgment in regard to a witness's statement if that statement does not contain what the judgment says it contains. [Para 11]

Anno. Civil P. C., O. 20, R. 4, N. 6.

(c) Civil P. C. (1908), O. 18, R. 13 — Omission to record important matters.

The real import of Rule is giving to the Judge a discretion in the matter of excluding making a record of unimportant matters appearing in the statment of witnesses and no more. It does not, in any event, give the Judge a right to record unimportant and insignificant matters and leave out the recording of important and relevant matters in the memorandum and instead making a record of them in his memory only and refer to them at the time of writing the judgment. [Para 11]

Anno. Civil P. C., O. 18, R. 13, N. 1.

Mohd. Hamid Husain—for Applicant ; *Man Singh—for Opposite Party.*

Order.—This is an application in revision by a defendant who had been sued under s. 5 (4), Control of Rent and Eviction Act. The plaintiff in the suit was the tenant. He sued the landlord on the ground that the rent of Rs. 75, to which he had agreed, was much above the reasonable rent for the premises and consequently he claimed that the rent should be fixed in accordance with the "reasonable rent" payable in respect of the premises in suit. The premises of which the plaintiff was the tenant were not substantial buildings in any sense. They were more or less tin sheds having small accommodation but these premises were situated in a very busy locality commercially and consequently they were in great demand and apparently landlords were able to get very high rents for them.

[2] I may also note that the landlord himself also filed a suit against the tenant, namely Shri Diwan Chand (plaintiff in suit No. 754 of 1949) for arrears of rent at the rate of Rs. 75 per mensem. The suit of the landlord for arrears was numbered as 841 of 1949. Both these suits, namely suit No. 754 of 1949 by the tenant for fixation of rent and suit No. 841 of 1949 by the landlord for arrears of rent, were consolidated and tried together by the Additional Munsif of Ghaziabad, Shri N. N. Misra.

[3] In the plaint of suit No. 754, Diwan Chand alleged that he had rented premises No. 18 which was situated opposite the Tahsil of Ghaziabad for his son, Yogendra Kumar, for opening a vulcanizing and welding business on the premises. He further alleged that he had taken the premises in June 1948 from the defendant at Rs. 75 per mensem as rent. He, however, alleged in the plaint that the rent of Rs. 75 per mensem was excessive, unfair and abnormal.

[4] On the plaint, it is clear that the plaintiff had, for several months, paid the landlord rent at the rate of Rs. 75 per mensem. According to the plaint allegation, the plaintiff discovered, after about six months of having been on the premises, that the defendant (the landlord) had been getting Rs. 5 per mensem for these premises from its previous tenant and consequently, according to the plaintiff, he approached the landlord to fix rent in accordance with the municipal assessment plus 25 per cent. over and above it. According to the plaint this came to Rs. 7 per month only. In the plaint there was no allegation that the defendant landlord had in any manner taken unfair advantage of the tenant in getting him to agree to Rs. 75 per month as rent for these premises.

[5] The defence to the suit was that there was an agreement to pay rent at Rs. 75 per month and that that was the fair rent having in view the situation of the premises and the prevailing rent in the locality. The defendant further pleaded that he had rebuilt these premises after 1946 and had spent a good deal of money on their reconstruction.

[6] The learned Munsif, who tried the suit, struck four issues, the two main issues being, one, "whether the building was constructed after 1946, if so to what effect", (2) "what is the fair rent of the shop in dispute and from what date is it payable." On the first issue, the finding of the learned Munsif was that the shop had been in existence since 1942 and that no additions were made either before or after 1946. On the second issue, the learned Munsif found that, according to the municipal assessment, the rent of the premises

could only be Rs. 5 per mensem. He naturally found that in view of the municipal assessment of 1942, the agreed rent was much higher than what would have been reasonable rent under the Rent Control Act. The learned Munsif then went on to say that

"the plaintiff Diwan Chand had deposed that he was in pressing need of a shop for his son and that no other shop was available to him at that time."

In view of this statement of the plaintiff, which the learned Munsif referred to, he came to the conclusion that the transaction was unfair between the parties and that the landlord had "taken undue advantage of the pressing needs of the plaintiff". He, therefore, fixed the fair rent at Rs. 5-8-0 per mensem and held further that the said rent was payable from 1-4-1949.

[7] Learned counsel for the applicant has contended before me that the statement of the plaintiff Diwan Chand, to which the learned Munsif has made reference in his judgment, does not find place in the statement which was recorded of the plaintiff in Court.

[8] I have myself, with the assistance of counsel on either side, read that statement and I must say that the statement recorded does not contain anything like what the learned Munsif thought was there in that statement. The record of the statement of the plaintiff Diwan Chand is in Hindi and I am constrained to say that it has been recorded in a most illegible manner. The statement appears to have been recorded by the learned Munsif in his own hand—I say so, because I find that the writing of the Reader of that Court is different from the writing in which the statement has been recorded.

Further, I find that the statement has been recorded in the same ink and bears the same characteristics in which the signature of the learned Munsif appears on the statement. It is a pity that judicial officers, while recording statements themselves, a very laudable thing, do not bear in mind the fact that there may be others apart from themselves who would have to read their handwriting and a little care in writing things legibly is, in my judgment, worth the trouble.

[9] I may here state that learned counsel present in Court, had the same difficulty in deciphering this record of the evidence by the learned Munsif as myself.

[10] The plaintiff Diwan Chand not having stated either in his plaint or in his statement in Court that any unfair advantage was taken of the situation in fixing the rent at Rs. 75 was, in my judgment, not entitled to the relief which was granted to him by the Court below. Section 5 (4) makes it clear that an agreed rent can only be varied by a Court if the Court is satisfied that the transaction between the parties was unfair. Unless there is an allegation or there is some evidence to indicate that the transaction is unfair, the Court cannot assume a transaction to be unfair simply because the Court finds a great disparity between the agreed rent and the municipal assessment. It appears from the record that these very premises were assessed at Rs. 960 per annum by the Municipality in the year 1948. It also appears from the evidence of the plaintiff himself that the adjoining premises are also fetching a rental of Rs. 75 per mensem.

[11] Mr. Man Singh appearing on behalf of the opposite party has contended before me that I must accept the statement of the learned Munsif contained in the judgment to the effect that the plaintiff had deposed that he was in pressing need of a shop for his son and that no other shop was available to him at that time as correct. I regret, I am unable to accept this contention of learned counsel for the simple reason that a Court is not entitled to put something into the judgment in regard to a witness's statement if that statement does not contain what the judgment says it contains.

Mr. Man Singh further contended that in this case, the learned Munsif was not bound to record the statement '*in extenso*' and that he need have only recorded a memorandum of the statement in accordance with O. 18, R. 13, Civil P. C. This may have been so because admittedly no appeal is provided for from a decision given by a trial Court under S. 5 (4), Control of Rent and Eviction Act.

But that does not mean that it was open to a Court to omit recording the most vital part of a witness's statement in its memorandum and refer to that vital part at the time of writing a judgment for the obvious reason that the law could not contemplate leaving vital statements made by witnesses or parties which were to effect their rights to the vicissitudes of a judicial officer's memory.

In my opinion the real import of R. 13 of O. 18 is giving to the Judge a discretion in the matter of excluding making a record of unimportant matters appearing in the statment of witnesses and no more. It does not, in any event, give the Judge a right to record unimportant and insignificant matters and leave out the recording of important and relevant matters in the memorandum and instead making a record of them in his memory only. I cannot, in the view that I take of O. 18, R. 13, accept Mr. Man Singh's contention that the learned Munsif must have carried that impression about the witness's statement in his memory and if he has referred to it in his judgment, then it must be taken by me that the witness must have so stated.

[12] In the view that I have taken, I cannot uphold the decision of the learned Munsif and must set aside that decision. This revision is therefore allowed with costs.

B/V.R.B. *Revision allowed.*

A.I.R. 1953 Allahabad 289 *[Vol. 40, C. N. 129]*

WALI ULLAH AND P. L. BHARGAVA JJ.

Sri Kishan—Defendant-Appellant v. *Jagannathji and others—Plaintiffs-Respondents.*

First Appeal No. 114 of 1947, D/- 27-9-1951.

(a) Hindu Law—Religious endowment—Shebait and bare manager—Distinction.

When the worship of an idol has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution. But from this, it cannot be said that when the worship of an idol is founded shebaitship with all the legal incidents automatically comes into existence. The founder of an endowment may make such arrangement as he likes for the administration of the endowed property as also for the worship and service of the deity. The noticeable difference between the position of a shebait and the position of a manager of a temple is that the shebait has, in the endowed property, a personal interest of a beneficial character. This distinction would be the determining factor when the question arises whether a particular endowment is being managed by a shebait or a bare manager. If the person appointed has any personal interest of a beneficial character in the endowed property, he would be a shebait, but if he has got no such interest, he would be treated as a bare manager. There is no bar to the founder of an endowment appointing a bare manager and prescribing a line of succession to the office of the manager. Shebaitship is property within the meaning of Hindu Law and a hereditary office. The same thing, however, cannot be said of the managership of a temple or an endowment. The rule of succession, which governs succession to the office of shebait, cannot be made applicable to the office of the manager of an endowment. Any order of succession to the office of a manager, which is inconsistent with the rule of succession laid down by the Hindu Law can be given effect to.

(Held on construction of a 'wakf' deed that shebaitship in its legal sense never came into existence and there were only the managers of the endowed property.) *Case law discussed.* [Paras 16, 27, 29, 35, 36, 42]

(b) Hindu Law—Religious endowment — Managership—Succession—Custom.

Where the succession to the office of a manager of a temple had been in accordance with the terms of the deed of 'waqf' and a person became 'mutwalli' by virtue of his being senior-most son or descendant in the family of the founder and had been in that position for over 50 years:

'Held' that it could be treated as a usage which should govern the future succession to the office of the manager of the endowment made by the founder. [Para 38]

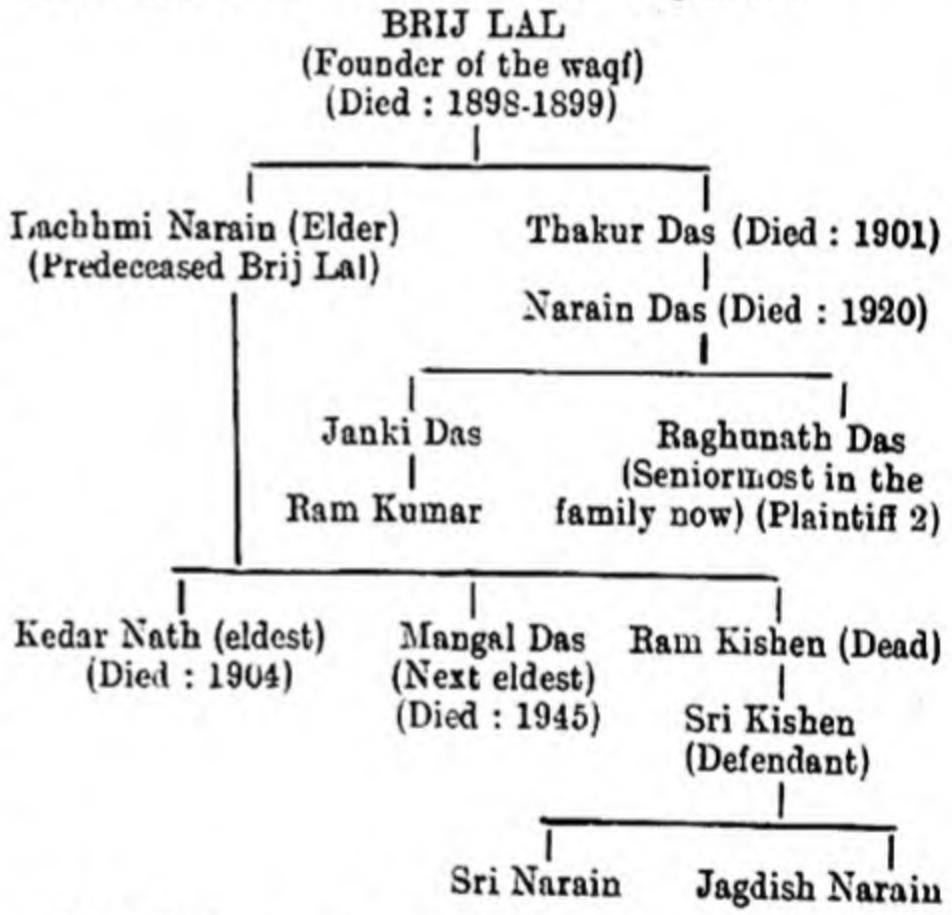
S. N. Verma; K. P. Sinha and P. L. Banerji — for Appellant; P. C. Chaturvedi and M. A. Kazmi — for Respondents.

REFERENCES : Courtwise/Chronological/Paras.

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('43) I.L.R. 1943) Mad. 858 : (A.I.R. 1944 Mad 1) 30

P. L. Bhargava J. — This appeal arises out of a suit instituted by Sri Jagannathji, installed in a temple situate in Jagannathji ki gali in old Generalganj in the city of Kanpur, and Raghunath Das (the plaintiffs-respondents) against Sri Kishen (he defendant-appellant) to obtain the following reliefs : (1) by enforcement of the right of management which vests in Raghunath Das (plaintiff 2), Sri Kishen (defendant) be removed from the management of property specified in the plaint, which has been made "waqf" of, and Raghunath Das be awarded possession over the said property as its "mutwalli" and manager; and (2) an order may be made requiring the defendant to render accounts of the income from the 'waqf' property upto the date of possession by Raghunath Das and a decree for the amount already realised, be passed in favour of Raghunath Das as against the defendant.

[2] The temple was admittedly constructed by one Brij Lal, whose relationship with the contending parties will appear from the following genealogical table, which is not disputed :



[3] Having constructed the temple, Brij Lal installed and consecrated therein the idol of Sri Jagannathji. He himself managed the temple and defrayed the expenses in connection with '*bhog*' etc. For the worship and services of the deity he had appointed a '*pujari*' (priest). On 15.1.1879, Brij Lal executed a deed of '*waqf*', whereby he dedicated to Sri Jagannathji two houses, situate in mohalla Old Generalganj in the City of Kanpur, transferring all his rights and interests therein. In the deed he stated that he had been and was defraying necessary expenses in connection with the temple, and with a view to perpetuate his name after his death, he had made the '*waqf*'. The first condition mentioned in the deed was that the necessary expenses in connection with the temple shall be defrayed out of the rent realised from the two houses, one of which was let out on an annual rental of Rs. 115 and the other fetched an annual rental of Rs. 110, i. e., in all Rs. 225.

The next condition in the deed was that none of the heirs of Brij Lal shall try to appropriate to himself any portion of the said sum of Rs. 225 and the whole amount shall be spent in meeting the expenses connected with the maintenance of the temple, and that the representatives of Brij Lal shall from time to time improve the condition of the '*waqf*' property so that the funds may never fall short for meeting the necessary expenses. The third condition in the deed is the most important, and its proper interpretation is one of the subject-matters in dispute in this appeal. That condition is to the effect :

"That my sons, Lachhmi Narain and Thakur Das, shall after my death be the managers ('*mohtamim*') and '*karkun*' of the temple made '*waqf*' of and shall act as my representatives like myself ('*misl zat khas mere*'). As the property has been set apart and made '*waqf*' of, I or my heirs have no personal interest left therein. If ever in future any such situation arises as to cause loss to the property aforesaid, my sons, Lachhmi Narain and Thakur Das, shall jointly or severally act as managers ('*muntazim-munsarim*') and do '*pairvi*' before the officer for the time being and at all times; and similarly in future the seniormost members of my family ('*aulad-i-akbar*) shall be the manager of the '*waqf*' property, shall supervise the affairs of the temple made '*waqf*' of, and shall have all the rights mentioned in this document, except the right to misappropriate. My sons, Lachhmi Narain and Thakur Das, or any of my lawful heirs shall never, under any circumstance, have the right to transfer the two houses mentioned above. In case any of my heirs incurs any liability, the property aforesaid, i. e., the two houses and the amount of rent made '*waqf* of, shall not be subject to the charge of any amount due from any of my heirs. In case it so happens, the officer for the time being shall protect the property from litigation. After my death, my two sons, aforesaid, shall have the right to, and remain in possession of, all the existing appurtenances to the temple. During my lifetime I myself shall be responsible."

[4] The fourth condition in the deed specifies how the sum of Rs. 225, the income from the rental of the two houses, was to be spent. After the details of the expenses, the boundaries of the two houses are given.

[5] The plaintiffs alleged in their plaint that—

(1) according to the conditions set forth in the deed of '*waqf*', after the death of Brij Lal his two sons, Lachhmi Narain and Thakur Das, were to be the managers and '*karkuns*' of the temple as well as of the '*waqf*' property, and after the death of the two sons, the seniormost member in the family of Brij Lal was to succeed to the office of the manager and '*karkun*' of the temple and of the '*waqf*' property. This interpretation of the conditions in the deed of '*waqf*' was not admitted by the defendant ;

(2) Brij Lal during his lifetime continued to manage the temple and the '*waqf*' property, but on account of his old age, the death of his elder son, Lachhmi Narain, and the indifference of his other son, Thakur Das, Brij Lal executed a '*mukhtarnama*' in favour of his grandson, Kedar Nath, who, as the general-agent of Brij Lal, started managing the temple and the '*waqf*' property. The defendant admitted that Brij Lal and Kedar Nath managed the temple and the '*waqf*' property ; but alleged that they did so in their own rights ;

(3) Brij Lal died in Sambat 1956. After his death, Thakur Das did not manage the temple or the '*waqf*' property on account of his indifferent health and as he had purchased another property known as Rambagh and dedicated the same to Sri Jagannathji to be managed by a trust appointed by him and had repudiated the '*waqf*' made by his father, he did not like personally to manage the same ; that, with the consent of Thakur Das, Kadar Nath remained the manager and '*karkun*' of the temple and the '*waqf*' property; that on the death of Thakur Das, according to the terms of the deed of '*waqf*' and by virtue of his being the seniormost member in the family of Brij Lal, Kedar Nath succeeded to the office of the manager and the '*karkun*' of the temple and the '*waqf*' property. It was admitted by the defendant that after the death of Brij Lal, Thakur Das filed a false suit for cancellation of the deed of '*waqf*' and that Kedar Nath became the '*mutwalli*' during the lifetime of Thakur Das as he was the next seniormost member in the family of Brij Lal ;

(4) after the death of Kedar Nath, in 1904, his brother, Mangal Das, by virtue of his being the next seniormost member in the family of Brij Lal, in accordance with the terms of the deed of '*waqf*', succeeded to the office of the manager of the temple and the '*waqf*' property. But his younger brother, Ram Kishen, took in his own hands the management of the temple and the '*waqf*' property on the ground that Mangal Das had become a Sadhu. Mangal Das filed suit No. 14 of 1909 against Ram Kishen, and obtained a decree declaring that, in accordance with the terms of the deed of '*waqf*', the seniormost member in the family of Brij Lal was entitled to succeed to the office of the manager of the temple and the '*waqf*' property. In terms of the decree, Mangal Das remained the manager of the temple and of the '*waqf*' property upto the date of his death, which event took place on 3-11-1945. The defendant admitted that Kedar Nath died childless in or about the year 1904, but asserted that after his death Mangal Das became '*mutwalli*' by virtue of his being the seniormost son in the family of Brij Lal and that he occupied that position upto the year 1945 ;

(5) after the death of Mangal Das, Raghunath Das (plaintiff 2) was now the seniormost member, i. e., the '*aulad-i-akbar*' in the family of Brij Lal and, according to the terms of the deed he was entitled to succeed to the office of the manager and '*karkun*' of the temple and the '*waqf*' property. The defendant is wrongfully asserting himself to be the manager and '*karkun*'. The defendant's reply to this allegation is that after the death of Mangal Das he obtained possession over the '*waqf*' property lawfully and by virtue of his being the

seniormost descendant in the family of Brij Lal ; and

(6) the defendant is unlawfully collecting the income from the '*waqf*' property to which Sri Jagannathji (plaintiff 1) alone is entitled and is, therefore, liable to render accounts of the same. This liability is denied by the defendant.

[6] It is not disputed that the temple and the '*waqf*' property had been validly dedicated by Brij Lal to Sri Jagannathji (plaintiff 1) in the year 1879 ; that the property still belongs to Sri Jagannathji ; that Brij Lal and his descendants have been managing the temple and the '*waqf*' property ; and that Raghunath Das or the defendant has no personal interest in the property.

[7] The additional pleas raised by the defendant 'inter alia' were that he is the lawful heir of Mangal Das, the last 'mutwalli' of the 'waqf' and in spite of the conditions laid down in the deed of 'waqf' relating to the devolution of the office of 'mutwalli' he is, according to law, the lawful 'mutwalli' of the 'waqf' property and no one has any right to dispossess him; that, even in view of the conditions laid down in the deed of 'waqf,' the defendant, as the seniormost descendant in the family of Brij Lal, is lawfully the 'mutwalli' of Sri Jagannathji and the manager and supervisor of the property belonging to deity; that, according to the intentions of the 'waqif' himself, the office of 'mutwalli,' manager and supervisor of the 'waqf' property has always been held by a member of the family in accordance with the rule of lineal primogeniture; that the members of the family of Lachhmi Narain have, for more than 50 years, held possession of the 'waqf' property as 'mutwallis,' and no one in the family of Thakur Das, to which Raghunath Das (plaintiff 2) belongs, has ever been in possession; as such, in view of the adverse possession of the defendant and his ancestors, the claim of Raghunath Das is barred by limitation; that during the lifetime of Brij Lal, Thakur Das and Narain Das had dishonestly filed a suit for cancellation of the deed of 'waqf,' which was dismissed and the decision of the trial Court was upheld on appeal; that the ancestors of Raghunath Das (plaintiff 2) and the members of his family have always been hostile and disloyal to Sri Jagannathji, consequently even if anyone in Thakur Das's branch had any right to the office of 'mutwalli' or manager of the temple and the 'waqf' property he had forfeited that right; and that Raghunath Das (plaintiff 2) has no right to demand rendition of accounts of the 'waqf' property, which is lawfully in possession of the defendant.

[8] The Civil and Sessions Judge of Kanpur, who tried the suit, has recorded the following findings :

(1) After the death of Brij Lal, his elder son, Lachhmi Narain, having predeceased him, the order of seniority of other descendants of Brij Lal was as follows : (1) Thakur Das, (2) Kedar Nath, (3) Mangal Das, (4) Narain Das, (5) Ram Kishen, and (6) Raghunath Das.

(2) The order of succession to the Managership of the temple and the 'waqf' property from the time of Brij Lal, has been that Brij Lal managed it till his death; after his death the management passed on to Kedar Nath (as Lachhmi Narain was dead and Thakur Das for one reason or the other did not take up the management) and then to Mangal Das.

(3) The scheme of succession to the office of manager as laid down in the deed of 'waqf' was that (i) the first manager will be Brij Lal himself; (ii) after him his sons, Thakur Das and Lachhmi Narain, jointly or severally will perform the duties of the manager; and (iii) after them, the member seniormost in age among the descendants of Brij Lal will be the manager.

(4) The above scheme of succession to the office of the manager is valid and enforcible and the member of the family, who fulfils the qualification laid down, takes the office as nominee of the founder of the 'waqf.' Kedar Nath and after him Mangal Das held the office in terms of the deed as they were the seniormost members of the family for the time being.

(5) On the date of the suit, Raghunath Das (plaintiff 2) was the person entitled to hold the office of the manager.

(6) The above order of succession has all along been accepted by the ancestors of the parties.

(7) No question of adverse possession arises as the plaintiff's right arose on the death of Mangal Das in the year 1945, and that the plaintiff's claim is well within time.

(8) Lachhmi Narain and his sons did not form joint family with Brij Lal at the time of the latter's death, and that even if the rights of management were to revert to the heirs of the founder, the defendant will not have preference and Raghunath Das will be entitled to the office of the manager jointly with the defendant.

(9) The defendant was liable to render accounts since the date of his entering into wrongful possession, of the 'waqf' property.

[9] Accordingly, the learned Civil Judge declared Raghunath Das (plaintiff 2) to be the rightful 'mutwalli' and made an order that he be put in possession of the property as a manager on behalf of Sri Jagannathji (plaintiff 1) and that the defendant should render account of the income and expenditure since 4-11-1945, upto the date of the decree.

[10] Learned counsel for the defendant-appellant has contended that as soon as the endowment was made by Brij Lal, 'shebaitship' which is the necessary commitment of the creation of an endowment came into existence; that as no one was appointed 'shebait' 'shebaitship' according to Hindu law, vested in the founder, namely, Brij Lal, who became first 'shebait'; and that on the founder's death as he had not prescribed any

permissible rule of succession, the 'shebaitship' devolved upon his legal heirs. In support of his contention that on creation of an endowment 'shebaitship' automatically comes into existence, the appellant's learned counsel has relied upon the following passage in Mulla's Hindu Law (10th Edn.) S. 421 at p. 509, and also upon the decisions of the Privy Council on which the observations in the said passage are based :

"S. 421. Rights of Founder. — (1) According to the Hindu Law, when the worship of an idol has been founded the 'shebaitship' is held to be vested in the founder and his heirs, unless : (a) he has disposed of it otherwise; or (b) there has been some usage or course of dealing which points to a different mode of devolution."

The Privy Council decisions are reported in *Greedharreejee* v. *Ramanlolljee*, 16 Ind. App. 137 (P C); *Jagadindra Nath Roy* v. *Rani Hemanta Kumari*, 31 Ind. App. 203 (PC) and *Mohan Lalji* v. *Gordhanlalji*, 40 Ind. App. 97 (PC).

[11] In the first case, *Greedharreejee* v. *Ramanlolljee*, 16 Ind App. 137, the plaintiff claimed to be the rightful 'shebait' of a consecrated picture of idol, to which peculiar sanctity was attached by the Bullav Acharjee sect or community of Vishnuvites, and as incident thereto he claimed things which had been offered to the idol and the possession of a temple in Calcutta, in which the idol had for some years been located. The plaintiff was the representative by primogeniture of the founder of the Bullav Acharjee community. The contesting defendant was cadet of the same family. All the male members of the family were in their lifetime esteemed by their community as partaking of the divine essence and as entitled to veneration and worship; but the head of the family had the precedence and was styled Tickut.' The plaintiff's grandfather Dowjee was 'Tickut' in his lifetime and had moved from Udaipur—the principal seat of the community—to Calcutta, where he presented to his disciples a consecrated portrait of himself, which has ever since been worshipped.

The plaintiff as 'Tickut' based his claim upon his spiritual character and authority which had all along been acknowledged by the persons concerned with the actual worship and management of the idol and the temple. The plaintiff's family had from time to time intervened in the affairs of the temple. The contesting defendant claimed to be shebait' having been appointed by the donee of the property at the site of which the temple had been constructed. Their Lordships stated the general law relating to shebaitship' in these terms :

"According to Hindu law, when the worship of a thakoor has been founded, the 'shebaitship' is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution."

And, with reference to the facts of the case before them, their Lordships held that the plaintiff was by general law the 'shebait' of the worship which had been founded by Dowjee and that the donee could not of his own authority alter the 'shebaitship'.

[12] In the second case, *Jagadindra Nath Roy* v. *Rani Hemanta Kumari*, 31 Ind. App. 203 (P.C.), the principal suit was brought by the plaintiff on the allegation that as 'shebait' of the idol the proprietary rights in certain 'taluqs' vested in him; that 'mouzah' Gabshara included in these taluqs' long ago became diluviated; that reformation took place and the reformed lands were resumed by Government and under the designation 'Khas Mehal Chur Gabshara' were settled with the predecessors-in-title of the plaintiff for different periods successively ; that the lands now in dispute became part of 'Chur Gabshara' by reformation and accretion; and that in 1864 the predecessor-in-title of the defendant with others, sued the plaintiff's predecessor-in-title to establish title to the lands in dispute and failed, whereby the right of the plaintiff's predecessors-in-title became established as against those whom the defendant represents On the strength of his title the plaintiff claimed to recover the lands in dispute, from which he said he had been dispossessed. The defence 'inter alia' was that the suit was barred by time, as the plaintiff had been out of possession for more than 12 years.

[13] Although the suit was brought as 'shebait' there was no evidence to show as to who had founded the religious endowment or as to the terms and conditions of the foundation. It was, however, admitted that the interest was in the Thakur and the settlements had been made from time to time with the grantees as 'shebaits.' In the circumstances of the case, on the authority of *Greedharreejee* v. *Ramanlolljee*, 16 Ind. App. 137 (P. C.), the legal inference was drawn that the title to the property, or to the management and control of the property, followed the line of inheritance from the founder.

[14] In that case, it was further held that an idol might be regarded as a juridical person capable as such of holding property though it was only in an ideal sense that the property was so held, especially when the dedication was of the completest character known to the law. Yet the possession and management of the dedicated property with the right to sue belongs to the 'shebait.'

[15] Similarly in the third case, *Mohan Lalji* v. *Gordhan Lalji Maharaj*, 40 Ind. App. 97 (P.C.), the plaintiff claimed the 'shebaitship' of a temple of which respondent was in possession as a 'shebait.' One of the questions raised in that suit was whether the succession to the office of a 'shebait' was governed by the ordinary rule of Hindu Law or by special usage. Reference was made in this connection to the principle enunciatd in *Greedharreejee* v. *Ramanlolljee*, 16 Ind. App. 137 (P.C.), which has been quoted earlier. Their Lordships held that according to the customs and

usages of the Ballav Kul the 'shebaitship' of the temple vested in the plaintiff.

[16] In all the three cases, the existence of the office of 'shebait' was admitted. In the first case the question was as to who was the 'shebait' for the time being; in the second case, the plaintiff had instituted the suit as a 'shebait'; and in the third case the dispute related to the succession to the office of a 'shebait.' These cases undoubtedly furnish authority for the general proposition of law that when the worship of an idol has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution but they cannot be accepted as authority for the proposition that when the worship of an idol is founded 'shebaitship' with all the legal incidents automatically comes into existence.

[17] The construction of a temple is one of the most common forms of a religious endowment. In a temple so constructed, an idol representing some deity is usually installed and consecrated by means of 'pratishtha' the means whereby the Universal Soul is localised and made to dwell in the idol. After the 'pratishtha' and 'pran-pratishtha' the idol acquires the status of a juridical personage, capable of holding the property. The person who erects the temple loses the proprietorship therein, and the same vests in the deity. The deity so consecrated has to be looked after and worshipped daily and the temple has to be repaired and maintained. A human agency is necessary for the daily worship as well as for looking after the repairs and maintenance of the temple.

[18] A person having constructed the temple and consecrated the deity therein is naturally anxious to devise means for the perpetuation of the worship and with that end in view, he makes a further endowment of property sufficient for the upkeep of the temple. Thereupon, the appointment of a human agency to look after and administer the endowed property also becomes necessary.

[19] The human agency required for the purposes of looking after the repairs and maintenance of the temple or for the management of the endowed property has been given different names —in some cases he has been designated as a 'shebait' in others as a manager and in some others as 'dharamkarta.' As observed by their Lordships of the Privy Council in *Vidya Varuthi* v. *Balu Sami*, 48 Ind. App. 302 (P.C.) :

"The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs, and usages of each institution."

[20] A 'shebait' of a religious institution is equated with the head of a 'muth.' As pointed out in *Srinivasa Chariar* v. *Evalappa Mudaliar*, 49 Ind. App. 237 :

"Those functionaries ('shebait' of a religious institution and the head of a 'Muth') have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character"

Mayne in his Treatise on Hindu Law and Usage thus sums up the position of a 'shebait' :

"The 'shebait' is one who serves and sustains the deity whose image is installed in the shrine. The duties and privileges of a 'shebait' are primarily those of one who fills a sacred office. 'Shebaitship' in its true conception therefore involves two ideas, the ministrant of the deity and its manager ; it is not a bare office, but an office together with certain rights attached to it."

The abovementioned description of a 'shebait' is based upon the observations in *Manohar* v. *Bhupendranath*, 60 Cal. 452 (F B) at p. 494. In that case it was further observed :

"A 'shebait s' position towards the 'debattar' property is not similar to that in England of a trustee towards the trust property. It is only that certain duties have to be performed by him which are analogous to those of trustees . . . , . .

Sufficient has already been said before to establish that the 'shebait' deals with the property in his custody or management as if he has some property, though not the full rights of property, in it, the legal property vesting in the idol."

[21] What is the true conception of 'shebaitship'? That would appear from the following observations of Mookerjee J. in *Kunjamani Dassi* v. *Nikunja Bihari Das*, 20 Cal. W. N. 314, which were quoted with approval in *Bhabatarini Debi* v. *Ashalata Debi*, 70 Ind. App. 57 (P. C.), at p. 62:

"To me it seems that both the elements of office and property, of duties and personal interest, are mixed up and blended together in the conception of 'shebaitship.' One of the elements cannot be detached from the other. The entire rights remain with the grantor when a deity is founded and it is open to him to dispose of these rights in any way he likes. If there is no disposition, 'sebaitship' remains like any other heritable property in the line of the founder and each succeeding shebait succeeds to the rights by virtue of his being an heir to his immediate predecessor and not to the original grantor.

If it is disposed of completely and absolutely in favour of another person, there remains nothing in the grantor except the possibility of a reverter when there is a failure or extinction of the line of 'shebaits' indicated by him. If, on the other hand, the founder has parted with his rights only in a partial manner for the lifetime of the grantee, the residue still remains in him and his heirs, and on the death of the grantee, the heir of the founder living at the time is entitled to the 'shebaitship.' If the grantee in such cases happens to be the sole heir of the founder upon whom the residuary right devolves at the same time and he becomes the 'shebait' under law as well, then whether or not we invoke the technical doctrine of merger or coalescence of the particular estate with the residue, his position, in my opinion, is that of an absolute 'shebait' whose rights devolve upon his heirs and not upon the heirs of the founder at his death.

If there was no grant in his favour, he would have been entitled to an estate of inheritance under law as regards the 'shebaiti', and the fact that there is a grant in his favour of a limited right cannot make his position worse, and take away from him the higher rights which he had irrespective of the grant. It would be opposed to all principles of law to require that in such cases on the death of the 'shebait' who was himself the heir of the grantor, the successor can come in only, to use the technical phrase, *per formam doni*."

[22] We do not, however, come across a 'shebait' possessed of the rights and interest of the

nature indicated above in every case. For instance, see *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*, 27 Ind. App. 69 (PC). In that case there was a gift by the founder of a religious endowment connected with a temple, but there was no 'shebait.' It appears that the superintendence of the endowment was vested in the Government and the management was being carried on by persons appointed by Government. The suit related to the right of management of the endowment. Also see *Srinivasa Chariar* v. *Evalappa Mudaliar*, 49 Ind App. 237 (PC). In that case the institution was being managed by a 'dharamkarta,' who is, according to the same case, literally no more than the manager of a charity and his rights are never of a higher legal category than that of a mere trustee. In addition to these cases reference may also be made to *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*, 49 Mad. 116. In that case also the endowed property was being managed by Government or its nominees.

[23] We do not find any mention of a 'shebait' in any of these cases. These cases, no doubt, related to the religious endowments in southern India, but, as pointed out in *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, 48 Ind. App. 302 (P.C.) in their general characteristics the institutions in southern India are almost identical with similar institutions in northern India and in the Bombay Presidency. In that case, it was also pointed out that neither under the Hindu Law nor in the Mohammedan system was any property conveyed to a 'shebait' or a mutwalli' in the case of a dedication. Nor was any property vested in him; whatever property he held for the idol or the institution, he held as manager with certain beneficial interests regulated by custom and usage.

[24] The heads of religious endowments, as already pointed out, bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution and also from the nature of the endowment. If the worship of a deity is established, the rights of worship have to be considered in determining the question as to who is to be regarded as a 'shebait'.

[25] In Prannath Saraswati's Hindu Law, Endowments, at p. 136, it has been observed :

"Great as is the religious merit of personally performing these services for the deity, the endower has not always the inclination or the capacity to perform them. Apart from the question of physical capacity there is that of religious capacity. Thus it is said in the Vrihan-Naradiya Purana, 'Women; those uninvested with the sacred thread, i.e. (the members of the 'dvija' class before the initiation ceremony has been performed for them); and Sudras are not competent to touch images of Vishnu or Siva."

[26] A person in order to be entitled to perform the functions connected with the worship of a deity must possess the religious capacity; he must possess full knowledge of sacred literature; he must also be a devoted worshipper of the deity whose image is to be worshipped; and he must be a religious student of good character. A founder may appoint a person, who possesses such qualifications, to perform the worship of the deity, and he may not himself perform the functions connected with the worship of the deity. But, he may still continue to manage the endowed property and out of the income of the property defray the expenses connected with the temple and the deity.

[27] The founder of an endowment may, therefore, make such arrangement as he likes for the administration of the endowed property as also for the worship and service of the deity. Whether on the creation of an endowment the office of a 'shebait' in the legal sense of the term comes into existence or not would depend upon the circumstances in each case; and it cannot be said that in each and every case, on the creation of an endowment 'shebaitship' automatically comes into existence. The law recognises the founder's right to management of and control over the endowed property because by dedication he divests himself of his proprietary rights absolutely, but so long as there is no appropriation of the property for the purpose for which it is dedicated, there is an obligation on him to see to its preservation, and, accordingly, a corresponding right of control so long as the property itself exists. This does not mean that he holds the property as a 'shebait' even though he has assigned to himself the position of a bare manager and also appointed another person to look after the service and worship of the deity in whose favour the endowment has been created.

[28] Certain religious endowments are managed by persons designated as managers. While dealing with the position of a manager of a temple, their Lordships of the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti*, 33 Ind. App. 139, observed at p. 144 :

"The manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property, the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office of dignity. . . ."

[29] The noticeable difference between the position of a 'shebait' and the position of a manager of a temple is that the 'shebait' has, in the endowed property, a personal interest of a beneficial character. This distinction would be the determining factor when the question arises whether a particular endowment is being managed by a 'shebait' or a bare manager. If the person appointed has any personal interest of a beneficial character in the endowed property, he would be a 'shebait', but if he has got no such interest, he would be treated as a bare manager. There is no bar to the founder of an endowment appointing a bare manager and prescribing a line of succession to the office of the manager.

[30] In *M. Desikar* v. *Gopala Chettiyar*, I. L. R. (1943) Mad. 858, it was held that the law gives to the author of a public religious trust the privilege of prescribing, if he is so minded, a line of succession to the office of the manager, without conforming to the law of inheritance. This principle, it was further pointed out, has its foundation in the distinction that exists between heritable property over which the owner has only a restricted power of disposition and a mere office which confers on the holder a bare right of management without any right to a beneficial interest in the property committed to his charge. If we may say so with respect, we entirely agree with these observations.

[31] Learned counsel for the appellant sought to distinguish this case on the ground that it related to a particular kind of endowment in southern India. The dispute in that case related to the properties which admittedly belonged to a Shiva temple in Jaffna in Ceylon founded by the ancestors of the parties. With reference to *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, 48 Ind. App. 302 (P.C.), it has already been pointed out that in their general characteristics the institutions in southern India are almost identical with similar institutions in northern India and in the Bombay Presidency. The manager of an endowment, who is designated as a 'dharamkarta', is not a 'shebait' or a 'pujari' of a shrine or a head of the 'Math'. He is literally and no more than the manager of a charity, and his rights are never of a higher legal category than that of a mere trustee, vide *Srinivasa Chariar* v. *Evalappa Mudaliar*, 49 Ind. App. 237 (P.C).

[32] In the case before us Brij Lal had constructed a temple and he had therein installed and consecrated the deity, Sri Jagannathji. He had appointed a 'pujari' (priest) for the service and worship of the deity; and he himself arranged for the funds and defrayed the necessary expenses of the temple and the deity. Consequently, the functions usually performed by a 'shebait' were being performed by Brij Lal himself as well as by the pujari. Subsequently, having regard to his advanced age, he made a 'waqf' of property in favour of the deity to provide for expenses for the worship of the deity. This was an endowment recognised by Hindu law. Under the endowment, the endowed property vested in the deity who could not enjoy the property except through a human agency. The pujari was to continue to look after the service and the worship of the deity and the work of realization of rent from endowed property and the defraying of expenses was to be done by the founder himself. Neither the 'pujari' nor the founder had any personal interest of a beneficial character in the endowed property. The same state of affairs was to continue even after the founder's death; provision was made in the deed of 'waqf' for payment of the salary of the 'pujari' and for the management being carried on by the sons of the founder and after them by the seniormost member of the family of the founder.

[33] It is not disputed that the human agency whose existence is necessary for the management of the endowed property and for arranging the worship of the deity must come into being as soon as the endowment is made. As already pointed out above, 'shebaitship' in its true conception involves two ideas, the ministrant of the deity and its manager, it is not a bare office, but an office with certain rights attached to it. The founder in the case before us did not constitute himself a 'shebait' in the literal or legal sense. He did make an arrangement for the due performance of the functions usually performed by a 'shebait' by assigning some of those functions to a 'pujari' (priest) and others to himself, his sons and the seniormost member of his family.

[34] In the present case, we are not concerned with the office of the 'pujari' (priest) and have to see what was the position of the founder and of those who have looked after and managed the temple and the 'waqf' property after the founder. In the deed of 'waqf' it was stated that the founder and after his death his two sons shall have the right to, and remain in possession of, all the existing appurtenances to the temple; that the sons of the founder shall be the managers ('mohtamim') and 'karkun' of the temple and the endowment, like the founder; and that similarly after the sons the seniormost member of the family of the founder would be the manager of the endowed property. The parties have, in their pleadings, also described the manager of the endowed property as manager, 'karkun', or 'mutwalli'.

According to the appellant's case Brij Lal and Kedar Nath managed the temple and 'waqf' property, Kedar Nath and Mangal Das became 'mutwallis' one after the other and he himself became 'mutwalli' after the death of Mangal Das. The term 'mutwalli' also conveys the idea of a superintendent, an administrator or procurator of any religious or charitable foundation. The appellant or anyone else never described the founder or those who held the office after him as 'shebait'. On the other hand, the form of their designation goes to show that they were treated as bare managers. Admittedly, none of them had any personal interest of a beneficial character in the endowed property. Their position was analogous to that of a manager of a temple as explained in *Ramanathan Chetti* v. *Murugappa Chetti*, 33 Ind App 139 (P.C.). It must, therefore, be held that there was no 'shebait', in the legal sense of the term, of the endowment created by Brij Lal.

[35] Having regard to the nature of the right of a 'shebait' in Hindu Law, it has been held in *Manohar* v. *Bhupendranath*, 60 Cal. 452 (F.B.), that 'shebaitship' is property within the meaning of Hindu Law and a hereditary office. The same

thing, however, cannot be said of the managership of a temple or an endowment.

[36] No authority has been cited before us to show that any order of succession to the office of a manager, which is inconsistent with the rule of succession laid down by the Hindu law, cannot be given effect to.

[37] In *Juttendro Mohun Tagore* v. *Ganendra Mohun Tagore*, it was held that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such and that by Hindu law no person can succeed thereunder as heir to estates described in the terms which in English law would designate estates tail. The rule laid down in *Tagore* v. *Tagore* is, no doubt, applicable to a hereditary office like that of a 'shebait' but it cannot be made applicable to succession to the office of a bare 'manager'.

[38] In this case, it had been admitted that the succession to the office of a manager of the temple has been in accordance with the terms of the deed of 'waqf'. The appellant has stated that after Mangal Das's death he became 'mutwalli' by virtue of his being the seniormost son or descendant in the family of Brij Lal. This has been the position for over 50 years and it can now be treated as a usage which should govern the future succession to the office of the manager of the endowment made by Brij Lal.

[39] It has been found by the Court below, and the finding has not been disputed before us, that Raghunath Das (plaintiff 2) is the seniormost male member of the family now alive.

[40] Whether Raghunath Das is entitled to succeed to the managership of the endowment depends upon the proper interpretation of the phrase "khandan main aulad-i-akbar" which occurs in the deed of 'waqf'. Learned counsel for the appellant has contended that the expression does not necessarily mean "seniormost member of the family" but it means "eldest in the eldest branch". The word "khandan" cannot be confined to the family of the elder son only. When Brij Lal used that word he obviously intended to refer to his own family, so as to include all the branches of his family. Brij Lal clearly laid down in the deed that after his death his two sons should jointly and severally be responsible for the administration and management of the endowment ; but as ill-luck would have it, his older son predeceased him and the younger son did not feel much interested in the endowment and even instituted a suit to have the 'waqf' set aside. Thereupon, Brijlal himself selected the then eldest among his male descendants, who happened to be of the senior branch to act as manager of the endowment. The same position continued even after the death of the person so selected by Brij Lal.

It is now that a person in the junior branch is the seniormost male descendant in the family of Brij Lal. Consequently, the expression "khandan main aulad-i-akbar" must be interpreted to mean the eldest male descendant in the family of the founder. That is how the expression has all along been understood by the parties as their pleadings go to show. Raghunath Das has, therefore, been rightly found entitled to succeed to the managership of the temple and the endowment.

[41] The next argument advanced on behalf of the appellant was that as Thakur Das did not enjoy 'shebaitship', he and his descendants lost their rights to hold that office. As 'shebaitship' never came into existence, this argument has got no force. The administration and management of the temple and the endowed property has been carried on by the persons nominated by the founder ; and the learned trial Judge has rightly pointed out that no question of adverse possession arises in the case.

[42] Another contention put forward on behalf of the appellant is that the 'shebaitship, having devolved absolutely upon Mangal Das, after his death it must devolve on his heirs and not on the heirs of the founder. This contention would have had force if any office of shebaitship had come into existence when the endowment was created. But as already stated, 'shebaitship' never came into existence and the rule of succession, which governs succession to the office of 'shebait', cannot be made applicable to the office of the manager of an endowment.

[43] The learned trial Judge was, therefore, perfectly justified in holding that Raghunath Das (plaintiff 2) was entitled to succeed to the managership of the temple and the endowment. As the defendant is in the possession and has been managing the endowed property, he is undoubtedly liable to render accounts. The decision of the Court below is, therefore, correct and must be upheld.

[44] The appeal is accordingly dismissed with costs.

B/D.H. *Appeal dismissed.*

A. I. R. 1953 Allahabad 296 *[Vol. 40, C. N. 130]*

(LUCKNOW BENCH)

WALIULLAH AG. C. J. AND DESAI J.

Radha Krishna Swami, Appellant v. *Parshottam Das and others, Respondents.*

S. C. A. No. 179 of 1945, D/- 9-5-1949.

(a) Debt Laws — U. P. Temporary Postponement of Execution of Decrees Act (10 of 1937), S. 5 — Words "and not covered by S. 6" in section govern only cl. (b) of the section and does not apply to cl. (a)— Court is not concerned if anomalies arise from this construction : A. I. R. 1945 All. 137 ; A. I. R. 1943 All. 316 ; A. I. R. 1948 Oudh 350 and A. I. R. 1945 All. 117 (F. B.), *Rel. on.* [Para 7]

(b) Interpretation of Statutes — Language clear — Court is not concerned with results implied.

When the language of an enactment is clear the Court is bound to give effect to it even though it is satisfied that the Legislature did not contemplate to give the actual result that the language implied. A statute will be construed contrary to its literal meaning when the literal construction would result in an absurdity or inconsistency, provided the words are capable of another construction which will carry out the manifest intention : A.I.R. 1947 All. 27 (F. B.), *Rel. on.* [Para 7]

(c) Debt Laws — U. P. Temporary Postponement of Execution of Decrees Act (10 of 1937), S. 5 — Sub-mortgagee from mortgagee is entitled to enforce his mortgage by putting the property to sale — He is free to proceed against original mortgagor—When he sues to put property to sale he does so to enforce his own sub-mortgage by enforcing the mortgage of his own mortgagor — Putting mortgagee rights of his mortgagor to sale means putting property to sale—His suit is for sale "in an enforcement of a mortgage" within meaning of S. 5—(T. P. Act (1882), S. 67).

[Paras 8, 11, 13, 15]

Anno. T. P. Act, S. 67 N 21.

(d) T. P. Act (1882), S. 92 — Prior mortgagee purchasing mortgaged property—Sale consideration consisting of amount of his own mortgage and also that on subsequent mortgage—Amount of subsequent mortgage kept with vendee to pay the subsequent mortgagee — Vendee mortgagee is not subrogated to the rights of the subsequent mortgagee.

In 1921 *H* an agriculturist executed a mortgage in favour of *G*, also an agriculturist. In 1922 he executed another mortgage in favour of *S*. *S* executed a sub-mortgage in favour of *P* in 1927. On 17-8-1928 *H* sold the property to *G*. The consideration consisted of the amount of both the mortgages and little more. Mortgage money due to *S* was kept with *G* to be paid to *S*. The sub-mortgagee *P* instituted a suit upon his mortgage of 1927 and sought a decree for sale of the property. He impleaded as defendants *S*, his own mortgagor, and (sons of) *H* and *G* :

Held that since the debt of *G* was satisfied by sale to him, the relation of debtor and creditor came to an end. It was not possible for *G* to keep the mortgage in his own favour alive when he purchased the equity of redemption. There was a merger of equity of redemption with the mortgage rights. In the absence of an agreement between *H* and *G* that on his paying off *S* he would be subrogated to the rights of *S* as mortgagee, *G* would not be subrogated to the rights of *S*. When *G* paid off *S* he did so not with his money but with the money of *H* left with him in trust for that purpose. When he did not use his own money he could not claim the right of subrogation. *G* was, therefore, not entitled to any subrogation or lien. *Case law referred.* [Para 19]

Anno. T. P. Act, S. 92 N 8, 10.

(e) Civil P. C. (1908), O. 34, R. 1—Mortgagor selling property to prior mortgagee — Consideration consisting of amounts due on his mortgage and subsequent mortgage Amount of subsequent mortgage kept with vendee — Mortgage for payment to subsequent mortgagee — Suit by sub-mortgagee of subsequent mortgagee for enforcement of his mortgage for sale of property—Original mortgagor-owner is not necessary party —(T. P. Act (1882), S. 67). [Para 10]

Anno. T. P. Act, S. 67 N. 21 ; Civil P. C., O. 34 R. 1 N. 9.

R. B. Lal and M. M. Lal, for Appellant ; B. N. Khanna, for Respondents.

REFERENCES : Courtwise/Chronological/ Paras.

('07) 29 All. 385 : (4 All. L. J. 273 F. B.) 14
('32) A.I.R. 1932 All. 489 : (54 All. 897 F. B.) 17
('37) A. I. R. 1937 All. 588 : (I. L. R. (1937) All. 880 F. B.) 17
('43) A. I. R. 1943 All. 316 : (I. L. R. (1943) All. 824 F. B.) 7
('45) 1945 Oudh W. N. (H. C.) 91 : (A. I. R. 1945 All. 117 F. B.) 7
('45) 1945 Oudh W. N. (H. C.) 80 : (A. I. R. 1945 All. 137) 7
('47) A. I. R. 1947 All. 27 : (I. L. R. (1946) All. 883 F. B.) 7
('39) A. I. R. 1939 Mad. 165 : (183 Ind. Cas. 537) 14, 15, 18
('13) 18 Ind. Cas. 389 (Oudh) 14
('42) 1942 Oudh W. N. 165 : (A. I. R. 1942 Oudh 260 F. B.) 17
('48) 1948 Oudh W. N. 141 : (A. I. R. 1948 Oudh 350) 7
('38) A. I. R. 1938 Pesh. 73 : (178 Ind. Cas. 344) 15
('37) A. I. R. 1937 Rang 56 : (167 Ind. Cas. 449) 15
(1881) 17 Ch. D. 746 : (50 L. J. Ch. 657) 7

Desai J. — This is a second appeal from a decree of District Judge of Sitapur in a mortgage suit. Har Bux Singh owned the entire mahal Lalta Singh in village Bhilawan. In 1918, he executed a mortgage EX. B1, in favour of Sheo Dayal and Sheo Sagar for RS. 2300. In 1921, he executed another mortgage, EX. B17, in favour of Mahant Basudeo Gir, defendant 2, for RS. 16000. On 22/24-3-1922, he executed one more mortgage, EX. 3, in favour of Sheo Darshan Singh, defendant 1, and Jagannath Singh, defendant 5, for RS. 4000. This mortgage was for the entire mahal Lalta Singh. One Raghubar Singh owned zamindari property in village Tikara. In 1920, he mortgaged it with Sheo Darshan Singh and Jagannath Singh. Thus Sheo Darshan Singh and Jagannath Singh were mortgagees of two different properties. The share of each was one-half in the mortgagee rights under each mortgage. Jagannath Singh has been paid off his dues and we have nothing to do with his share in the mortgagee right in this dispute. Sheo Darshan Singh, the other mortgagee, on 2-9-1927 executed a sub-mortgage, EX. 1, in respect of his one-half shares in the two mortgagee rights in favour of the plaintiff Purshottam Dass for RS. 3300. On 17-8-1928 Har Bux Singh sold mahal Lalta Singh to Mahant Basudeo Gir for RS. 35000. Ex. 2 is the sale-deed. Har Bux Singh left with Basudeo Gir RS. 4755 odd for the payment to Sheo Dayal and Sheo Sagar in discharge of his liability under the mortgage of 1918, RS. 23169 odd in discharge of his liability to him under the mortgage of 1921, RS. 4875 for payment to Sheo Darshan Singh and Jagannath Singh in discharge of his liability under the mortgage of 1922 and RS. 1800 for payment to one more creditor of his. Thus he left RS. 34600 with Basudeo Gir for payment to his creditors including Basudeo Gir himself and took cash of only RS. 400. The liability of Har Bux Singh to Basudeo Gir under the mortgage of 1921 was automatically discharged when RS. 23169 odd were left with Basudeo Gir. Basudeo Gir took some time to pay off the mortgage of 1918. He paid it off in instalments. He paid RS. 135 on 13-12-1929, RS. 1000 on 1-5-1931 and RS. 4918 on 29-2-1932. Thus he paid in all RS. 6053 and obtained receipt EX. B2 on 29-2-1932. He had to pay more because

interest had accumulated between 17-8-1928 and 29-2-1932.

[2] The suit from which this appeal arises was instituted by Purshottam Das, the sub-mortgagee to recover the money due to him under the sub-mortgage of 1927. He sought a decree for sale of mahal Lalta Singh. He impleaded as defendants to the suit not only his own mortgagor, Sheo Darshan Singh, but also Jagannath Singh, Jagannath Singh's successors-in-interest, and the sons of Har Bux Singh and Raghubar Singh who had died. Sheo Darshan Singh had been adjudged insolvent and the official receiver, who had the custody of his property, was also impleaded as defendant.

[3] The suit was contested by Basudeo Gir, Sheo Darshan Singh and a son of Raghubar Singh. The main contest was by Basudeo Gir who alone filed this appeal and is now represented before us by Shri Radha Krishna Swami Asthapith Mandir in village Bajrakha. The contesting defendants did not dispute the facts mentioned above. Mahant Basudeo Gir pleaded that he and Shri Radha Krishna Ji are agriculturists, that he is subrogated to the rights of Sheo Dayal and Sheo Sagar under the mortgage of 1918 on account of his discharging that mortgage, that he has a charge or lien over mahal Lalta Singh for RS. 23169 on account of his having satisfied the mortgage of 1921, that even if mahal Lalta Singh was liable to be sold in enforcement of the sub-mortgage of 1927, the sale should be subject to his rights on account of the subrogation and the charge, that the suit was barred by time and that the plaintiff was not entitled to interest and costs on account of his failure to comply with the provisions of S. 32, Agriculturists' Relief Act. Sheo Darshan Singh also pleaded that the plaintiff was not entitled to interest and costs on account of his non-compliance with the provisions of S. 32, Agriculturists' Relief Act.

[4] The trial Court decided that as Mahant Basudeo Gir paid off the mortgages of 1918 and 1921 from the money left with him by his vendor, Har Bux Singh, for that very purpose he was not entitled to be subrogated to the rights of Sheo Dayal and Sheo Sagar and to have a lien over mahal Lalta Singh in respect of the sum of RS. 23000 odd, and that the suit was barred by time and consequently dismissed it.

[5] The plaintiff went up in appeal before the District Judge. He decided that the suit was within time and agreed with the trial Court that Mahant Basudeo Gir was not entitled to subrogation and charge ; he, therefore, decreed the suit. The appellant Shri Radha Krishna Swami challenges the finding of the Courts below that it is not entitled to subrogation and charge and the finding of the learned District Judge that the suit was not barred by time. It also questions the right of the plaintiff, as sub-mortgagee, to sue for a decree for sale of mahal Lalta Singh and contends that since the plaintiff had failed to prove the mortgage of 1922 as against the heirs of Har Bux Singh, it could not be enforced by sale of mahal Lalta Singh.

[6] I would deal with the question of limitation first. There is no dispute about the fact that the period of limitation is twelve years and is to be computed from 17-8-1928. That is the date of the sale EX. 2 by Har Bux Singh in favour of Mahant Basudeo Gir in which Har Bux Singh admitted the existence of his liability under the mortgage of 1922 by leaving some money in the hands of Basudeo Gir for discharge of it. There is thus an acknowledgment by Har Bux Singh of 17-8-1928 from which a fresh period of limitation started. The period ended on 17-8-1940 when the Temporary Postponement of Execution of Decrees Act, 1937 (Act 10 of 1937) was in force. The Act remained in force from 1-1-1938 to 31-12-1940. It is admitted that Har Bux Singh and Basudeo Gir were agriculturists and that the appellant is an agriculturist. It is stated in S. 5 of the Act that :

"In computing the period of limitation prescribed by the Indian Limitation Act, 1908 . . . . for (a) the institution of a suit in a civil Court against an agriculturist for money or for foreclosure or sale in enforcement of a mortgage, and (b) the execution of such decree as is referred to in S. 3 and not covered by S. 6 the period during which this Act shall remain in force shall be excluded."

The plaintiff claimed that under this provision he was entitled to exclude the period 1-1-1938 to 31-12-1940 while computing the period of limitation for the suit. From 17-8-1928 to 31-12-1937 the period was 9 years 4 months and 14 days. If S. 5 of the Act applies and the period 1-1-1938 to 31-12-1940 is to be excluded the period of limitation would be counted again from 1-1-1941. From 1-1-1941 to 17-8-1943 the period was 2 years 7 months and 16 days. Therefore, the period from 17-8-1928 to 17-8-1943 was twelve years, if the period 1-1-1938 to 31-12-1940 was excluded. It was holiday on 17-8-1943 and consequently the suit, which was instituted on 18-8-1943, was just in time.

[7] There were two arguments advanced before us in support of the view that S. 5 does not apply to the facts of the case. One is that S. 5 does not apply to a case which is covered by S. 6. The learned counsel for the appellant contended that the words "and not covered by S. 6" in S. 5 govern not only part (b) but also part (a) of S. 5. There is no force in this contention. Grammatically the words can be read only with the words "and (b) the execution of such decree as is referred to in S. 3" and not with the words "for (a) the institution of a suit in enforcement of a mortgage." The words "as is referred to in S. 3 and not covered by S. 6" mean "as is referred to in S. 3 and is not covered by S. 6." The words "not covered by S. 6" are a part of the clause beginning with the words "as is referred to." This clause applies only to part (b) and cannot apply to part (a); so the words "not covered by S. 6" also can-

not apply to part (a). Both ss. 3 and 6 deal with decrees, neither of them deals with a suit. Part (a) deals only with a suit and part (b) only with a decree. Consequently, the reference to ss. 3 and 6 can be read only in part (b) and cannot be read in part (a) where it would make no sense at all. In *Pokhar Singh* v. *Mulaim Singh*, 1945 oudh W. N. (H. C.) 80, Braund J. while interpreting the provision of S. 5 remarked that the exclusion applies to such decrees as are referred to in S. 3 provided they are not of the kind excepted by S. 6. Thus he read the words of part (b) and not of the other part (a). If the plaintiff had sued earlier and obtained a decree, its execution would not have been stayed under the provisions of the Act. Section 6 of the Act lays down that :

"Nothing in the Act applies to a mortgage-decree sought to be executed by sale of the mortgaged property in the hands of a subsequent transferee who has taken the transfer subject to the mortgage."

Basudeo Gir took the transfer subject to the mortgage of 1922. So S. 6 would have saved the decree from being governed by S. 3 of the Act and it could have been executed even during the period 1-1-1938 to 31-12-1940. In *Radha Kishan* v. *Umrai Singh*, A. I. R. 1943 ALL. 316 (F. B.), a Full Bench of this Court held that execution of such a decree as is mentioned in S. 6 was not barred by anything contained in S. 3. So the argument of the learned counsel for the appellant was that if the execution of the decree itself could not have been stayed there was no sense in excluding the period of three years while computing the period of limitation for the suit. An argument similar to the one adopted here was adopted in the *case of Pokhar Singh* but was repelled. Braund J. observed at page 81 :

"It is argued, ... that it is absurd to suppose that the Temporary Postponement of Execution of Decrees Act, 1937, would give to decree-holder the benefit of a suspension of the period of limitation in a case in which the decree-holder was not qualified to take advantage of Sub-s. (1) of S. 3 and did not choose to try to take advantage of Sub-s. (2) . . . . In my view . . . the language of S. 5 is quite plain, and even if it did produce a result such as I have suggested above, the learned Civil Judge is quite right in supposing that that fact affords no reason why the plain language of the statute should not be given effect to."

The plain language of the section clearly says that the period of three years should be excluded while computing the period of limitation, and it must be given effect to whether it appeals to reason or not. It is a recognized manner of construction of statutes that when the language of the enactment is clear the Court is bound to give effect to it even though it is satisfied that the Legislature did not contemplate to give the actual result that the language implied. A statute will be construed contrary to its literal meaning when the literal construction would result in an absurdity or inconsistency, provided the words are capable of another construction which will carry out the manifest intention : *See Bharat Singh* v. *Mt. Chadi*, A. I. R. 1947 ALL. 27 (F. B.) relying upon *Ex parte Walton; In re Levy*, (1881) 17 Ch. D. 746. Here neither are the words of S. 5 capable of another construction nor would the construction that I propose to put on them result in any absurdity. It cannot be said that it would be absurd for the Legislature to let the execution of a decree go on but to discourage creditors from suing during the pendency of the Act. It was stated in *Lachhman Singh* v. *Lachhman Prasad*, 1948 oudh W. N. 141, at p. 142 that :

"The provisions of S. 5 so far as they relate to the exclusion of time for institution of a suit were apparently intended to encourage creditors to desist from filing suits, the fruits of which they could not be permitted to reap till after the enactment of the projected legislation."

This does not mean that the Legislature intended to discourage the filing of only those suits, the decrees in which could not be executed. For certain reasons it was advised to discourage the filing of even those suits, the decrees in which could be executed. It is not for the Court to concern itself with the reason for this. Even if it be said that the Legislature did not intend to discourage the filing of those suits, the decrees in which could be executed, the language of S. 5 part (a) is quite clear and free from ambiguity and if the result of its literal interpretation is not quite in consonance with the intention of the Legislature, it is for the Legislature to remedy the defect in the language. In *Behari Lal* v. *Ganga Prasad*, 1945 oudh W. N. (H. C.) 91, a Full Bench of this Court laid down that:

"In construing the plain words of S. 5 the Court will not be justified in embarking upon a consideration of the question whether certain anomalies will not arise if the words of S. 5 are given their natural and plain meaning."

[8] The other argument is that S. 5, part (a) excludes the period of three years while computing limitation for the institution of a suit for sale "in an enforcement of a mortgage," and that the present suit was not one in an enforcement of a mortgage. It is to be noted that the plaintiff wants to enforce the mortgage of 1922 by putting mahal Lalta Singh to sale. That mortgage was not in his favour; it was in favour of Sheo Darshan Singh and Sheo Darshan Singh has made a sub-mortgage of his mortgagee rights to him. The argument of the appellant is that if the plaintiff were attempting to put the mortgagee rights of Sheo Darshan Singh to sale, that would be an enforcement of his sub-mortgage and that his putting mahal Lalta Singh to sale cannot be said to be enforcing his mortgage. As I would show presently a sub-mortgagee is free to proceed against the original mortgagor, i. e., the plaintiff is free to put mahal Lalta Singh to sale even though it was not directly mortgaged with him. When a sub-mortgagee sues the original mortgagor, he does so to enforce his own sub-mortgage. Really he enforces both the mortgages, the mortgage by the owner of the property and the sub-mortgage by the mortgagee. If the plaintiff was not a mortgagee from Sheo Darshan Singh he

would have no right to proceed against mahal Lalta Singh. He derives the right to proceed against it from the sub-mortgage by Sheo Darshan Singh in his favour. When he sued to put mahal Lalta Singh to sale he did so to enforce his own sub-mortgage by enforcing the mortgage of 1922. His suit is clearly, therefore, a suit for sale in an enforcement of his sub-mortgage. The word mortgage in S. 5 includes a sub-mortgage because a sub-mortgage is nothing but a mortgage of mortgagee rights. What he can put to sale in an enforcement of his sub-mortgage has nothing to do with the question whether his suit is one for sale in an enforcement of a mortgage. He may seek to put to sale a wrong property in an enforcement of his sub mortgage; nevertheless his suit would be a suit for sale in an enforcement of a mortgage. If he had no right to put mahal Lalta Singh to sale in enforcement of his sub-mortgage his suit would fail on that ground but while computing the period of limitation the period of three years will have to be excluded as laid down in S. 5. If a sub-mortgagee can sue the original mortgagor or for sale of the property mortgaged by him, it is undoubtedly a suit for sale in an enforcement of a mortgage.

[9] Therefore, S. 5 applies and the suit was within time.

[10] The mortgage deed EX. 3 was not proved against the heirs of Har Bux Singh. It was admitted by the appellant and Sheo Darshan Singh and consequently was used against them without proof. It was said on behalf of the appellant that when it was not proved against the heirs of Har Bux Singh it could not be enforced against them. The simple reply to this contention is that the heirs of Har Bux Singh are left with absolutely no interest in the property mortgaged under the deed because Har Bux Singh had sold the property to Basudeo Gir in 1928. The mortgage is now to be enforced not against Har Bux Singh or his heirs but against the appellant on whose behalf it has been admitted. The heirs of Har Bux Singh were not, at all necessary parties; they were impleaded *ex abundanti cautela*.

[11] According to the terms of the sub-mortgage, EX. 1, in default of repayment by Sheo Darshan Singh, the sub-mortgagee is to have the right to recover all his money by sale of "the mortgaged property." The property that was expressed in the deed to have been mortgaged was the mortgagee rights of Sheo Darshan Singh acquired under the mortgage deed of 1922. So it was contended on behalf of the appellant that the plaintiff, in an enforcement of the sub-mortgage, could only put to sale the mortgagee rights of Sheo Darshan Singh and not mahal Lalta Singh which had been mortgaged with him under the mortgage of 1922. It is true that the plaintiff can enforce only the sub-mortgage of 1927 but it does not follow that he cannot do so by enforcing the mortgage of 1922. On the contrary he can enforce his sub-mortgage only by enforcing the mortgage of 1922, that is, by proceeding against mahal Lalta Singh. Putting the mortgagee rights of Sheo Darshan Singh to sale means putting mahal Lalta Singh to sale. Sheo Darshan Singh had a right to put mahal Lalta Singh to sale in an enforcement of the mortgage of 1922 and when he mortgaged this right it meant that he gave the right to the plaintiff to do what he could do, that is to put mahal Lalta Singh to sale. In the very nature of things it was not possible for a smaller right to be carved out of the right to put mahal Lalta Singh to sale. It would make no sense to say that the plaintiff could only put to sale the right to put mahal Lalta Singh to sale. It was said on behalf of the appellant that it was a sub-mortgage by Sheo Darshan Singh and not an assignment or transfer of his mortgagee rights and that consequently the plaintiff did not stand in the shoes of Sheo Darshan Singh and could not exercise the very right which he could. There undoubtedly is a distinction between a sub-mortgage which is nothing but a simple mortgage of a mortgage and an assignment or transfer of mortgagee rights. But it does not necessarily follow that there should be a distinction between every effect of a sub-mortgage and every effect of an assignment. A gift passes the same title as a sale but no body has any difficulty in distinguishing between a gift and a sale. Merely because they pass the same title to the transferee it cannot be said that there is no distinction between them. So merely because a sub-mortgage and an assignment of mortgagee rights would pass the same title to the transferee it cannot be said that a sub-mortgagee is being confused with an assignment.

[12] It is stated in "The Law of Mortgage in India" by Ghose, Volume I, page 283:

> "Debts secured by mortgage are also frequently assigned by way of security. Such transactions are known as sub-mortgages and may be evidenced merely by a deposit of the title-deeds. The sub-mortgagee, by virtue of the assignment, is not only entitled to the usual remedies against his own mortgagor but also against the original mortgagor."

Fisher in his "Law of Mortgage," Edn. 6, p. 110, describes a sub-mortgage as:

> "A compound mortgage consisting of a mortgage of a chose in action (viz. the original mortgage debt) and of the property which is the security for the original mortgage debt."

Similarly Coote writes in his book on 'Mortgages' volume II, page 860:

> "Where there is a sub-mortgage, the security will comprise: first, the personal covenant of the sub-mortgagor; secondly, the transfer of the original mortgage debt and mortgaged property, subject to redemption, with the benefit of the power of sale, and other powers and remedial clauses contained in the original mortgage; thirdly, a power of sale enabling the sub-mortgagee to dispose of the original mortgage debt and security."

On page 861 he writes that the sub-mortgagor "is in a position bearing a great resemblance to that of a surety."

[13] In view of this interpretation of sub-mortgage, there can be no doubt that a sub-mortgagee can proceed against the original mortgagor or the property mortgaged by him. There may be some restrictions on this, however, arising out of the state of accounts existing between the original borrower and the mortgagee or the sub-mortgagor but they are the only restrictions, and we are not concerned with them in this case.

[14] Many authorities have laid down that a sub-mortgagee can proceed against the original mortgagor and the property mortgaged by him. It is stated by Coote on 'Mortgages' at page 912, that

"the mortgaged property would comprise the original mortgage debt and all rights incident thereto, including among such rights the (right ?) to enforce and exercise all securities, powers and remedies given by the mortgage, whether expressly mentioned or not . . . . . if the sub-mortgagor makes default, the sub-mortgagee by virtue of the statutory power of sale implied in his own security may sell the original debt thereby extinguishing the sub-mortgagor's right of redemption therein."

"A sub-mortgagee may foreclose the original mortgagor", (page 1031) and similarly he may sue for sale of the property mortgaged by him. I have already referred to the statement in "The Law of Mortgage in India" by Ghose that a sub-mortgagee is entitled to the usual remedies against the original mortgagor also. In *Ram Shankar Lal* v. *Ganesh Prasad*, 29 ALL. 385 (F. B.), it was decided by a bench of six Judges that a sub-mortgagee of mortgagee rights in immovable property is entitled to a decree for sale of the mortgagee rights of his mortgagor. It was observed by Stanley C. J., at page 398 that :

"In the case of a derivative mortgage that is, a sub-mortgage, it is usual to implead the original mortgagor and to foreclose the original mortgagor as well as the sub-mortgagor."

In *Kanhai Lal* v. *Mahadeo Prasad*, 18 Ind. Cas. 389 (oudh), Lindsay A. J. C., stated :

"The position of the original mortgagee after a sub-mortgage becomes as if it were that of a surety, the sub-mortgagee becoming the creditor while the original mortgagor continues to remain the debtor"

and held that a sub-mortgagee is entitled to a remedy against the original mortgagor as well. In *Vijiaraghavalu* v. *Arunachalam*, A. I. R. 1939 Mad. 165, a sub-mortgagee was allowed to maintain a suit against the original mortgagor.

[15] In *Po Hla Maung* v. *Ma Ngwe Sint*, A. I. R. 1937 Rang. 56, and *Bhag Chand* v. *Sujan Singh*, A. I. R. 1938 Pesh. 73, the contrary view was taken and a sub-mortgagee was held not entitled to join the original mortgagor in a suit for sale and to sell the property mortgaged by him or to foreclose his mortgage. The basis of this decision was that there exists no privity of contract between a sub-mortgagee and the original mortgagor. A sub-mortgagee takes his sub-mortgage from the mortgagee and the original mortgagor is no party to the contract of sub-mortgage. A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money. It is not a contract. The transfer of an interest in specific immovable property will result from a contract and so a mortgage is preceded by a contract but when the mortgage is executed the contract becomes an accomplished contract and nothing remains to be done under it. The question of privity of contract arises only when under a contract something remains to be done by one party and the other party seeks to enforce it to do it. When a mortgagee sues to enforce the mortgage, the mortgage is an accomplished fact and what he seeks to do is simply to enforce the right that he possesses in the property. It is stated by Ghose at page 70 :

"Regarded as a promise by the debtor to repay the loan, it (mortgage) is a contract creating a personal obligation. But it is also a conveyance, because it passes to the creditor a real right in the property pledged to him."

When it is a question of enforcing a certain right in the property, there should not arise any question of privity of contract. What is true of a mortgage is also true of a sub-mortgage. I have already explained the nature of a sub-mortgage: it gives the sub-mortgagee a power to proceed against the property mortgaged by the original mortgagor. The Rangoon case was referred to in *Vijiaraghavalu* v. *Arunachalam*, (A. I R. 1939 Mad. 165) and was dissented from. It was pointed out that Form No. 11 in Appendix D, Civil P. C., clearly contemplates a suit by a sub-mortgagee in which he can ask for relief by way of sale of the property comprised in the original mortgage. The plaintiff was, therefore, entitled to sue for sale of mahal Lalta Singh on the foot of his sub-mortgage.

[16] The claim of the appellant to subrogation to the rights of Sheo Dayal and Sheo Sagar mortgagees under the 1918 mortgage, and to a lien for the sum of Rs. 23,169 paid in satisfaction of his own debt, is without any foundation. When he purchased the property he had a claim for Rs. 23,169 against Har Bux Singh on the foot of his mortgage of 1921 and Har Bux Singh left this amount out of the sale consideration in his hands in order to discharge the claim in full. I do not understand how there can arise any question of lien or subrogation. Har Bux Singh discharged the mortgage debt of 1921 and the relationship of debtor and creditor came to an end. It was not possible for the appellant to keep the mortgage in his own favour alive when he purchased the equity of redemption. There was clearly a merger of the equity of redemption with the mortgagee right.

[17] There was no agreement between Har Bux Singh and the appellant that on his paying off Sheo Dayal and Sheo Sagar he would be subrogated to the rights as mortgagee. Therefore, if s. 92, T. P. Act applies, he was not entitled to subrogation. And this section does not apply. It came into effect in 1929 and the appellant discharged the mortgage debt of Sheo Dayal and

Sheo Sagar afterwards. A right of subrogation accrues when the prior encumbrance is wholly discharged. So the appellant became entitled to the right of subrogation if at all on 29-2-1932 by which date the amended section had already come into force. In any case, it has been held in numerous cases that the amendment has retrospective effect. A Full Bench of the Allahabad High Court in *Tota Ram* v. *Ram Lal*, A. I. R. 1932 ALL. 489 (F. B.), held that where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay off the first mortgage, in a suit by the second mortgagee to enforce his mortgage it is open to the third mortgagee to insist on his being treated as a first mortgagee whose mortgage must be paid off before the second mortgagee brings the mortgaged property to sale. In *Hira Singh* v. *Jai Singh*, A. I. R. 1937 ALL. 588, another Full Bench held that a subsequent mortgagee or vendee who pays off a prior mortgage is entitled to subrogation if he does so out of his own funds and is thus out of pocket in excess of the amount of the mortgage money or the sale consideration, and is not entitled to subrogation when he does so with the money left out of the mortgage or sale consideration in his hands by the mortgagor or vendor. In *Abdul Hamid* v. *Ram Kumar*, 1942 oudh W. N. 165, a Full Bench of the Chief Court of Oudh took a different view and held that a subsequent mortgagee who redeems a prior mortgage with money left with him for that purpose is subrogated to the rights of the prior mortgagee even without a registered instrument. I prefer the view taken in the *case of Hira Singh*, if I am not actually bound by it. It is one thing to say that the debt of the creditor who has been paid off is to be treated as assigned to the lender who provided the money and another thing to say that the security which may be held by the creditor as well as priority over other creditors should be ceded. A right to cession or assignment of the security can be claimed only by a person who, though not primarily liable to discharge a debt, is obliged to pay it for his own protection. It cannot be claimed by a purchaser who agreed to buy the property free of all encumbrances and undertakes to discharge them all out of the purchase money but fails to do so. See Ghose on the Law of Mortgage, page 355. At page 364 Ghose writes :

"A claim to subrogation can be sustained only when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagee, and though such an agreement may be presumed when the money is expressly advanced for the purpose of paying off an incumbrance; there can be very little doubt that the mere fact that the money borrowed by the debtor is used to pay off a prior mortgage does not entitle the lender to the benefit of the discharged security. The real question in all such cases is whether the payment made by the stranger was a mere loan to the debtor on his personal security, or whether it was made under an agreement that he should be substituted for the creditor. The law does not usually thrust benefits on people for which they do not themselves stipulate, and we find that in the Roman Law and the systems based on it subrogation is permitted only when there is an agreement to that effect with the borrower. In America, too, where the right of subrogation is very freely recognised, it is never allowed except where there is a distinct bargain to that effect with the mortgagor by the lender when he advances the money. In England also, as a rule, if there is no bargain for a transfer, an incumbrance will not be kept alive simply because it is paid off with the lender's money."

[18] There is no evidence of any agreement between Har Bux Singh and the appellant and the sale-deed does not at all indicate that it was contemplated that the appellant would be subrogated to the rights of the mortgagees whom he pays off.

[19] When the appellant paid off Sheo Dayal and Sheo Sagar he did so not with his money but with the money of Har Bux Singh left with him in trust for that purpose. When he did not use his own money he cannot claim the right of subrogation. When he paid off Sheo Dayal and Sheo Sagar he did so in order to fulfil his own obligation to Har Bux Singh and not to protect his own interest. He was bound to pay them off according to the contract with Har Bux Singh. If Har Bux Singh had retained the liability in his hands by taking the full sale consideration and leaving nothing in the appellant's hand and if the appellant had been obliged on account of coercive process to pay off Sheo Dayal and Sheo Sagar, he might have been entitled to claim subrogation to their rights. But the facts here are different. The appellant is, therefore, not entitled to any subrogation or lien.

[20] In the result the appeal must be dismissed with costs.

[21] **Waliullah Ag. C. J.**—I agree.

B/R.G.D. *Appeal dismissed.*

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(LUCKNOW BENCH)

SANKAR SARAN AND BRIJ MOHAN LAL JJ.

Radha Krishen Pratap Singh — Plaintiff—Appellant v. *H. S. Bates—Defendant—Respondent.*

Appeal Nos. 6 and 7 of 1948, D/- 10-5-1950.

(a) Oudh Courts Act (4 of 1925), S. 12 (2)—Ex parte order granting leave — If can be challenged before Bench hearing appeal.

Per *Brij Mohan Lal J.*—When an order granting leave to appeal under S. 12 (2), Oudh Courts Act, has been passed ex parte it is open to the respondent, with the permission of the Court hearing the appeal to challenge the order granting leave. 1943 Oudh W. N. 457 (1) & 23 All. 415 (P.C.), *Ref.* [Para 15]

Per *Sankar Saran J.*—The declaration by a Judge that a case is a fit one for appeal, under S. 12 (2), Oudh Courts Act, should not be challenged as it is not challenged in Letters Patent Appeals in the Allahabad High Court. [Para 53]

(b) Oudh Courts Act (4 of 1925), S. 12 (2) — Leave to appeal — Case involving not merely interpretation of certain documents—Question whether single Judge was justified in upholding defendant's plea of privilege and whether he had acted contrary to recognised

principles and precedents in giving advantage to defendant of such plea also involved—Grant of leave is justified and cannot be challenged. [Para. 16]

(c) Oudh Courts Act (4 of 1925), S. 12 (2)—Scope—Leave to appeal — Power of single Judge to restrict points on which appeal should be heard.

Per *Brij Mohan Lal J.* — Where an order granting leave to appeal under S. 12 (2) of the Act merely declares that the case is fit one for appeal without specifically specifying the points on which appeal is to be heard before the Bench, the whole case becomes open and the appellant cannot be confined to certain given points. [Para 17]

Per *Sankar Saran J.* — There is no similarity between S. 12 (2), Oudh Courts Act, and Ss. 109 and 110, C. P. C. All that the Judge is required to do under S. 12 (2), Oudh Courts Act, is to declare that the case is a fit one for appeal. He is not bound to state his reasons, nor can the power of the Bench hearing the appeal be restricted by the single Judge referring only points of law for the decision of the Bench. [Para 49]

(d) Tort — Defamation—Damages—Suit for—Cause of action when arises.

The essence of a cause of action for defamation lies in the fact that the person defamed is lowered in the estimation of others. If none else has heard the defamatory remark, no suit is maintainable for damages for defamation. It is immaterial that the plaintiff's feelings were hurt by the said remark. [Para 18]

(e) Tort—Defamation—Qualified privilege—Remark by superior officer about his subordinates.

A superior officer has a qualified privilege to comment upon the conduct of his subordinate. Even if the remarks about the conduct of the subordinate are incorrect they are privileged unless they are malicious. [Para 19]

(f) Civil P. C. (1908), S. 100—Finding of fact—Finding as to absence of malice is one of fact and must be accepted as correct : A. I. R. 1938 P. C. 91, *Rel. on.* [Para 19]

Anno. C. P. C., S 100 N 39.

(g) Tort — Defamation—Publication of defamatory remarks by an official when privileged.

A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is so made has a corresponding interest or duty to receive it: 1917 A. C. 309, *Rel. on.* [Para 20]

Hence the publication of defamatory remarks made by a superior officer about the conduct of his subordinate would not, in the absence of malice, be actionable if the publication is made in the performance of his duty.

When an official act is to be performed, naturally it must necessarily pass through the hands of subordinates. Publication to such subordinates is always privileged. [Para 21]

(h) Tort—Defamation—Defamation of rival by way of retaliation if permissible.

Even where a person is defamed, and the law gives him an opportunity to defend himself, he may publish such matters as will clear his own conduct. But the privilege does not extend to defame one's opponent if such defamation does not clear his own conduct. Therefore, defamation of one's rival carried out by way of retaliation is not permissible. [Para 28]

(i) Tort — Defamation — Defence of justification — Pleading and proof — (Civil P. C. (1908), O. 6, R. 4)—(Evidence Act (1872), Ss. 101 to 103).

In an action for damages for defamation, the defendant who wants to put forward the defence of justification must not only raise the plea in his written statement but should prove it strictly by leading evidence that the defamatory remarks about the plaintiff were true. The onus to prove justification always lies on the defendant. [Paras 29, 30]

Anno. C. P. C., O. 6 R. 4, N. 9; Evi. Act, Ss. 101 to 103 N. 6.

S. K. Ghose — for Appellant; *R. N. Shukla — for Respondent.*

REFERENCES: Courtwise/Chronological/ Paras.

('01) 28 Ind. App. 11 : (23 All. 227 P. C.).	51
('01) 28 Ind. App. 182 : (23 All. 415 P. C.).	15
('21) 48 Ind. App. 31 : (A. I. R. 1921 P. C. 25).	50
('38) A.I.R. 1938 P. C. 91 : (173 Ind. Cas. 19).	19
('29) A.I.R. 1929 Lah. 561 : (11 Lah. 45).	29
('26) 3 Oudh W. N. 574 : (A. I. R. 1926 Oudh 419).	46
('26) 1926-3 Oudh W. N. 576 : (A. I. R. 1926 Oudh 415).	16, 46
('40) 1940 Oudh W. N. 193 : (A.I.R. 1940 Oudh 217).	47
('42) 1942 Oudh W. N. 742.	48
('43) 1943 Oudh W. N. 372 ; (A.I.R. 1944 Oudh 12).	16, 48
('43) 1943 Oudh W. N. 393 (1).	48
('43) 1943 Oudh W. N. 404 : (A.I.R. 1944 Oudh 114).	16, 48
('43) 1943 Oudh W. N. 457 (1).	15, 48
('44) 1944 Oudh W. N. 228 : (A.I.R. 1944 Oudh 212).	48
('46) 1946 Oudh W. N. 300 : (A.I.R. 1946 Oudh 20).	17, 48
(1917) A. C. 309 : (86 L. J. K. B. 849).	20

Brij Mohan Lal J.—This and the connected appeal No. 7 of 1948 are two appeals by the plaintiff under S. 12 (2), Oudh Courts Act (4 of 1925) against two decrees of a learned single Judge of the erstwhile Chief Court. The appeals were preferred before the amalgamation of the Chief Court with the Allahabad High Court.

[2] The plaintiff is one Kunwar Radha Krishna Pratap Singh who was formerly the Assistant Manager of the Balrampur Estate. The appellant happens also to be related to the Maharaja, i. e., the proprietor of the estate. He brought the suit, which has given rise to these two appeals, to recover a sum of Rs. 2000 as damages for slander and libel against four persons, namely, (1) H. S. Bates, I. C. S., Manager of the estate, (2) Y. A. Dikshit, Confidential Adviser to the Maharani Saheba, (3) V. V. Singh, Private Secretary to the Maharaja and (4) the Maharaja. In the plaint, as originally filed, damages were claimed against the first three defendants only, and it was stated that the Maharaja, defendant 4, was a pro forma defendant. Later on the plaintiff got his plaint amended and claimed damages against the Maharaja also.

[3] The taluqa known as Balrampur Estate was formerly under the superintendence of the Court of Wards. It was released in 1937. Ordinarily the proprietor is invested with full proprietary powers after release. There was, however, some talk about reserving some of the powers in favour of the Maharani as a condition of release. Such a step, if taken, would have increased the power and influence of Dikshit, Confidential Adviser of the Maharani. The relations between the plaintiff-appellant and Dikshit were by no means cordial. Naturally the plaintiff-appellant was not pleased

at the prospect of Dikshit gaining more influence and power in the estate.

[4] Early in February 1940, there was a rumour that the Maharaja's powers were being transferred to the Maharani. The plaintiff-appellant inquired of Bates whether there was any truth in the rumour. Bates gave no definite reply and asked the appellant his views. Thereupon the appellant presented before Bates on 9-2-1940, an unsigned draft of a representation which he intended to submit to the Maharaja. Bates advised the appellant not to press the representation and promised to look into the matter himself. The appellant took back the representation. On 26-2-1940, Bates sent a note to the appellant asking him to see him the next day. In reply the appellant sent to Bates the same representation together with a signed and a slightly amended copy thereof. The next day he went to see Bates. At that interview Bates called the appellant a "traitor to the Maharaja". The appellant took this remark to heart. He came back and wrote a letter to Bates in which he said that since he had been called a traitor he would no longer continue in service. He further informed Bates that he had decided to withdraw his representation. The same day he addressed a letter of resignation to the Maharaja and stated therein that since his immediate officer thought that he had not been true to the Maharaja, he had decided not to continue in service. Bates placed the resignation and the representation before the Maharaja, who apparently got displeased with the appellant. On 1-3-1940, the Maharaja passed a long order accepting the resignation. The most offensive part of it was as follows:

"It is extremely wicked, ignobble and disloyal on the part of Mr. Radha Krishna Pratap Singh to make even veiled insinuations against Maharani Saheba. Mr. Radha Krishna Pratap Singh has not been true to the Maharani Saheba and myself. I am definitely of opinion that he is unworthy of being retained in the service of my Raj any longer."

[5] The appellant based his claim for damages against Bates on the following grounds, namely, (a) that he called him a "traitor" to the Maharaja, (b) that he produced the same remarks before the Maharaja, (c) that he allowed Mukat Behari Lal, his P. A., to see the letter which the appellant had addressed to him (Bates) and in which he had reproduced Bates' remark and thus he published the said defamatory remark to Mukat Behari Lal, (d) that the libellous order passed by the Maharaja was really the outcome of his (Bate's) brain and that he had a hand in drafting it, and (e) that he published the aforesaid libellous order passed by the Maharaja to (i) his P. A. Mukat Behari Lal, (ii) his head clerk Har Bishen Dayal, and (iii) Mr. Waugh I. C. S., an Adviser to the estate.

[6] There were also allegations to the effect that he (Bates) had published his own slanderous remark and the Raja's libellous order to other persons also, but since that part of the allegation has not been proved, it is unnecessary to take notice thereof. It was also alleged that Bates was a party to a conspiracy which existed between him and Dikshit and V. V. Singh to harm him (appellant) and to oust him from service. This has also not been proved and it is, therefore, unnecessary to refer to this part of the case.

[7] Against Dikshit the appellant's case was that he had published, (1) to Suraj Narain Singh and to his (appellant's) father Capt. Adhya Pratap Singh the libellous order passed by the Maharaja, and (2) that he had called the appellant "intriguer and disloyal". Against him also there were allegations of conspiracy and of having published the Maharaja's order to other persons. These allegations have not been proved and may, therefore, be ignored. Against him also there was a further suggestion that the Maharaja's order was the outcome of his brain and that he had had a hand in getting that order passed. This part of the case has also not been proved and may not be referred to any more.

[8] It is unnecessary to state what the appellant's case was against V. V. Singh and the Maharaja because the claim was dismissed against both of them by the first two Courts and the order of the lower appellate Court, dismissing the said claim, was not challenged by way of second appeal in the High Court. The dismissal has become final qua these two defendants.

[9] The defence put forward by Bates was that he, as superior officer, had the privilege to comment on the appellant's conduct, that none was present when he called the appellant a "traitor to the Maharaja" and, therefore, the appellant had no cause of action on the basis of that remark. He contended that he repeated the same remark before the Maharaja in the performance of his duties and, therefore, the publication was privileged. He denied having any hand in securing the Maharaja's order, although he admitted that the Maharaja had discussed the matter with him before passing the order and had obtained his approval to the said order. It was next pleaded that the communication to Mukat Behari Lal, Har Bishen Dayal and Waugh had been made in due course of business and as such was privileged. He denied having been actuated by any malice towards the appellant.

[10] Dikshit denied having uttered any slanderous remarks or having published the Maharaja's order. It was next contended by him that neither his remark nor the Maharaja's order was defamatory. What is significant in his defence is that he pleaded neither privilege nor justification.

[11] The learned Munsif upheld Bates' defence in toto. As regards Dikshit, he was of the opinion that his remark was defamatory and that he did publish the Maharaja's order. He went on to hold that the appellant's friends had tried to intercede on his behalf and the Maharaja's order had to be made known to those friends of the appellant to

explain the circumstances in which the order was made. In his opinion the application of the order in such circumstances was privileged. Lastly he upheld the plea of justification which, as already noted, had not been raised in the pleadings.

[12] The plaintiff went in appeal. The learned Judge of the lower appellate Court upheld Bates' defence. As against Dikshit he was of the opinion that there was no justification nor privilege. He upset the trial Court's finding, namely, that the Maharaja's order was published because the appellant's friends had tried to intercede on his behalf. Lastly he found malice proved on the part of Dikshit. On these findings he decreed the claim in toto against Dikshit.

[13] The appellant filed a second appeal against the decree of the lower appellate Court in so far as it dismissed his claim against Bates. Dikshit preferred an appeal against the same decree inasmuch as it decreed the claim against him. Both appeals came before a learned single Judge of this Court who dismissed the appellant's appeal and upheld the dismissal of his claim against Bates. He allowed Dikshit's appeal on the ground that there was justification and privilege. Further he held that the appellant had been indulging in intrigues against Dikshit and, therefore, Dikshit was justified in using strong language against the appellant.

[14] The appellant has now preferred two appeals. The present appeal (NO. 6 of 1948) is directed against Bates whereas the connected appeal (NO. 7 of 1948) has been preferred against Dikshit.

[15] A preliminary objection has been taken by the learned Counsel for the respondents to the effect that no leave should have been granted to the appellant to prefer these appeals under S. 12 (2), Oudh Courts Act. The first question, therefore, that arises for decision is whether it is open to the respondent to put forward such a plea after the case has been certified by the learned single Judge to be a fit one for appeal. The learned Counsel for the respondent has cited a number of authorities which go to show that such a question can be raised before the Bench which hears the appeal. By way of example, reference may be made to the case of *Mohammad Jafar* v. *Mt. Birka*, 1943 oudh W. N. 457 (1). In that case the case had been certified to be a fit one for appeal, but the Bench hearing the appeal did come to the conclusion that the leave should not have been granted. This view is in conformity with the practice followed by their Lordships of the Privy Council who also allow a respondent to challenge, if he wishes, the certificate granted by the High Court. In the case of *Radha Kishan Das* v. *Rai Kishen Chand*, 28 Ind. App. 182 (P.C.), their Lordships refused to hear the appeal notwithstanding the fact that a certificate had been granted by the High Court. In view of these authorities, and also in view of the fact that the order granting leave had been passed ex parte, permission was given to the learned Counsel for the respondent to challenge the order granting leave.

[16] The contention put forward by the learned Counsel for the respondent was that the case involved really a question of the interpretation of the Maharaja's order on the appellant's representation and that there was a string of authorities which lay down that leave should not be granted where the only dispute whether a document has been rightly interpreted by the single Judge. In support of his contention he relied on the cases of *Brij Bhukhan* v. *Bhagwan Dutt*, 1943 Oudh W. N. 404; *Uman Shankar* v. *Ashraf Husain*, 1943 oudh W. N. 372 and *Bisheshwar Dayal* v. *Lachman Ram*, 1926-3 oudh W. N. 576. These authorities do support the learned Counsel's contention, but the present case is not one in which the only question is the interpretation of the Maharaja's order and the appellants' representation. Several other legal problems of great importance also arise for decision. In the first place it is contended by the learned Counsel for the appellant that the plea of justification should not have been upheld because it had not been raised in the pleadings. It is next contended by him that the finding on the plea of justification was a finding of fact, and since the finding on that point had been recorded in the negative by the lower appellate Court, it was not open to the learned single Judge to upset that finding. Again it was contended on behalf of the appellant that there was neither a finding nor an issue about Dikshit being privileged. There was an issue as to whether Bates and the Maharaja were privileged, but now whether Dikshit was privileged. The question whether the learned single Judge of this Court was justified in upholding the plea of privilege is also one of great importance. In any case the question arises whether or not the learned single Judge acted contrary to recognised principles and precedents in giving Dikshit the advantage of the plea of privilege. In the circumstances the preliminary objection raised by the learned Counsel for the respondent is overruled.

[17] The learned Counsel for the respondent next cited the case reported in *Beni Madho* v. *Harihar Prasad*, 1946 oudh W. N. 300, and contended that the appellant's learned Counsel should be kept confined to the points on which the learned single Judge gave leave to appeal. The learned single Judge, however, did not specify in his order granting leave the particular point on which he desired the appeal to be heard. The relevant portion of his order is as follows: "I grant the declaration that the cases are fit for appeal to a Bench of two Judges." It will thus appear that he considered the whole case fit to be heard by the appellate Bench. In the circumstances the contention put forward by the learned Counsel for the respondent, namely, that the appellant's counsel should be kept confined to certain given points must also be overruled.

[18] The case against Bates may be taken up first. It is admitted by him that he called the appellant a "traitor to the Maharaja". But it has also been found as a fact that none else was present in the room when this remark was made. Bates rightly contends that no action for defamation can be based on the basis of this utterance because none else heard it. The essence of a cause of action for defamation lies in the fact that the person defamed is lowered in the estimation of others. If none else has heard the defamatory remark, no suit is maintainable for damages for defamation. It is immaterial that the plaintiff's feelings were hurt by the said remark.

[19] Another defence put forward by Bates is that he, as the superior officer, had a qualified privilege to comment on the conduct of his subordinate. This contention is also well founded. Bates was the Manager of the Estate. The appellant was the Assistant Manager. The representation which he had made related to the affairs of the estate. In the circumstances Bates had the privilege of expressing his opinion and making comments on the representation and on the appellant's conduct according to his own light. Even if Bates's remark was incorrect, it was privileged, unless it was malicious. In the present case there is the finding of the lower appellate Court that there was no malice on the part of Bates. This finding, as laid down by their Lordships of the Privy Council in *C. Sabhapathi* v. *C. Huntley*, A. I. R. 1938 P. C. 91, is a finding of fact and must be accepted as correct.

[20] The next grievance put forward by the appellant is that Bates's conduct became actionable when he published his own slanderous remarks to the Maharaja. In order to appreciate this point, it is necessary to narrate the circumstances in which this publication was made. It will be remembered that the appellant had submitted his resignation to the Maharaja and had sent it through Bates. It was, therefore, Bates's duty to place resignation before the Maharaja. The relevant portion of the resignation runs as follows:

"As my immediate officer thinks I have not been true to your honour, I think it unworthy of me to continue in service any more and beg to resign."

When this resignation was placed before the Maharaja, he naturally asked Bates what remarks he had made and why. After all the appellant was the Maharaja's relation, and the latter must have been anxious to protect his interest also. It was then Bates' duty to tell the Maharaja, that he had called the appellant "a traitor," and that he had done so after seeing the representation which the appellant had drafted. Naturally, the Maharaja must have liked to see the representation himself. It is, therefore, obvious that Bates reproduced his remarks before the Maharaja in the performance of his duty. The occasion was, therefore, privileged. It was laid down in the case of *Adam* v. *Ward*, (1917) A. C. 309 at p. 334, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This test is satisfied in the present case. Therefore, the publication of the remarks to the Maharaja was privileged and was not, in the absence of malice, actionable.

[21] Next comes the appellant's grievance, namely, that the Maharaja's order was published to Mukat Behari Lal and Har Bishen Dayal. After passing the order, the Maharaja handed it over to Bates who was asked to "take necessary action thereon." Mr. Bates made the following note on it:

"P. A.

Copies to Kunwar Radha Krishna Pratap Singh and to Mr. Waugh. Then file in confidential box."

Thus the file came to the hands of Mukat Behari Lal, P. A. The latter gave the file to Har Bishen Dayal, head clerk, to prepare typed copies of the order. Har Bishen Dayal prepared the copies. Thereafter a copy was sent to the appellant. Thus both Mukat Behari Lal and Har Bishen Dayal had an opportunity of reading the Maharaja's order. This was done by them in the performance of their duty. Bates was not expected to copy out the whole order himself and to send it himself to the persons concerned. When an official act is to be performed, naturally it must necessarily pass through the hands of subordinates. Publication to such subordinates is always privileged. In this connection it is necessary to reproduce the following passage from Gatley on Libel and Slander, Edn. 3, pp. 288-289:

"Defamatory but privileged words do not lose their privilege by being dictated to a typist or copying clerk in the reasonable and ordinary course of business. If a business communication is privileged, as being made on a privileged occasion, the privilege covers all the incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business for a business man to dictate his business letters to a typist even though these letters contain statements defamatory of third person."

The publication to Waugh, Adviser to the Estate, was also made in the discharge of duties and was privileged. Bates had a duty cast upon him to inform Waugh that the appellant had been removed from service. He was doing so under the order of the Maharaja.

[22] The letter Ex. A5 which the appellant had addressed to Bates, and in which he had reproduced Bates' remark, was not marked "personal" or "confidential". In due course it was placed on the file and was seen by Mukat Behari Lal though not by Har Bishen Dayal. The file had to pass through the hands of the P. A. and publication to the P. A. could not be avoided. In all such cases subordinates handle a file and get an opportunity of reading it, but the superior officer cannot be held liable for publication of any defamatory

matter that may be contained in it. It is too much to expect that he should himself deal with every file so as to deny access to it to his P. A. even. In my opinion Bates has not rendered himself liable for damages by permitting his P. A. to have a look at the appellant's letter EX. A5.

[23] Bates has omitted that the Maharaja discussed his order with him before signing it and the order was passed with his (Bates's) approval. The question is whether Bates incurred any liability by reason of having discussed the said order with the Maharaja and of having approved of it. It must be remembered that the Maharaja was the superior officer and employer. If the Maharaja took him into confidence and told him that he was offended at the appellant and intended to pass an order of a certain nature, it was not expected of Bates to oppose his employee particularly when he (Bates) also had not approved of the appellant's conduct. If he expressed his approval of the proposed order, he did not thereby become the author of the order. The order remained the order of the Maharaja and the responsibility for passing that order rested with the Maharaja.

[24] For the above reasons the appellant has no cause of action against Bates. His claim has been rightly dismissed against Bates. Appeal NO. 6 of 1948 preferred by the appellant against Bates fails.

[25] Next comes the appeal preferred against Dikhsit. The findings against him are that he did publish the Maharaja's order to Suraj Narain Singh and to Capt. Adhya Pratap Singh and did call the appellant an "intriguer and disloyal." The circumstances in which the publication was made to Suraj Narain Singh are that the latter was camping at Balrampur and went to see the Maharaja. He did not utter a word about the appellant. While he was at the Maharaja's place, Dikshit inquired of him if he would like to pay his respects to the Maharani. He replied that he would be delighted to do so. Dikshit then arranged for an interview. In his interview with the Maharani, Suraj Narain Singh did not talk about the appellant. It was the Maharani herself who introduced the subject and remarked that the appellant was doing propaganda against the transference of power to her. After the interview was over, Dikshit went inside, brought out a file and showed the appellant's representation and the Maharaja's order to Suraj Narain Singh. The lower appellate Court has recorded a definite finding that Suraj Narain Singh had done nothing to intercede on behalf of the appellant and that the publication of the Maharaja's order to him was gratuitous. This finding has to be accepted.

[26] As regards the publication to Capt. Adya Pratap Singh, the finding of the lower appellate Court is that Dikshit called him twice to his place and in the first meeting he translated the Maharaja's order to him. It may be remarked at this stage that Capt. Adya Pratap Singh does not know English. The Maharaja's order was written in English. In the second meeting Dikshit suggested that he would arrange an interview between Capt. Adya Pratap Singh and the Maharani. The communication of the Maharaja's order by Dikshit to Capt. Adya Pratap Singh had been made before the proposed interview took place. In his case also the publication was gratuitous.

[27] It has been held by the learned Single Judge that the appellant's representation contained insinuations and innuendoes against Dikshit and that Dikshit, in his defence, published the Maharaja's order in order to refute those insinuations and innuendoes. In this connection it may be pointed out that Suraj Narain Singh and Capt. Adya Pratap Singh, to whom the publication was made, had not seen the appellant's representation and no question arose of Dikshit clearing his conduct before these two persons. What he did was first to place before them the representation which contained matters defamatory of himself and then to retaliate by publishing the Maharaja's order which was defamatory of the appellant. In other words, he was trying to find out a pretext for publishing the Maharaja's libellous order.

[28] Even where a person is defamed, and the law gives him an opportunity to defend himself, he may publish such matters as will clear his own conduct. Cases have occurred where a person to defend himself, has been permitted to use strong language. But the privilege does not extend to defame one's opponent. If such defamation does not clear his own conduct, if the persons defending himself goes to the extent of describing his opponent a "liar," it may be argued that in his zeal he used necessarily strong language and he may be excused. But he does not clear his own conduct by simply defaming his opponent. Therefore defamation of one's rival carried out by way of retaliation is not permissible. Even if Dikshit's object was to prove that the insinuations made against him in the representation were false, that object could not be achieved by telling others that the Maharaja considered the appellant a "wicked and ignoble" person. Similarly he could not disprove the said insinuations by stating that the appellant himself was an "intriguer and disloyal." The appellant's unworthy conduct, if any, could not be a justification of Dikshit's conduct. In the circumstances Dikshit cannot be held to have possessed any privilege to either communicate the Maharaja's libellous order or to call the appellant an "intriguer and disloyal." The learned single Judge's finding on the point cannot be upheld. As already stated no such privilege had been claimed by Dikshit in the pleadings and there was no issue as to whether Dikshit enjoyed any privilege.

[29] The next point to consider is whether there was justification in the sense that the

remarks published were true; if the remarks were true, action will fail even if the publication was malicious. But the plea of justification must always be raised in the written statement. Not only should justification be specifically pleaded but should be strictly proved. This was laid down in the case of *C. M. G. Ogilvie* v. *Punjab Akhbarat and Press Co., Ltd., Lahore*, A. I. R. 1929 Lak. 561. In the present case one finds that no plea of justification had been raised in the pleadings. But one finds that there was an issue on the point. This circumstance has enabled the respondent to put forward the argument that since an issue was framed, the appellant cannot complain that he was taken by surprise. He knew what case he had to meet. There is force in this argument and the respondent was, therefore, allowed to rely on this plea, although it had not been raised in the pleadings.

[30] But it must be remembered that the onus to prove justification always lies on the defendant. In other words it is for the defendant to lead evidence to prove that the defamatory statements made about the plaintiff were true. In the present case the defendant respondent led no evidence. His contention is that the appellant's conduct as disclosed in the representation proves justification. It is, therefore, necessary to examine the representation presented by the appellant in order to see whether this representation (justified ?) the slanderous and libellous remarks made about the appellant. The original unsigned draft representation runs as follows :

"To

Sri Man Maharaja Sahib Bahadur
Balrampur Raj,

Through

H. S. Bates Esq., I.C.S.,
Manager, Balrampur, Raj.

May it please your honour,

Most respectfully I beg to lay the following for your kind consideration :

1. That though we have a Maharaja—with a majestic personality, wonderful memory, untiring energy, radiant health—Free of all evils and under the influence of no one—Always eager to hear patiently the Riyaya of the Raj and redress their grievance—Touring in all the corners of the Raj at a good bit of inconvenience and personal discomfort—Of firm determination, still ready to yield to reason Always ready to learn and look into things still least interfering in the day-to day administration of the various departments and exceedingly polite to services—the qualities that make you so dear to all and an ideal Maharaja for running the Estate on democratic lines.

2. That though we have a Maharani Sirkar coming out of a family of administrators of high repute and calibre and known to be absolutely devoted to Maharaja Bahadur and like an ideal "Hindu Dharma-Patni" wanting nothing for herself and ready to take any risk and do any sacrifice for the Pati."

3. That though we have Mr. Bates as Manager of the Raj who is a senior member of Civil Sarvice, extremely kind and polite to his subordinates, always ready to yield to reason and loved alike by services and riyaya for his kind and sympathetic heart and saintly ways and highly loyal and faithful to Maharaja Bahadur and chiefly responsible for the release of the Raj from Court of Wards.

4. That though masses are solidly for Maharaja Bahadur whom they love and admire for his good qualities and for whom if the need be and they know of it they may do any sacrifice.

5. That though such a district as Bahraich where we have comparatively speaking less influence thought fit to praise the qualities of Maharaja Bahadur by presenting him various addresses.

6. That still it is a strong rumour that Maharaja Bahadur has to sit with Maharani Sirkar in Purdah to deal important papers which if true will undermine Maharaja Bahadur's prestige and position in public eye and may be resented by every faithful citizen and servant.

7. That still it appears to be a fact that everything is not so smooth running and plain sailing as it should be and there appears to be a sense of uncertainty and unsecurity prevailing in services and certain amount of dissatisfaction all round.

8. That these fears have naturally arisen due to successive retrenchments and other economic measures which were the outcome of the bogey of financial crisis raised by brainy people when Mr. Bates was out in England on leave and ended in hardships to certain humble servants of the Raj and increase in deputation allowance of the author of the retrenchment scheme on top of annual graded promotion. What was the real motive of these brainy people has yet to be probed into.

9. That still one finds that a particular report written about Maharaja Bahadur which is said to be not very complimentary to Maharaja Bahadur is claimed to have been written with the help of one of Maharani Sirkar's trusted servants.

10. That still it is said that the period of Court of Wards was extended for the first time on account of opposition from a certain quarter not unknown to your goodself and even at the time of release taking advantage of these, certain demands it is said were pressed on behalf of Maharani Sirkar which created a dead-lock and it is said that ultimately an English Officer had to remark that he was fighting like that for sirkar and who was to fight for Maharaja and decline to agree with the request in its entirety.

11. That since your honour mentioned my name in connection with Private Secretary's appointment there has been a great intrigue against me and certain gross untruths and deliberate lies were told against me to Mr. Bates and to other respectable personalities which I regard as my duty to expose and fight.

12. That though Maharaja Bahadur is the constitutional head of the Balrampur administration still it is an open secret that he could not have a secretary of his choice even when he gave an option as wide as to gibe him any English man and the news is all the more discomforting when one hears that even Maharani Sirkar opposed Maharaja Bahadur's wishes.

13. That there are a good few other rather unplesant things which I do not want to mention here.

14. That these things are bound to cause a serious rupture in the house some day and I consider it my duty to struggle to stop if after carefully studying things and thinking out ways and means for doing so.

15. That this cannot be done and should not be done as long as I am in regular service and I have, therefore, decided to go on long leave.

16. I, therefore, beseech your goodself to grant me all my due leave and order "immediate payment of my dues and to relieve me early so that I may :

fight for your cause as an independent and faithful citizen and relation.

struggle to remove the sense of unsecurity and uncertainty from service.

give Maharani Sirkar frank and correct advice if and when needed.

help your honour and Mr. Bates to establish constitutional rule in Balrampur.

enlighten the masses on their duty to your goodself and the Raj.

Expose the intriguers and hypocrites who shed gallons of crocodile tear and profess tons of love to you and still talk lot of nonsense and indulge in undesirable propoganda against your honour.

And thus do real service to the Raj which may be remembered long after I am dead and gone.

Thanking your goodself, Maharani Sirkar and Mr. Bates for all the kindness and special considerations shown to me.

I have the honour to be,
Sir,
Your most obedient servant."

The fair copy of the representation had been slightly altered in the following respects, namely, the last two lines of paragraph 1 run as follows :

"An ideal Maharaja for running the estate on constitutional lines with the help and advice of his Manager."

For paragraph 6 in the draft, the following paragraph was substituted, namely,

"That still it is a strong rumour that Maharaja Bahadur has to sit with a 'body of administrators' in purdah to deal important papers which if true is not only wrong from legal and constitutional point of view but is bound to undermine Maharaja Bahadur's prestige and position in public eye and may be resented by every faithful citizen. In view of what I have said above there is no need at all of these 'administrators' but in case any body feels that there is any need of a helper or helpers this privilege should go to the riyaya of the Raj who have an inherent and birth right to advise their Maharaja."

[31] The learned single Judge of this Court has interpreted the appellant's representation as containing "an implied threat . . . to the estate authorities that the appellant intended to start a mass agitation in Balrampur." Further he held that the intention of the appellant was to "arouse the tenantry" against the Maharaja. There is nothing in the appellant's representation to suggest that he wanted to do anything against the Maharaja. As already stated, the respondent's evidence on this point is nil. Since the respondent wants to base the plea of justification on the appellant's statement, that statement must be taken as it stands. No words which do not exist in it should be read in that statement. The appellant enumerates at the end of the representation the points towards which his efforts would be directed after he is relieved from service. He says that he would "fight for your (Maharaja's cause as an independent and *faithful* citizen and relation" and "enlighten the masses on their duty to your goodself and the Raj" since he wants to act as a "faithful" citizen, it is not possible to interpret this statement of his as implying a threat to do something adverse to the Maharaja. Similarly he wants to enlighten the masses of their duty towards the Maharaja. This statement of his should not be construed as a threat to misguide the tenantry and to induce them to claim any rights adverse to the Maharaja. He wishes to remove the sense of insecurity and uncertainty from the minds of the servants. This too was not any objectionable activity. He wants to give frank and correct advice to the Maharani "if and when needed." Lastly he wants to "help your honour (Maharaja) and Mr. Bates to establish constitutional rule in Balrampur." The use of the words "constitutional rule" is unfortunate because after all the Maharaja is a proprietor and not a ruler. But what is significant is that he offers "his help" and not opposition. If the appellant's own representation is to be made the basis of founding the plea of justification, it should be interpreted according to the plain meaning of the words it contains. It does not justify the inference that the appellant wanted to start a mass agitation against the Maharaja or to arouse the tenantry against him.

[32] There is no doubt that the appellant says in para. 6 that the Maharaja has in the matter of administration to consult other, either the Maharani Sirkar or his advisers. But the conduct attributed to the Maharaja cannot by any stretch of reason or imagination be described as discreditable. There is nothing objectionable in an owner of a big estate, like Balrampur, consulting his advisers or his wife. Perhaps the appellant feared that the adviser, of whom he dreaded Dikshit the most, might gain more influence, and this might lower the Maharaja's prestige in the eyes of the public. This remark has been interpreted by the trial Court (which interpretation was approved by the learned single Judge) that the appellant wanted to paint the Maharaja as an "imbecile." In my opinion this inference is too far fetched to be accepted as correct.

[33] The appellant has pointed out in para. 8 that during Bate's absence, some of the interested persons drew up a scheme of retrenchment which involved hardship on some of the servants of the Raj, but as a result of that scheme their own employments were enhanced. There was nothing objectionable in bringing this point to the notice of the Maharaja.

[34] He states that a report, not very complimentary to the Maharaja, was written by one of the Rani's trusted servants. Possibly he means Dikshit. He again refers to the efforts which were made for securing powers for the Maharani at the time of the release of the estate from the superintendence of the Court of Wards. This reference is borne but by EX. P. W. 12/1. Again he makes a mention of the fact that there was once a talk of the Maharaja appointing him (appellant) as his private secretary, and that this led to an intrigue against him. He adds that there was a difference of opinion between the Maharaja and Maharani on the question of the appointment of the former's secretary. In para. 13 he says that there are some other unpleasant things which he does not want to mention. In para. 14 he remarks that events may cause a rupture in the family in the future. Finally he adds that so long as he is in service he cannot act freely and

"express the intriguers and hypocrites who shed gallons of crocodile tear and profess tons of love to you and still talk lot of nonsense and indulge in undesirable propaganda against your honour."

[35] Obviously he meant that Dikshit and others, who profess to be the Maharaja's faithful servants, but who in his opinion were not really his well-wishers, needed to be exposed and therefore he wanted to perform the duty of bringing the true facts to the Maharaja's notice. In his opinion he could do this only after he had ceased to be a servant of the Raj.

[36] It must be remembered that the appellant is one who has had his education in foreign countries. He in his own way wanted to be helpful to the Maharaja. His representation gives me the idea that he never wanted to be hostile to the Maharaja but he wanted to rid him of certain persons, including Dikshit, whom he believed, rightly or wrongly, to be engaged in anti-Maharaja activities. According to his views it was his duty to prevent these persons from gaining influence and strength. He feared that these persons might lead the Maharani to do certain acts which might create a rupture between the Maharaja and the Maharani at some future time. He might have been misguided and mistaken, but certainly he was not anti-Maharaja or anti-Maharani. His targets were Dikshit and his friends, and neither the Maharaja nor the Maharani. In the circumstances it was not correct to say that he made "veiled insinuations against the Maharani." He certainly did not deserve the libellous remark, namely, "extremely wicked, ignoble and disloyal." In the circumstances the plea of justification recorded by the learned single Judge cannot be upheld.

[36a] It was further argued on behalf of the appellant that the finding recorded by the lower appellate Court, namely, that justification had not been proved, was a finding of fact and that the learned single Judge could not upset it. Since I have agreed with the lower appellate Court on merits, it is unnecessary to enter into this question.

[37] For the above reasons, the appellant's claim succeeds against Dikshit.

[38] Next comes the question of damages. The appellant had claimed a sum of Rs. 15000 as damages in the notice but he brought the suit to recover Rs. 2000 only because his object was to vindicate his honour and not to make money. Since the claim has been decreed against one of the defendants only, it will be sufficient to grant him a decree for Rs. 1000 only. He shall get costs from Dikshit in proportion to success in all Courts.

[39] For the reasons stated above, the appeal (No. 6 of 1948) against Bates fails and is hereby dismissed with costs.

[40] **Sankar Saran J.**—I am in general agreement with my learned brother on the questions that have arisen in this appeal. I should, however, like to add a few words of my own, specially with regard to the preliminary objection that no leave to appeal should have been granted in this case. It is necessary to examine the provisions of ss. 12 and 14, Oudh Courts Act, and the provisions of ss. 109 and 110, Civil P. C., relating to appeals to the King in Council as also cl. 10, Letters Patent of the Allahabad High Court which provides for appeals to the High Court from orders of one Judge of the same Court.

[41] Section 12 (2), Oudh Courts Act, runs as follows:

"Except as otherwise provided by any enactment for the time being in force, an appeal from any appellate decree made by a single Judge of the Chief Court shall lie to a Bench consisting of two other Judges of the Chief Court, if the Judge who made the decree declares that the case is a fit one for appeal."

[42] Clause 10 of the Letters Patent has similar provisions. It provides that an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court "where the Judge who passed the judgment declares that the case is a fit one for appeal."

[43] Section 14, Oudh Courts Act, provides that a single Judge or a Bench of the Judges of the Chief Court can refer for the decision of a larger Bench any question of law or construction of any document, etc.

[44] It will appear from a perusal of both, s. 12 (2), Oudh Courts Act, and cl. 10 of the Letters Patent, that an appeal is provided for where a Judge who passed the judgment "declares that the case is a fit one for appeal." The language is identical. This declaration by a Judge that a case is a fit one for appeal has, to my knowledge, never been challenged in appeal in the Allahabad High Court. At least, I have not been able to lay my hands on any case where this question was raised. In the Oudh Chief Court, however, there are a fairly large number of decided cases where the propriety of the declaration made by the Judge who passed the judgment and granted leave to appeal has been challenged.

[45] It was contended before us that the right under s. 12 (2), Oudh Courts Act, is analogus to the right of appeal as contained in ss. 109 and 110, Civil P. C. Now s. 109, Civil P. C., provides an appeal to His Majesty in Council if it is certified to be a fit case for appeal. Section 110, Civil P. C., lays down three conditions, viz., that the appeal must be valued at Rs. 10000 or upwards, or the decree must involve some question respecting property of that valuation, or the decree affirms the decision of the Court immediately below the Court passing the decree, or the appeal must involve some substantial question of law.

[46] Upon an examination of the provisions of s. 12 (2), Oudh Courts Act, and ss. 109 and 110, Civil P. C., I am unable to hold that they are analogous. If they are analogous at all, they are analogous to cl. 10 of the Letters Patent of the Allahabad High Court. But from the early times, indeed ever since the Chief Court was established, it seems that a very restricted interpretation has been given to s. 12 (2), Oudh Courts Act, and words have been imported in it

which upon a plain interpretation of the section it is not possible to import. In *Bisheshwar Dayal* v. *Lachman Ram*, 3 oudh W. N. 576, there are two cases. In one of them *Usuf Ali Beg* v. *Nathu*, 3 oudh W. N. 574, a learned Judge of that Court held that a certificate of fitness for an appeal under S. 12 (2), Oudh Courts Act should be granted only when the decision is

"(1) opposed to any general principle of law, or (2) it involves a question of public interest, or (3) is contrary to any recognised precedent."

No reasons, however, were given for the view expressed. In the other case, *Bisheshwar Dayal* v. *Lachman Ram*, 3 oudh W. N. 576, Gokuran Nath Misra J., referred to the rights of appeal conferred by the Letters Patent of a High Court but finally came to the following conclusion :

". . . . . One has only to turn to S. 109 (c), Civil P. C. (V of 1908), where such words do exist. It has been held by the various High Courts in India that, where a case has to be certified as a fit one for appeal to His Majesty in Council, the interpretation to be put upon these words must be a very restricted interpretation. Clause (c) of that section is intended to meet special cases, such for example as these in which the point in dispute is not measurable by money, though it may be of great public or private importance . . . Applying this test, I think I can safely hold that the point involved in this case is not a point of any general importance. Indeed the point involved is not even a substantial point of law."

This case appears to be the leading case on the subject and all subsequent rulings have followed this case or adopted the principles laid down in it.

[47] In *Dayana Ulla* v. *Atia Khanam*, 1940 oudh W. N. 193, a Bench of the Chief Court after reviewing a number of cases observed as follows :

"The view which has been taken in these cases consistently is that a certificate of fitness for further appeal under S. 12 (2), Oudh Courts Act, should be granted only when the decision for which a further appeal is proposed to be preferred is (1) opposed to any general principle of law, or (2) involving a question of public interest, or (3) is contrary to any recognised precedent."

[48] Similar views were expressed in *Mubarak Husain Khan* v. *Ghulam Abid Khan*, 1942 oudh W. N. 742, four cases reported in *Uman Shankar* v. *Ashraf Husain*, 1943 oudh W. N. 372, *Bhagwant* v. *Mst. Ganga Dei*, 1943 oudh W. N. 393, *Brij Bhukhan* v. *Bhagwan Datt*, 1943 Oudh W. N. 404 and *Mohammad Jafar* v. *Mt. Barka*, 1943 oudh W. N. 457, *Ewaz Ali* v. *Mt. Firdous Jehan*, 1944 oudh W. N. 228 and *Beni Madho* v. *Harihar Prasad*, 1946 oudh W. N. 300.

[49] With the greatest respect to the learned Judges who are of this view, I am unable to hold upon a plain reading of the sections that there is any similarity between S. 12 (2), Oudh Courts Act, and ss. 109 and 110, Civil P. C. All that the Judge is required to do under S. 12 (2), Oudh Courts Act, is to declare that the case *is a fit one for appeal*. It seems to me that he is not bound to state his reasons nor can the power of the Bench hearing the appeal be restricted by the single Judge referring only points of law for the decision of the Bench.

[50] The principle governing appeals to the King in Council have been laid down in several cases. In *Radhakrishna Ayyar* v. *Swaminatha Ayyar*, 48 Ind. App. 31 (P. C.), their Lordships of the Privy Council enunciated the principle on which leave to appeal can be granted.

They said :

"that as an initial condition to appeal to His Majesty in Council, it is essential that the petitioners should satisfy the Court that the subject-matter of the suit is Rs. 10,000 and in addition that in certain cases there should be added some substantial question of law. This does not cover the whole grounds of appeal, because it is plain that there should be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter is in dispute cannot be reduced into actual terms of money."

[51] In another case, *Banarsi Parshad* v. *Kashi Krishna*, (28 Ind. App. 11 at p. 13 (P. C.) their Lordships of the Judicial Committee have held that when the valuation is less than Rs. 10,000 certificate under S. 109 (c), Civil P. C., on the ground that the case is a fit one for appeal cannot be granted merely because the case involves a substantial point of law.

[52] It must be borne in mind that in an appeal before the Judicial Committee, unless there were concurrent findings of fact, the Judicial Committee could consider questions both of fact and law, and a substantial question of law was all that was necessary to entitle an appellant to a certificate where the vlauation was Rs. 10,000 or above but the decrees were concurrent. A fit case for appeal under S. 109 (c), Civil P. C., was, therefore, interpreted to mean a case involving something more than a mere substantial question of law. In second appeals the High Court can only consider questions of law, and to hold that even if a case involved a substantial question of law, the appellant would not be entitled to a certificate seems to me going too far. When a certificate was once granted their Lordships of the Judicial Committee never felt bound to consider only the points mentioned in the order granting the certificate. They used to deal with the whole case. With all respect, the practice that grew up in Oudh of restricting the arguments of the appellant on the point or points on which the certificate was granted does not appear to me justified either by the statute or the practice in the Privy Council.

[53] The right of a single Judge to refer a case to a Bench of two or more Judges under S. 14, Oudh Courts Act, is unfettered. But as soon as a Judge has made up his mind and decided a case, restrictions are placed upon his discretion to have the matter adjudicated upon by a larger bench by way of appeal. His judgment that a case is a fit one for appeal is disregarded and the leave that he grants under S. 12 (2), Oudh Courts Act, can be challenged and that instead of principles that

govern Letters Patent Appeals the principles that apply in appeals to a higher tribunal like the King in Council are applied. With all respect, I am unable to adhere to this view. The declaration by a Judge that a case is a fit one for appeal, in my judgment, should not be challenged as it is not challenged in Letters Patent Appeals in the Allahabad High Court.

[54] In the result I am satisfied that there is no force in the preliminary objection and in agreement with my learned brother I would overrule it.

[55] Regarding the merits of the appeal, I am in entire agreement with my learned brother. I also would hold that the appellant had no cause of action against Bates. His claim against Bates has been rightly dismissed. Accordingly I would dismiss appeal NO. 6 of 1948.

[56] As for his appeal against Dikshit, there again I am in agreement with my learned brother and consider that it should be allowed and he should be granted a decree for RS. 1000. Learned counsel for the respondents has contended that the remarks that were made against the appellant were fully justified and has tried to show that the conduct of the appellant was certainly deserving of being characterized as "extremely wicked, ignoble and disloyal." It seems to me that there can be no justification for such characterization. He was a relation of the Maharaja and had received education abroad apparently at the expense of the Maharaja. He was anxious for the Maharaja's good name and satisfactory administration of his estate. In his keenness to help the Maharaja he built an imaginary edifice of constitutional hierarchy. He began to think in terms of a constitutional monarchy, the cabinet and the opposition. The Maharaja was to be the constitutional monarch and the appellant wanted to be his chief executive adviser, failing which he desired to be the leader of the opposition. For this purpose he was prepared to resign—in fact actually resigned—his appointment in the Raj because he wanted to fight for the cause of the Maharaja "as an independent and faithful citizen and relation" and "give Maharani Sirkar frank and correct advice if and when needed help for your honour and Mr. Bates to establish constitutional rule in Balrampur, enlighten the masses on their duty to your goodself and the Raj. This was considered as an implied threat. With all respect, it seems to me that there is no question of any threat whatsoever. It appears likely that the appellant was jealous of Dikshit and did not consider his influence in the state to be for the good of the estate and possibly his own good. Dikshit, on the other hand, did not approve of him and was not unwilling to give publicity to the Maharaja's orders which were defamatory of the appellant. There was no justification for this. Thus the appeal against Dikshit must be allowed. I would grant a decree for RS. 1000 only against Dikshit.

[57] **By the Court.** — The appeal fails and is dismissed with costs.

B./K.S. *Appeal dismissed.*

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(LUCKNOW BENCH)

KIDWAI J.

Narain Singh and others, Appellants v. *Har Bux Singh and others, Respondents.*

Second Appeal No. 71 of 1944, D/- 23-9-1949.

(a) Interpretation of Statutes—Meaning to be given to every word used.

A Court cannot ascribe to the Legislature any intention of using redundant word and, if it is possible to do so, meaning must be given to every word used. [Para 5]

(b) Oaths Act (1873), S. 9, Proviso — "Personally" —Offer by party's counsel to abide by special oath: 14 Bom. 455, *Dissent.*

The use of the word "personally" means that an answer may be given through an agent, that is to say the offer to abide by the special oath under S. 9 may be accepted not by party personally but by a party through an agent even. It is therefore possible for a party to act through his counsel in making the offer to abide by the special oath of a certain person: A. I. R. 1940 Oudh 314, *Foll.*; A. I. R. 1916 All. 165 and A. I. R. 1929 Oudh 56, *Ref.* [Paras 5 and 6]

Anno. Oaths Act, S. 9 N. 2 Pt. 1.

(c) Oaths Act (1873), S. 9 — Offer by counsel—Implied authority.

The power to make an offer under S. 9 is inherent in the conduct of the case by an advocate and if an advocate is authorised to conduct the case as well as to file and withdraw applications which are material in the course of the case, he must also be deemed to be authorised to make an offer under S. 9: A. I. R. 1940 Oudh 314; A. I. R. 1929 Oudh 56 and A. I. R. 1931 Oudh 350, *Foll.* [Para 7]

Anno. Oaths Act, S. 9 N. 2.

R. B. Lal and R. B. Chaudhri, for Appellants; Hyder Husain, for Respondents.

REFERENCES: Courtwise/Chronological	Paras
('16) 38 All. 131: (A. I. R. 1916 All. 165).	6
('90) 14 Bom. 455.	5, 6
('28) 5 Oudh W. N. 1070: (A. I. R. 1929 Oudh 56).	6, 7
('31) 8 Oudh W. N. 880: (A. I. R. 1931 Oudh 350).	7
('40) 1940 Oudh W. N. 662: (A. I. R. 1940 Oudh 314).	4, 5, 7

Judgment. — Respondents 1 to 3 instituted a suit in the Court of the Munsif, Barabanki, for recovery of possession of certain land which formed part of 'ahata NO. 1 in village Telwari in the district of Barabanki by demohtion of constructions standing upon it and by removal of certain pegs and other alleged encroachments. The suit was contested by the defendants and the trial Court framed four issues.

[2] On the date fixed for evidence namely 20-10-1943 the plaintiffs were present in person with their advocate, Mr. Durga Dayal, and the defendants were represented by Mr. Ajodhia Prasad. Only one of the defendants, Jagmohan Singh, respondent 4 was present in person. On 20-10-1943 the Court recorded the following proceedings:

"Parties and their pleaders agree that if Raj Bahadur Singh, plaintiff 2 states with 'Gangajali' in his hand that the defendants have encroached upon the plaintiffs' land and the encroached portion is not on the old foundation, the suit be decreed with costs, otherwise dismissed."

This proceeding is signed by the pleaders of the parties as well as by Jagmohan Singh. Thereafter Raj Bahadur Singh stated on oath, with 'Gangajali' in his hand, that the defendants had encroached on the plaintiffs' land as shown by the commissioner in his plan and the encroached portion is not on the old foundation. The parties closed their case and the judgment was delivered on the same day. The plaintiffs' suit for possession by demolition of constructions and by grant of perpetual injunction was decreed.

[3] All the defendants except Jagmohan Singh appealed. In appeal before the learned Civil Judge it was contended that Pt. Ajodhia Prasad had no authority to abide by the special oath of plaintiff 2 and that in any case the Court should have determined the objections to the commissioner's report filed by both the parties. The learned Civil Judge held that Pt. Ajodhia Prasad had the necessary authority and that it was not necessary in view of the statement of plaintiff 2 on oath, to go into the objections to the commissioner's report. He accordingly dismissed the appeal.

[4] The same defendants have now come up in appeal and their learned advocate has pressed the first point of objection, namely that Pt. Ajodhia Prasad had no authority. The Vakalatnama under which Pt. Ajodhia Prasad acted authorised him to present appeals or any other application or to make oral statements or to confess judgment or to file compromise or to withdraw the suit or any application. It further authorised him to prosecute the case (Original in Urdu). The last paragraph stated that the vakil should not have authority to do anything else without the permission of his client. On a constructin of this vakalatnama the learned lower Court, in accordance with the principle laid down in *Mathura Prasad* v. *Sita Ram*, 1940 oudh W. N. 662 at pp. 666 to 668, held that Pt. Ajodhia Prasad had authority to abide by the special oath of one of the plaintiffs.

[5] It is contended that *Mathura Prasad* v. *Sita Ram*, 1940 oudh W. N. 662, does not lay down the correct law. The appellants' learned advocate contended that whatever is required by S. 9, Oaths Act, to be done is required to be done by the party himself and cannot be done through an agent. In support of this contention he relied upon *Sadashiv Rayaji* v. *Maruti Vithal*, 14 Bom. 455, in which that interpretation has been placed upon S. 9. This interpretation does not seem to be borne out by the words of S. 9 itself. A proviso to that section is as follows:

"Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question."

If the word "party" in this section meant a party himself then the word personally is redundant and should not have been used. We cannot ascribe to the Legislature any intention of using redundant word and, if it is possible to do so, meaning must be given to every word used. In the present case the use of this word "personally" means that an answer may be given through an agent, that is to say the offer to abide by the special oath under S. 9 may be accepted not by party personally but by a party through an agent even. There is no reason why the offer itself may not be made through an agent. In this connection the Arbitration Act may be referred to. If under S. 21, Arbitration Act, which authorises a party interested to agree to refer a matter to arbitration, a reference may be made through a vakil or mukhtar, there is no reason why it should not be possible to make an offer under S. 9 also through an agent. Reference can also be made to O. 3, Civil P. C. Thus it is not possible to agree with the opinion of the Bombay High Court that it is the party alone that could offer to abide by the special oath under S. 9, Oaths Act.

[6] In *Wasi-ul-zaman Khan* v. *Mt. Faiza Bibi*, 38 ALL. 131, a Bench of the then Allahabad High Court also differed from *Sadashiv Rayaji* v. *Maruti Vithal*, 14 Bom. 455, and held that it was possible for a duly authorised agent of a party to make an offer contemplated under S. 9. The same view was taken in *Amir* v. *Mohamad Bakhsh*, 5 Oudh W. N. 1070. In the present case, therefore, it was possible for the client of Pt. Ajodhia Prasad to act through him in making the offer.

[7] Another question that arises is whether Pt. Ajodhia Prasad had authority in his vakalatnama to make the offer which he did. The purport of the power has already been stated. Pt. Ajodhia Prasad was authorised to do 'pairvi' and to present all applications. He could even confess judgment or withdraw a case or any application made by him. His power was, therefore, very extensive. It is true that it was not unlimited because it is specifically stated in the last paragraph that if he does anything which is beyond the scope of the authorised provisions of the vakalatnama it will not be binding upon his clients. In *Mathura Prasad* v. *Sita Ram*, 1940 oudh W. N. 662, it is further laid down that the power to make an offer under S. 9, Oaths Act, is inherent in the conduct of the case by an advocate and that if an advocate is authorised to conduct the case as well as to file and withdraw applications which are material in the course of the case, he must also be deemed to be authorised to make an offer under S. 9, Oaths Act. As I have already stated the correctness of the law laid down in this decision is challenged. I do not, however, see my way to differ from this authority on the point but there are at least two earlier Avadh cases, namely, *Amir* v. *Mahomde Bakhsh*, 5 oudh W. N. 1070 and *Mt. Jasoda* v. *Gopal*, 8 oudh W. N. 880. I, therefore, agree with the lower appellate Court that Pt. Ajodhia Prasad had authority to abide by the special oath of plaintiff 2.

[8] The result, therefore, is that the appeal fails and is dismissed with costs. Stay order dated 7-3-1944 is vacated.

B./V.R.B. *Appeal dismissed.*

A. I. R. 1953 Allahabad 314 *[Vol. 40, C.N. 133.]*

RAGHUBAR DAYAL AND AGARWALA JJ.

State v. *Wahid Bux and others, Respondents.*

Criminal Appeal No. 704 of 1949, D/- 21-8-1952.

(a) Evidence Act (1872), S. 9 — Identification of articles found in possession of accused alleged to have been taken in dacoity—Chits attached to articles—No chits on other articles mixed with those put up for identification—Articles of very ordinary type of every day use — No reliance held could be placed on such identification. [Para 4]

Anno. Evidence Act, S. 9 N 4.

(b) Evidence Act (1872), S. 9—Identification parade. In identification parades, it is always better to have as large a number of persons mixed up with the accused as possible. But no hard and fast rule can be laid down and if five times the number of the accused persons are mixed with them, it cannot be said that there is any flaw in the identification proceedings. [Para 6]

Anno. Evidence Act, S. 9 N. 5.

(c) Evidence Act (1872), S. 9—Identification parade —Identification parade of particular accused—Identification proceedings of other accused held long before or after, should not be taken into consideration in judging the value of the particular identification. [Para 9]

Anno. Evidence Act, S. 9 N. 5.

J. R. Bhatt, Asst. Govt. Advocate, for the State; S. P. Kunwar (for No. 3), Bageshwari Sahai (for No. 1) and B. D. Pande (for Nos. 2, 4, 5 and 6), for Respondents.

Agarwala J. — This is a Government appeal against the acquittal of respondents Wahid Bux, Dori, Chandu, Badam, Devi and Buddha.

[2] The respondents along with several others were prosecuted for having committed dacoity armed with guns at the house of one Thakur Prasad in the night between 4th and 5th March 1948 in village Lahdaura, district Budaun. Fifteen persons were prosecuted by the police. One of them was discharged by the Committing Magistrate. Out of fourteen who were committed to the Court of Session, only two, namely Mian Jan and Parshadi, who were caught on the spot, were convicted. The rest were acquitted. Out of the twelve acquitted persons, the Government has filed an appeal against the six respondents only.

[3] That there was a dacoity at the house of Thakur Prasad in the night in question is not disputed. In this dacoity 20 or 25 dacoits took part. Some of them were armed with guns, some with spears and others with lathis. Property worth about Rs. 30,000 was looted. The villagers came up on the scene and gave a fight. In the fight some of the villagers and some of the dacoits were injured. Two of the dacoits, Mian Jan and Parshadi, were caught by the villagers and handed over to the police. A pistol and cartridges were recovered from Mian Jan.

[4] The question with which we are concerned is whether the six respondents or any of them participated in the dacoity. The evidence against some of the respondents consists both of recovery of certain articles from their possession and of identification and against others it consists of identification alone. There were several identification parades in jail. One was held on 7-4-1948, another on 27th May, the third on 29th May, the fourth on 12th July, the fifth on 29th July, the sixth on 18th August and the seventh on 21-9-1948. Some of the witnesses appeared in more than one of the parades. The articles which were recovered from the possession of some of the respondents were put up for identification. The articles had chits attached to them. The Judicial Magistrate, who conducted the identification, was unable to say whether similar chits were placed on the other articles which were mixed with the articles to be identified. If no such chits were placed on the other articles, it was very easy to pick up the articles with chits. This would be no identification at all.

Further the articles recovered were of a very ordinary type. For instance, from Wahid Bux a Dua, a Jugnu and a patta were recovered. From Dori completely torn coat and a dhoti were recovered. From Chandu a lota, a tumbler, a longe were recovered. Nothing was recovered from the other respondents. These articles were of ordinary kind and could be found with anybody in the village and the witnesses did not point out any special features or marks of identification on them. They were not able to say to whom the articles belonged. In this view of the matter the learned Sessions Judge did not draw any inference from the fact that these articles were recovered from the possession of the aforesaid respondents. We are of opinion that the learned Sessions Judge was right in rejecting the testimony relating to the recovery of the articles.

[5] We are, therefore, left with the identification alone. The learned Sessions Judge rejected the testimony of identification also on one general ground which related to all the respondents. This was that in the first information report it had been stated that the village people set fire to a chappar of Thakur Prasad's house and that when its light spread the dacoits began to run away. The learned Sessions Judge concluded that since the dacoits ran away as soon as the chappar was set fire to, there was not enough time for the witnesses to identify them. This reasoning has not appealed to us. It appears that either the village people or the dacoits themselves set fire to the chappar of the house of Thakur Prasad probably after they had looted the house and were going out of it and were about to retire. But the villagers who had collected there gave a fight. In that fight both the parties were injured and two of the dacoits were caught as already stated. All this must have happened while the chappar was burning and there was sufficient light. The villagers had thus time to see the dacoits. It cannot, therefore, be said that there was no occasion for them

to see the faces of the dacoits. We are, therefore, unable to discard the evidence of identification on this general ground.

[6] It was urged before us by learned counsel for the respondents that identification suffered from the non-inclusion of a sufficient number of persons along with the accused at the time of identification. It appears that more than five times as many persons as the accused were mixed up with the accused. There were altogether 17 accused and 97 persons were mixed up with them. Therefore the proportion of the accused in the whole assembly was about one-sixth. It was urged that the number of persons to be mixed up with the accused should have been ten times. We do not think that there is any such general rule. Of course, it is always better to have as large a number of persons mixed up with the accused as possible. But no hard and fast rule can be laid down and we are of opinion that if five times the number of the accused persons are mixed with them, it cannot be said that there is any flaw in the identification proceedings.

[7] Wahid Bux was identified by no less than five persons, Thakur Prasad, Ram Murti, Rangi Lal, Shib Charan and Ram Charan. In his case there is a certain amount of doubt as to whether he was shown to the witnesses or not. Wahid Bux was arrested on 7-4-1948. On the same day he was taken to jail and that was the day when identification proceedings were to be held. The Magistrate who was to hold the identification proceedings, however, arrived very late at about 3 in the afternoon. For all this time the witnesses must have been waiting outside the jail. There is, therefore, a likelihood that when Wahid Bux was being taken to the jail he may have been shown to the identifying witnesses. This fact, therefore, creates a reasonable doubt in our minds about Wahid Bux having been seen by the identifying witnesses. We are, therefore, unable to convict him on the testimony of the identifying witnesses alone. There is, therefore, no reason to interfere with the order of the Sessions Judge so far as Wahid Bux is concerned.

[8] Dori respondent was identified by two witnesses, Shib Charan and Rukmi. The identification of Dori took place on 7-4-1948. Shib Charan made no mistake and identified Dori as well as other accused correctly. Rukmi identified six correct persons and made two mistakes only. In spite of two mistakes Rukmi's identification would be considered to be a good identification, specially having regard to the fact that Rukmi was one of the villagers who was injured in the fight. The learned Sessions Judge discarded his evidence because he identified two wrong persons in two subsequent identification parades. These two parades were held on 27-5-1948 and 29-7-1948. The first one of them was obviously a month and 20 days after the first identification in which Dori accused was put up and the second was even later. The learned Sessions Judge lumped up the result of all the identification proceedings and in this way considered the value of identification of each witness.

[9] The question in such cases is whether we can rely upon the identifying witnesses. Normally the result of identification proceedings in which a particular accused was put up must alone be taken into consideration in deciding this question. It is upon the basis of it that it must be held whether identification is good and reliable or fit to be discarded. Other identification proceedings in which the particular accused was not put up for identification and other accused were put up are immaterial except in so far as an inference may be drawn against the power of observation of the witnesses. This inference may be drawn from these other identification proceedings when they were held either prior to the identification proceeding relating to the particular accused or simultaneously with or shortly after it. But no conclusion can be drawn from these other identification proceedings if they were held long afterwards, because by the lapse of time a witness may lose that freshness of impression which he might have retained at the time when the proceeding connected with the particular accused was held. Therefore identification proceedings held long after the particular proceeding with which the Court is concerned should not be taken into consideration in weighing the evidence of identification with regard to a particular accused. Tested in this light the identification of Dori by Rukmi was 75 per cent. correct and was, therefore, a good identification. Taking it along with the identification of Shib Charan which was 100 per cent. correct there was sufficient evidence for the conviction of Dori.

[[9a] His Lordship considered the individual cases and proceeded.]

[10] The result, therefore, is that we allow this appeal against Dori and Badam and we dismiss the appeal against the other respondents. We set aside the order of acquittal of Dori and Badam and convict them under s. 395, Penal Code. It has been urged that they have been in detention in jail after the institution of the appeal in this Court for about three years. In view of this fact we sentence Dori and Badam to four years' R. I. only.

[11] The other respondents, Wahid Bux, Chandu, Debi and Buddha, shall be released from custody forthwith unless required in connection with some other case.

C./R.G.D. *Order accordingly.*

A.I.R. 1953 Allahabad 315 *[Vol. 40, C.N. 134]*

(LUCKNOW BENCH)

KIDWAI J.

Abdur Rashid Khan and others—*Applicants* v. *The State.*

Criminal Revn. No. 286 of 1951, D/- 14-4-1952.

(a) Criminal Trial—Evidence.

Where the evidence has been believed by the two Courts mere fact that it is partisan does not mean that it is perjured as even partisans may deliver the truth on oath. [Para 2]

(b) Penal Code (1860), Ss. 147, 149 and 323 — Convictions under S. 147 and under S. 323 read with S. 149.

Where the accused are convicted both under S. 147 and S. 323 read with S. 149, Penal Code, and none of them is convicted for himself causing any injury under S. 323, Penal Code, but only for the act of some members of an unlawful assembly of which they were members, their conviction under S. 323 read with S. 149, Penal Code, cannot stand as the conviction under S. 147, Penal Code, depends also on the same facts and they cannot be punished twice over in respect of facts which constitute one offence : A. I. R. 1940 Nag. 120, *Rel. on.* [Para 4]

Anno. Penal Code, S. 147, N. 1.

Kalbe Mustafa—for Applicants; Uma Shankar Srivastava for Deputy Government Advocate — for the State.

REFERENCE Para.
('40) A. I. R. 1940 Nag. 120 : (41 Cri. L. J. 360) 4

Order.—At about 5 P. M., on 25-3-1951, an incident took place as a result of the cutting of the breach of tamarind tree which resulted in injuries being caused to Suleman. A report was made of the incident the next day at the kotwali Rae Bareli. After investigations the applicants and eight other persons were prosecuted under ss. 147 and 323 read with s. 149, Penal Code. The applicants were, however, convicted by the Magistrate and the other eight persons were acquitted. The applicants appealed but the learned Sessions Judge upheld their conviction. They have come up in revision.

[2] The first point taken is that the evidence produced on behalf of the prosecution is partisan and should not be believed. The evidence has been believed by the two Courts. The mere fact that it is partisan does not mean that it is perjured and even partisans may deliver the truth on oath. The Courts below having believed the evidence and there being nothing inherently improbable in the acceptance of that evidence I cannot interfere in revision.

[3] It was contended also in this connection that the defence evidence should have been believed. The defence evidence related to Wahab being attacked and Wahab going to the place first of all. The Courts below have rejected this evidence and have held that Wahab went there later and was not there at all at the beginning of the incident. It is on this ground that Wahab has been acquitted. Wahab having been acquitted and the defence evidence rejected it cannot be of any avail to the applicants.

[4] The next contention was that at any rate the conviction both under Ss. 147 and 323 read with S. 149, Penal Code, is illegal. This contention must prevail. None of the applicants have been convicted for themselves causing any injuries under S. 323, Penal Code. Their conviction under S. 323, Penal Code, is by reason of the application of S. 149, Penal Code, that is to say because they were members of an unlawful assembly. It is not their individual act for which they have been convicted under S. 323, Penal Code, but for the act of some member of the unlawful assembly of which they were the members. Their punishment, therefore, depends upon their being members of an unlawful assembly and their having committed a riot in the course of which some one or more of them caused simple injuries. Their conviction under S. 147, Penal Code, also depends upon these very facts. They cannot, therefore, be punished twice over in respect of facts which taken together constitute one offence, vide *Baldeo Singh* v. *Emperor*, A. I. R. 1940 Nag. 120 at pp. 122 and 123. The conviction of the applicants under S. 323 read with S. 149, Penal Code, must, therefore, be set aside.

[5] I accordingly modify the order of the Court below by upholding the conviction and the sentence passed upon the accused under S. 147, Penal Code, and setting aside the conviction of the accused under Ss. 323/149, Penal Code, and the sentence passed under those sections.

C/D.R.R. *Order accordingly.*

A.I.R. 1953 Allahabad 316 *[Vol. 40, C. N. 135]*

DESAI J.

Lallan Parsad, Defendant — Appellant v. *Sharda Parsad, Plaintiff—Respondent.*

Second Appeal No. 788 of 1952, D/- 16-10-1952.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (2) —Enhancement of rent by agreement— Validity — Notice under S. 5 (2)—Not necessary.

The enhancement that is contemplated by S. 5 (2) is enhancement by unilateral action or which can be imposed upon the tenant against his will. But it is always open to the parties by agreement between themselves to enhance the rent; no restriction on this right has been imposed by the Act. As a matter of fact if the parties agree to pay and receive a higher rent, that becomes the agreed rent and at once becomes liable to be paid by the tenant under Section 5 (1).

Question of notice does not arise when the tenant not only knows everything about the enhancement, but has also accepted it as binding, and the enhancement by mutual agreement does not become invalid because no notice as contemplated by S. 5 (2) is given. [Para 4]

(b) Houses and Rents —U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 (a)—When committed—Intention immaterial.

When a tenant agrees to pay rent at an enhanced rate but does not, in fact, pay it, he commits a wilful default. Why he intended to commit the default is wholly immaterial. Even if he had thought that the enhancement was invalid and that he was not liable to pay at the enhanced rate, that would not make the default anything but wilful: A. I. R. 1953 All. 113, *Foll.* [Para 5]

(c) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (2) — Question whether rent was enhanced is one of fact -Finding on it is binding in second appeal — (Civil P. C. (1908), Ss. 100-101). [Para 3]

Anno. : Civil P. C., Ss. 100-101, N. 52.

D. Sanyal, for Appellant.

REFERENCE Para.

('52) S. A. No. 1807 of 1952, D/- 8-10-1952 : (A. I. R. 1953 All. 113) 5

Judgment. — This is an appeal by a tenant against whom a decree for arrears of rent and ejectment from a house has been passed. No permission of the District Magistrate was obtained for the appellant's ejectment : the suit for ejectment was filed on the ground that he had wilfully defaulted in paying the arrears within a month of the receipt of a notice demanding the same.

[2] It is admitted that originally the rent of the house in dispute was Rs. 16 per month. The case of the respondent is that by mutual agreement that rent was enhanced to Rs. 20 per month with effect from 1-9-1947 and that the appellant failed to pay the arrears in spite of a notice demanding the same. The appellant denied the enhancement of the rent from Rs. 16 to Rs. 20 per month.

[3] The trial Court held that the rent had not been enhanced but the lower appellate Court held that it had been enhanced. The lower appellate Court attached importance to the fact that in reply to the notice demanding the arrears at the enhanced rate, the appellant in his reply did not deny or repudiate the agreement of enhancement. All that he said in his reply was that it made 'excessive demand' and contained 'incorrect allegations.' This does not necessarily mean that he denied the existence of the agreement to enhance the rent to Rs. 20 per month. He did not say anything about the enhancement or the agreement to enhance or the rate of rent in his reply. Had it not been a fact that he agreed to pay Rs. 20 per month with effect from 1-9-1947, he would have said so clearly in his notice instead of resorting to such ambiguous pleas that the notice made an excessive demand and that it contained incorrect allegations. The lower appellate Court was quite justified in inferring from the appellant's failure specifically to deny the alleged enhancement by agreement that the enhancement existed. When it said that 'the defendant did not reply to the notice repudiating the agreement' it did not mean that he did not give any reply to the notice; it only meant that the reply, if any was given, did not repudiate the agreement. It is a finding of fact which is binding in second appeal that the rent was enhanced to Rs. 20 per month.

[4] I do not accept the contention that it was not open to the parties by mutual agreement to enhance the rent. Section 5 (2), U.P. (Temporary) Control of Rent and Eviction Act does not exhaustively lay down the ways in which the (agreed) rent can be enhanced. It does not bar other lawful ways to enhance the rent. It uses the word 'may' suggesting that it is at the option of the landlord to use other means of enhancing the rent. The enhancement that is contemplated by s. 5 (2) is enhancement by unilateral action or which can be imposed upon the tenant against his will. But it is always open to the parties by agreement between themselves to enhance the rent ; no restriction on this right has been imposed by the Act. As a matter of fact if the parties agree to pay and receive a higher rent, that becomes the agreed rent and at once becomes liable to be paid by the tenant under s. 5 (1). Section 5(2) deals with enhancement of the agreed rent, i. e., enhancement in the absence of an agreement. No question of notice can possibly arise when the tenant not only knows everything about the enhancement, but has also accepted it as binding. Thus enhancement by mutual agreement has greater effect than enhancement imposed upon the tenant under s. 5 (2) of the Act. I hold that the enhancement to Rs. 20 P. M. did not become invalid because no notice as contemplated by s. 5 (2) was given.

[5] The appellant next contended that even if the enhancement were valid, he did not commit wilful default in not paying the arrears at the enhanced rate. This argument is devoid of force. The appellant committed default inasmuch as he did not pay the arrears. He intended to commit the default : it is not that he did not intend to commit the default but the default occurred through accident or circumstances beyond his control. Why he intended to commit the default is wholly immaterial. He might have thought that the enhancement was invalid and that he was not liable to pay at the enhanced rate but that would not make the default anything but wilful. I do not wish to say anything more because I have dealt with this question in detail in *Second Appeal No. 1807 of 1952, D/. 8.10.1952.*

[6] Lastly, the appellant invoked the benefit of s. 114, T. P. Act, but it has no application in the present case.

[7] I, therefore, agree that the appellant committed wilful default. The appeal is dismissed.

[8] Leave to appeal to a Division Bench is refused.

B./D.R.R. *Appeal dismissed.*

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(LUCKNOW BENCH)

KAUL AND GURTU JJ.

Deputy Commissioner, Faizabad — Appellant v. Rudra Pratap Singh and others—Respondents.

First Appeal No. 12 of 1946, D/- 23-10-1952.

Civil P. C. (1908), O. 41, R. 14 and O. 5, R. 17—Refusing to take summons.

Where a party meets the process-server but refuses to accept the notice of the appeal whereupon if the process-server affixes the notice to the outer door of the residence of the party there is sufficient service of the process upon him. [Para 1]

Anno. Civil P. C., O. 5, R. 17 N. 3 Pt. 1a; O. 41 R. 14 N. 1.

P. N. Chaudhary and S. N. Srivastava — for Appellant; M P Srivastava — (for Nos. 2 to 4 and 6 to 9); Akhtar Husain and R. K. Agnihotri — (for Nos. 10 and 11)—for Respondents.

Kaul J. — In a proceeding initiated under S. 4, Encumbered Estates Act, by Rudra Pratap Singh a claim under S. 11 was filed by Avdesh Pratap Singh who was originally the appellant in F. C. Appeal No. 12 of 1946, in this Court. The claim was dismissed as time barred. It was against this order that Appeal No. 12 of 1946 was preferred. Respondent 10 was one of the creditors of Rudra Pratap Singh and, in the proceeding under the Encumbered Estates Act, a decree for a certain sum was passed in his favour. As already stated, he is a party to the appeal preferred by Advesh Pratap Singh. It may be mentioned that the property in respect of which Avdesh Pratap Singh had preferred a claim under S. 11, Encumbered Estates Act, was taken over by the Court of Wards under its superintendence in 1950. The Deputy Commissioner, Faizabad, was appointed manager Court of Wards in respect of this estate. Consequently the name of Deputy Commissioner, Faizabad, was substituted on the record of F. C. Appeal No. 12 of 1946 in place of that of the original appellant Avdesh Pratap Singh. The estate was released from the superintendence of the Court of Wards in May 1951, but no steps have been taken since by Avdesh Pratap Singh for the progress of this appeal.

[2] The present application was made by respondent 10 praying that the appeal be dismissed for want of prosecution. Notice of this application as also a notice of the appeal were issued to Avdesh Pratap Singh. The notice of the application issued for 11-8-1952 was served upon him. We find, however, from the report of the process server on the back of the notice in the main appeal for today that Avdesh Pratap Singh met the process server but refused to accept the notice of the appeal. Accordingly, the process server affixed the notice to the outer door of the residence of the appellant. For some reason, which is not clear, the learned Civil Judge to whom the notice was sent for service, has declared the service to be insufficient. We are clear that inasmuch as Avdesh Pratap Singh met the process server but refused to accept the notice there was sufficient service of the process upon him. We hold accordingly that Avdesh Pratap Singh was served with notice of the hearing of the appeal today. He is absent. The appeal is accordingly dismissed for default. The appellant shall pay the costs of the respondents. In view of this order, it is unnecessary to pass any further order on the application made by Raju Narain Pratap Singh respondent 10.

C./V.S.B. *Appeal dismissed.*

A.I.R. 1953 Allahabad 318 *[Vol. 40, C.N. 137]*

V. BHARGAVA AND CHATURVEDI JJ.

M/S. The Banarsi Stores — Appellants v. *President of the Union of Indian Republic for India, through Secy. Rly. Board, New Delhi and others — Respondents.*

First Appeal No. 149 of 1948, D/- 26-11-1952.

(a) Railways Act (1890, before amendments of 1947 and 1949), S. 75—Unless both conditions namely, the person sending the parcel had declared the value of the goods at the time of the delivery of the parcel for carriage by railway and had paid or engaged to pay a percentage on the value so declared, if required to do so by the administration are complied with, administration is not responsible for loss of goods of the nature described in section — Manner of loss is immaterial—It might be due to misconduct or theft by railway servants. [Para 10]

Anno. Railways Act, S. 75 N. 1, 4, 6.

(b) Evidence Act (1872), S. 45—Handwriting expert —Evidence is not conclusive — Overwhelming evidence in proof of handwriting — Opinion of expert to the contrary held was of no value. [Para 17]

Anno. Evid. Act, S. 45 N. 6.

(c) Railways Act (1890), S. 75 — Person sending parcel for carriage by railway not declaring value of goods—Loss of parcel to railway administration by theft or misappropriation by railway servant or otherwise — Administration is absolved from liability : A. I. R. 1946 All. 198 and A. I. R. 1952 All. 891 (FB), *Rel. on.* [Para 18]

Anno. Railways Act, S. 75 N. 6.

(d) Railways Act (1890), S. 75—"Loss"—Servant of Railway .dishonestly removing parcel from railway premises for personal gain—It is a loss to railway administration : A.I.R. 1949 All. 223, *Dissent.* [Para 18]

Anno. Railways Act, S. 75 N. 5.

(e) Railways Act (1890), S. 75—Loss to railway administration—Burden is on administration to prove it —Nature of evidence required indicated — (Evid. Act (1872), S. 106). [Para 21]

Anno. Railways Act, S. 75 N. 7; Evid. Act, Ss. 106 N. 6.

N. P. Ashthana, N. R. Sharma and Semrikh Muni — for Appellants ; Standing Counsel — for Respondents.

REFERENCES : Courtwise/Chronological/ Paras.

('45) 1945 All. L. J. 543 : (A.I.R. 1946 All. 198) Pr 18

('49) A.I.R. 1949 All. 223 : (1949 All. L. J. 166) Pr 18

('52) 1952 All. L. J. 443 : (A.I.R. 1952 All. 891 F. B.) Pr 18

Chaturvedi J. — This is a plaintiff's appeal arising out of a suit for the recovery of Rs. 16,220-14-6.

[2] The plaintiff despatched 43 silk saris from Kashi railway station to Howrah railway station on 5-10-1945. The plaintiff was the consignor as well as the consignee. The saries were loaded in a passenger train known as the 14 Down Upper India Express, and a partner of the plaintiff's firm, by name Raghunath Prasad, went in the same train by which the saris were despatched. This parcel was found missing at Howrah and was not delivered to Raghunath Prasad at Howrah after the arrival of the train at that station. There was a lengthy correspondence after this but the parcel was not delivered at all. Hence the suit.

[3] The plaintiff claimed Rs. 14,278-1-3 as price of the 43 saris despatched by him, Rs. 1,289-11-3 as interest on the above amount at Rs. 9 per cent. and Rs. 653-9-3 as expenses incurred in coming and going to Calcutta in connection with the steps taken for obtaining delivery of the saris.

[4] The plaintiff's case was that the saris were not of a description which required to be declared and insured according to the provisions of S. 75, Railways Act, and the suit was based on non-delivery of the parcel containing these saris. The plaintiff did not admit that the parcel had been lost to the railway administration and the prayers contained in the plaint were that the missing parcel with its contents be ordered to be delivered to the plaintiff, and in the alternative, a decree be passed in its favour for the recovery of the price of the saris with interest and incidental charges as mentioned above.

[5] The main defence to the suit were that the consignment in suit consisted of silk saris with and without gold or silver thread-work of the value of more than Rs. 100; and should, therefore, have been declared and insured as provided by S. 75, Railways Act. It was alleged that the plaintiff did not declare the value nor paid the insurance charges; on the other hand, he executed a risk note in Form X exonerating the railway administration of all responsibility for the loss of the consignment. It was further pleaded that the consignment had been lost in spite of the best efforts and vigilance of the railway staff which was not negligent or careless. The value of the consignment, as alleged by the plaintiff, was said to be exaggerated.

[6] The learned 1st Additional Civil Judge of Banaras who tried the suit framed altogether six issues in the case, but the issues which are material for the purposes of this appeal are the first three issues framed by him. These three issues are as follows:

1. Whether the consignment in suit consisted of goods excepted within the meaning of S. 75, Railways Act; if so, what is its effect?

2. Whether the goods in dispute were consigned with the defendant in risk-note form X; if so, what is its effect?

3. Whether the consignment in suit was not delivered to the plaintiff on account of gross negligence and misconduct of the defendants or was the same lost as alleged by the defendants?

[7] On the first issue the learned Civil Judge held that the goods consigned consisted of pure silk saries with or without gold or silver thread-work and they were not artificial silk or imitation thread. The goods were itself of a description which required to be declared and insured under S. 75, Railways Act. The findings of the learned Civil Judge on issue 2 were that Radhey Lal, a partner of the plaintiff's firm did execute risk note Form X. In the third issue the learned Civil Judge found that Radhey Lal did declare the value of the goods to the clerk concerned but he did not agree to pay the insurance charges; that the parcel in dispute was lost between Moghal Sarai and Burdwan and was no longer in the custody of the railway administration. The defendant, therefore, was not liable to the plaintiff for the payment of the price of the articles consigned. The learned Civil Judge went on to hold that, if the defendant had been held liable to pay the value of the consignment, the Civil Judge would have decreed the entire claim, because the value of the saris had been proved to be as alleged by the plaintiff in the plaint. In the end the learned Civil Judge dismissed the suit with costs, on the finding that the defendant was protected by the provisions of S. 75, Railways Act.

[8] The learned counsel for the appellant has argued that the goods were not of a description which required to be declared and insured under S. 75, Railways Act; that in any case, even if they were so required to be declared and insured, the plaintiff had declared the value of the goods and it was not proved that Radhey Lal had ever executed the risk note Form X; that the goods have not been proved to be lost to the railway administration; and that the loss, if any, was caused by the theft or misappropriation by the servants of the railway administration.

[9] We propose to deal with the last point first, as in our opinion, the question does not arise in a case which is covered by S. 75, Railways Act, and in which a risk note in Form X has been duly executed. Section 75, Railways Act, was amended once in the year 1947 when the words "Rs. 300" were substituted for the words "Rs. 100" and again in the year 1949 when more substantial amendments were made in the section. As stated above, the goods were consigned on 5-10-1945 and the present suit was instituted on 1-10-1946. We shall, therefore, have to ignore the amendments mentioned above and have to decide the case on the section, as it stood before the amendments of 1947 and 1949. Before these amendments S. 75, Railways Act, stood as follows:

"75 (1) When any articles mentioned in Sch. 2 are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

(2) . . . . ,

(3) . . . . ."

[10] The section clearly provides that the railway administration would not be responsible for the loss, destruction or deterioration of the parcel unless the person sending the parcel had declared the value of the goods at the time of the delivery of the parcel for carriage by railway and had paid

or engaged to pay a percentage on the value so declared, if required to do so by the administration. Unless both these conditions were complied with, no responsibility attached to the railway administration for the loss of the parcel; and it did not matter in what way this loss was caused. In the case of the class of goods mentioned in sch. 2 the value of which exceeded one hundred rupees the railway administration would naturally take extra care and were entitled to be paid additional charges. If the plaintiff elected not to fulfil both the conditions, he took the risk of the parcel being lost; and the section nowhere provides that under such circumstances the railway administration would be responsible for making good the loss in case it was caused by misconduct or theft by servants of the railway. We have, therefore, to consider in this appeal whether the plaintiff had declared the goods, and whether he was required by the railway administration to pay an additional charge and had refused to do so. We have further to see whether the goods were of a description as mentioned in sch. 2 attached to the Railways Act. We have also to see whether the goods have been lost not only to the plaintiff but also to the railway administration.

[11] We propose to decide these points in the order in which they were argued by the learned counsel for the appellant.

[12] The first contention of the learned counsel for the appellant was that the saris were made of artificial silk and were wrought up with imitation gold or silver thread. They were not thus of the description given at items (a), (c) or (1) of sch. 2 of the Railways Act. On these points the plaintiff has produced one of his partners, Radhey Lal, and another partner, Raghunath Prasad, and another silk merchant Bhola Nath, the munim of the plaintiff firm, Daya Shankar, and three weavers, by name Asghar Husain, Mohammad Umar and Abdul Rauf.

[13-14] Before considering the oral evidence produced by the plaintiff on the point, we propose to consider the documentary evidence first. (After discussing this evidence his Lordship proceeded): In view of the facts mentioned, we agree with the learned Judge in his conclusion that Banarsi silk is genuine silk, and the saris despatched under the parcel were made of Banarsi silk, as the documentary evidence mentioned above fully establishes. In view of the said documentry evidence, and the admitted fact that the cloth known as Banarsi silk is not artificial silk, we have no hesitation in disbelieving the witnesses produced by the plaintiff on this point. As stated above, the parcel, therefore, was of a description mentioned at item (1) of sch. 2 of the Railways Act.

[15] The next point that arises for consideration is whether the plaintiff had declared the value of the goods at the time of the delivery of the parcel for carriage by the railway. (His Lordship considered the evidence and proceeded): In this state of evidence, we are of the opinion that it has not been proved that Radhey Lal declared the value of the parcel. The learned Civil Judge has held it to be proved that the value of the parcel has been declared by Radhey Lal; and for this finding, he has mainly relied on the fact that the risk note in form X had been executed and the execution of this risk note pointed to the conclusion that the value must have been declared. We find ourselves unable to agree with the learned Civil Judge on this point, because everybody could have known that the value of the goods contained in the parcel was more than RS. 100; and this being the value, the necessity of the execution of the risk-note immediately arose. The execution of this risk-note was denied by Radhey Lal, but we have considered the above point on the assumption that Radhey Lal had actually executed the risk-note; as we are of the opinion that it had been proved that Radhey Lal did execute the risk-note EX. A5.

[16] This risk-note has actually been produced in Court by the defendant and it is difficult to believe that the defendant or any servant of the defendant would go to the length of forging Radhey Lal's signature on the risk-note. (His Lordship considered the evidence on the question of proof of the risk-note and continued): The evidence mentioned above leaves no room for doubt that the risk-note was executed by Radhey Lal at the time when he tendered the parcel to the parcel clerk at Kashi Railway Station, and we agree with the learned Civil Judge on his finding on this point.

[17] The plaintiff has produced a handwriting expert, Mr. M. M. Sen Gupta, to prove that the signatures on the risk-note are not those of Radhey Lal. The learned Civil Judge has not placed any reliance on the statement of this witness, because he was of the opinion that the opinion of this witness was likely to be prejudiced in favour of the party who had paid him and summoned him to appear as a witness. The opinion of a handwriting expert is seldom conclusive and the same is the position as far as the opinion of Mr. Sen Gupta in the present case is concerned. The documentary evidence to prove that Radhey Lal had executed the risk-note is overwhelming, and, under the circumstances, no importance can be attached to the opinion of this handwriting expert in the present case.

[18] The next point argued by the learned counsel for the appellant is that the plaintiff would still be entitled to a decree unless the defendant proved that the parcel had been lost to the railway administration. His contention is that S. 75, Railways Act, absolves the defendant from liability only in case it is proved that the parcel has been lost not only to the plaintiff but also to the railway administration. In support of this proposition the learned counsel cited three cases

reported in *Governor-General-in-Council* v. *Debi Sahai*, 1945 ALL. L. J. 543, *Governor-General-in-Council* v. *Mohammad Badr-i-alam*, A. I. R. 1949 ALL. 223 and *Governor-General-in-Council* v. *Mahabir Ram*, 1952 ALL. L. J. 443 (F. B.). The first case mentioned above is a Division Bench case of this Court and it fully bears out the contention of the appellant's counsel on the point; and the last case is a Full Bench case of this Court, and it clearly lays down that the word 'loss' as used in s. 77 means loss to the railway administration. We respectfully agree with the propositions of law laid down in the first and the last case mentioned above. But in the second case certain observations have been made by a learned Single Judge with which, with the greatest respect, we find ourselves unable to agree. The learned Single Judge lays down :

"Where, for instance, the goods were lying in a godown of a railway somewhere on the line or have been deliberately removed or stolen by some employee of the railway, that would not be a case of a 'loss' by the railway company. Surely the railway company would not be deemed to 'lose' what a servant of the company is all the time keeping for his own enjoyment."

We have no difficulty in agreeing with the learned Judge that, if the goods were lying in a godown of a railway somewhere on the line, it could not be said that the goods had been lost to the railway administration. They are then really in the possession of the railway and have certainly not been lost to the railway administration. But when the learned Judge goes on to say that, if the goods were removed or stolen by some employee of the railway and such employee was keeping the goods for his own enjoyment, even then the railway would not be said to have lost the goods, we think the learned Judge has gone too far. If the railway servant has deliberately removed the goods and is keeping them at his house for his own enjoyment, the possession of the goods is no longer with the railway administration; but it has transferred to the employee who has removed the goods. On the question whether the master or the servant is in possession of the goods, the element of intention of the servant, who may be in actual possession, is the determining factor. If the servant is keeping the goods with himself for his own use or has removed them for that purpose, the possession has immediately been transferred from the master to the servant. If it were otherwise, there would hardly be a case of theft of the master's goods by a servant. We are, therefore, of the opinion that, if the parcel is not in the possession of the railway administration but has been removed by some servant of the railway dishonestly for his personal gain, the parcel must be taken to be lost to the railway administration.

[19] In this view of the matter, it is not necessary to decide whether the loss has been occasioned by a theft or misappropriation by a railway servant or by somebody else. If the parcel is proved to be no longer in the possession of the railway administration, we must take it to be established that the parcel has been lost to the said administration.

[20] We have, therefore, to consider whether it has been proved by the defendant that the parcel in question has been lost to it. The loss of this parcel was to be proved by the defendant, and to prove the loss, the defendant has produced two guards, by name Ram Shankar and R. T. Ojha; an assistant luggage and parcel supervisor at Howrah by name N. K. Mitter, and a clerk in the Chief Commercial Manager's office, Calcutta, by name K. P. Rai Chaudhari. (His Lordship went through their evidence and proceeded :)

The learned counsel for the appellant argued that the defendant should have produced all the letters that were written to the different station masters and their replies to those letters; and that the defendant should have appointed somebody to go to every railway station and to look into every parcel office to find out the parcel. We do not agree with this contention of the learned counsel, and we think that it would be laying too heavy a burden on the railway administration to require them to positively prove that every parcel office of every station has been thoroughly searched; and, probably, every other building belonging to the railway administration has laso been searched for each individual parcel; and the person or persons who have made the search should come to Court and state these facts; and it is only then that the Courts can possibly hold that a parcel has been lost to the railway administration. It is true that the burden of proving loss of the parcel to the railway administration lies on the administration, but when parties have entered into evidence, it is for the Courts to decide on that evidence as to whether the parcel has been proved to have been lost or not. In this connection, we may point out that the Upper India Express becomes a passenger train from Moghal Sarai to Howrah and there must have been hundreds of railway stations where the train must have stopped while running from Moghal Sarai to Howrah.

[21] We think that it was quite sufficient for the railway authorities to have made enquiries from every station master on the line, and it was not at all necessary that a man should have been deputed for looking into the parcel office of every railway station for every parcel, and then come to make statement in Court that he has personally looked into every parcel office of all intermediate stations but the parcel was not found at any one of them. This was not a case where there was any transhipment of goods at any intermediate station; it was the same train which went from Kashi up to Howrah. It is proved that the parcel was loaded at Kashi and it is proved that it was not available at Howrah, and, to avoid a remote possibility of the parcel having been taken out by

mistake at anyone of the intermediate stations, inquiries were made from all the station masters. In our opinion, this was quite sufficient to prove that the parcel has been lost to the railway administration; and we agree with the Court below on its finding on this point.

[22] There is a possibility that the parcel may have been misappropriated by some of the railway servants, but there is no doubt that, as far as the railway administration is concerned, the parcel has been lost to them. On these facts, the railway administration is fully protected by the provisions of S. 75, Railways Act, and by risk-note in form X which embodies a special contract between the parties.

[23] We, therefore, confirm the decree passed by the learned Civil Judge and dismiss this appeal with costs.

A/R.G.D. *Appeal dismissed.*

A.I.R. 1953 Allahabad 322 *[Vol. 40, C. N. 138]*

MUSHTAQ AHMAD J.

Shyam Sunder Lal and another—Defendants — Appellants v. *Shagun — Plaintiff — Respondent.*

Second Appeal No. 2228 of 1948, D/- 27-11-1951.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3 and 15—Applicability — Suit for ejectment of tenant — Decree passed — During pendency of appeal Act extended to area in question for first time — Suit is not bad for want of sanction as required by S. 3.

A landlord brought a suit on 31-10-1946 for ejectment of his tenant without the permission of the District Magistrate when the U. P. Ordinance 3 of 1946 was in force, though not in the area in which the house was situate. The suit was decreed. During the pendency of appeal from the decree, U. P. Act 3 of 1947, which took the place of the U. P. Ordinance with retrospective effect from 1-10-1946, was for the first time extended to the area in question on 5-3-1949. According to S. 3 of that Act permission of District Magistrate was necessary for the institution of the suit :

Held that (i) the suit could not be held to be defective for want of permission as required by S. 3 of U. P. Act 3 of 1947. The fact that the Act was extended to the locality could not make it applicable to that locality from the date of the commencement of the Act but only from the date of extension to the locality. Consequently, the Act did not apply on the date of the institution of the suit and as such there was no bar to an ejectment decree being passed in such suit : A. I. R. 1950 All. 504, *Rel. on.* [Paras 6, 7]

(ii) The suit in question was not pending on the date of the commencement of the Act, viz., 1-10-1946, and as such the provisions of S. 15 of the Act were not applicable. [Para 7]

(iii) The Act of 1947 having taken the place of the Ordinance with retrospective effect from 1-10-1946, it was the provisions of the Act and not the Ordinance that were applicable. [Para 8]

Babu Ram Avasthi—for Appellants.
M. L. Chaturvedi—for Respondent.

REFERENCE : Para.

('50) 1950 All. L. J. 345 : (A. I. R. 1950 All. 504) 6

Judgment.—This is a defendants' appeal in a suit for ejectment and arrears of rent. The suit was filed on 31-10-1946, when the U. P. Ordinance 3 of 1946 was in force, the relief for ejectment being based on the landlord's own requirement of the house. The defendants, who are father and son, executed a rent note in the plaintiff's favour on 23-1-1941, at a monthly rent of Rs. 4 in respect of the house from which their ejectment was sought by the plaintiff. A notice was sent by the plaintiff to the defendants on 9-9-1946, asking them to quit the house by 22-10-1946, and also to pay the arrears of rent. The relief for ejectment was, of course, sought on the basis of this notice and the defendants' refusal to leave the house.

[2] The defence taken was that the notice was bad, that the defendants had sent Rs. 23-1-0 after deducting 0-15-0 as cost of repairs to the plaintiff, this amount being the rent for the six months for which the claim had been made, that the amount had not been accepted by the plaintiff, that the defendants had, therefore, not been in default of payment of rent and that the plaintiff's allegation of personal need of the house was untrue.

[3] The trial Court, while decreeing the arrears of rent, dismissed the relief for ejectment, putting the costs on the parties themselves. The findings recorded by the Court were that the notice served by the plaintiff was valid, that he did not require the house for his own use and that Rs. 24 were payable to the plaintiff as arrears of rent.

[4] On appeal by the plaintiff the relief for ejectment was also allowed, with the result that the entire suit stood decreed. The findings in appeal were that the notice was valid and that the U. P. (Temporary) Control of Rent and Eviction Act, 3 of 1947, was not applicable, as the house lay within the town area of Qaimganj.

[5] The only point of substance urged before me by the learned counsel for the defendants-appellants was that, although the Act just mentioned did not apply on the date of the decree of the lower appellate Court, it is applicable now, as the Act has since been extended to the town area of Qaimganj under a notification dated 5-3-1949, published at page 201 of the U. P. (Hindi) Gazette.

[6] To begin with, if by reason of this notification the U. P. Act 3 of 1947 is held applicable to the present case, we shall be face to face with a very anomalous situation. That would be that, although none of the provisions of the Act were applicable on the date the suit was filed on 31-10-1946, we would be penalising the plaintiff for not doing something which subsequently came to be enjoined by the Act as a result of the notification just referred to. Such a position is commensurate neither with logic nor the ordinary principles of justice. How can a party be made to suffer for not doing something which the law had never enjoined during the period to which the charge about his failure to do that thing relates? To put the position in a concrete form, there was no such provision on the date of the institution of the suit in the present case as is contained in S. 3 of the Act, requiring the landlord to claim the eject-

ment of his tenant either on the happening of certain specified events or on any other ground with the permission of the District Magistrate. This provision, so far as the locality in dispute is concerned, came to apply only on 5-3-1949, when the notification referred to above was published. To hold, therefore, that the plaintiff ought to have complied with the rules and restrictions contained in s. 3 even at a time when they never existed in this particular locality would be to insist upon something which was a veritable impossibility. In this view, there was, of course, no defect in the suit filed by the plaintiff-respondent by reason of his having failed to do something before he filed it. The question arose before a learned Judge of this Court in *Rup Lal* v. *Ram Swarup*, 1950 ALL. L. J. 345, and it was there pointed out that in circumstances like these it could not be said that there was any defect in the institution of the suit.

[7] The matter of the applicability or otherwise of s. 3 may yet be approached from another stand-point. The enforcement of this section has been specifically enjoined in s. 15 of the Act. That section, however, applies only to suits pending on the date of the commencement of the Act. The date of the commencement of the Act, as held in several cases, must now be taken to be 1-10-1946, in view of the provisions of s. 1 (3) of the Act. The suit in the present case was filed much later on 31-10-1946. It was, therefore, not a suit pending on the date of the commencement of the Act and as such s. 15 of the Act would in terms not apply. If the argument advanced by the learned counsel for the defendants-appellants with regard to the applicability of the Act to this case were accepted, we would be necessarily disregarding the position I have just stated with reference to s. 15 of the Act and inevitably hold that the section is applicable also to cases that were not pending on the date of the commencement of the Act but filed later. Such an interpretation would be contrary to the plain terms of the section. This aspect of the matter also was considered in the case I have already mentioned, and it was definitely held that the fact that the Act might have been extended to a particular locality made the Act applicable to that locality only from the date of such extension and not from the date of its commencement. I am in entire agreement with that view, and I hold that the Act having been extended to the Qaimganj town area after the institution of the suit giving rise to the present appeal, the Act did not apply on the date of its institution and as such there was no bar to an ejectment decree being granted to the plaintiff-respondent.

[8] It was also contended by the learned counsel for the defendants-appellants that the suit having been brought at a time when the U. P. Ordinance, 3 of 1946, was in force (this was in force from 1-10-1946 to 31-3-1947) and that the Ordinance having enjoined the permission of the District Magistrate being taken before a suit for ejectment could be filed, the plaintiff should have taken such permission in the present case also. I am not inclined to accept this argument. It may be mentioned again that the U. P. Act 3 of 1947, was made retrospective from 1-10-1946. This Act took the place of the said Ordinance, with the result that nothing required by the Ordinance could be deemed to be in force from that date, so that, if the applicability of the Act was not otherwise barred, it was the provisions of the Act and not of the Ordinance which could be applied to the present case from 1-10-1946. The Act itself was not applicable as it did not apply to town area and it came for the first time to be applied to the town area in Qaimganj as late as 5-3-1949, when the notification to that effect was published in the Gazette. In these circumstances it is the Act and nothing else which was applicable to the case from the date of this notification. Having already held that, under the notification the Act, by which I mean the provisions of s. 3 of it, came to be applicable for the first time on 5-3-1949, and not earlier, I cannot accept this contention also.

[9] For these reasons, I uphold the judgment of the lower appellate Court and dismiss this appeal with costs.

[10] Leave to appeal to a Bench is granted.

B/K.S. *Appeal dismissed.*

A.I.R. 1953 Allahabad 323 *[Vol. 40, C. N. 139.]*

MALIK C. J. AND SAPRU J.

Badri Prasad and others—Applicants v. *Shri Nath and others—Opposite Party.*

Civil Misc. Writ No. 299 of 1952, D/- 14-8-1952.

U. P. Panchayat Raj Act (26 of 1947), Ss. 77A, 49 and R. 62A—Retrospective operation of S. 77A—Does not affect orders or decisions already made — R. 62A cannot amend or alter S. 49 : A. I. R. 1952 All. 510, *Approved.* [Paras 1 and 2]

Gopi Nath—for Applicants.

REFERENCE Para.

('52) 1952 All. L. J. 98 : (A. I. R. 1952 All 510 : 1952 Cri. L. J. 940). 2

Malik C. J.— The Panchayati Adalat disposed of this case by an order passed before June 1950. There was a revision filed in the Court of the Sub-Divisional Magistrate, Phulpur, who on 3-6-1952, came to the conclusion that as only four Panches had decided the case and appended their signatures on the order, in place of five, the judgment of the Panchayati Adalat was invalid in view of s. 49, Panchayat Raj Act. Learned counsel has drawn our attention to s. 77A of the Amending Act which lays down that it was not necessary for all the five Panches appointed to a Bench constituted under s. 49 of the Act to be present at all the sittings nor was it necessary for all the five Panches to sign the judgment before it was delivered by the Panchayati Adalat. This amending section has been given retrospective effect, but it cannot reopen orders or decisions which

had already been made. The Sub-Divisional Magistrate had disposed of the case on 3-6-1952, before the amendment and his order was perfectly in accordance with the law then in force.

[2] Learned counsel has drawn our attention to R. 62A of the rules framed under the Panchayat Raj Act and has urged that that rule was not brought to the notice of the Bench deciding the case of *Jiwa Ram* v. *Panchaiti Adalat*, 1952 ALL. L. J. 98 and that even before the amendment it was not necessary for all the five Panches to attend all the sittings or to sign the judgment. Section 49 fixes the quorum required for a Panchaiti Adalat and the State Government cannot amend the section by making a rule which was not in accordance with the provisions of the Act. Before the amendment of the Panchayat Raj Act, the decision had to be by a Bench of five Panches. In *Jiwa Ram's case* it was held that when the Act had fixed the quorum at five, all the five Panches forming the Bench must take part in the trial and the decision of the case. The judgment of the Sub-Divisional Magistrate, having been delivered before the amendment, was perfectly correct. The subsequent amendment of the Act cannot affect that decision.

[3] This application has no force and is dismissed.

C/D.R.R. *Application dismissed.*

A.I.R. 1953 Allahabad 324 *[Vol. 40, C. N. 140.]*

(LUCKNOW BENCH)

P. L. BHARGAVA J.

Raja Ram Kumar Bhargawa, Applicant v. *State.*

Criminal Revn. No. 90 of 1951, D/- 26-4-1952.

Factories Act (1948), S. 106 — Inspector of factory writing communication to District Magistrate enclosing complaints—Letter held written to District Magistrate in his capacity of District Magistrate and not in his capacity as Inspector of Factories — Letter held amounted to complaint within S. 106. [Para 10]

B. K. Dhaon and Suresh Chandra, for Applicant; Addl. Govt. Advocate, for the State.

REFERENCE Para

('49) Cri. Reference No. 68 of 1948, D/- 12-5-1949 (All), P. C. Bhargava v. Rex. 12

Order. — The applicant, Raja Ram Kumar Bhargava is the 'occupier' of a factory known as the Upper India Couper Paper Mills Company Limited, Lucknow. He was prosecuted for an offence, punishable under s. 92, Factories Act (63 of 1948) for contravention of the provisions of S. 54 of the same Act. Section 54, Factories Act is in these terms:

"Subject to the provisions of S. 51, no adult worker shall be required or allowed to work in a factory for more than nine hours on any day."

[2] The case for the prosecution was that, on 12-4-1950, an Inspector of Factories discovered that, on 18-2-1950, five persons were 'allowed' to work in the factory, of which the applicant is the occupier, for more than nine hours.

[3] Learned counsel for the applicant opened his arguments with reference to a letter from the Chief Inspector of Factories, Uttar Pradesh, addressed to the District Magistrate of Lucknow, which is not on the record of the case before me but which has been filed in a connected case, pending in the Court of the City Magistrate of Lucknow. A copy of the letter should have been placed on the record of the case if the applicant intended to rely upon it. However, in order to appreciate the arguments advanced on behalf of the applicant, and in view of the importance of the question raised before me, I have seen the letter and consider it worthwhile to quote it 'in extenso.' Its contents are as follows:

"I have the honour to send herewith seven complaints against Shri Raja Ram Kumar Bhargava, Occupier and Shri Henry Thimas Maclaughlin, Manager of the Upper India Couper Paper Mills Ltd., Lucknow, under the Factories Act and request you to kindly inform the Court concerned for further action. Copies of the complaints are sent to the City Magistrate Lucknow, direct.

"2. Will you please let me know the place and date fixed for hearing the case giving at least 15 days' notice so that the tour of the Inspector may be arranged accordingly and direct Shri Zami Abbas, Pleader, to conduct the case.

"3. The accused may be heard at the first hearing and the case decided without the presence of the Inspector, if they plead guilty, otherwise another date may be fixed and the Inspector summoned.

"4. In this connection your attention is invited to para. 5 of the G. O. No. U-643(L)/XVIII 433(L)-42, dated 20-8-1943, addressed to all District Magistrates, and it is, therefore, requested that the Inspector concerned may please be summoned when the Court has made sure of the presence of the accused and has otherwise satisfied itself that the case is ready for hearing, as this would facilitate the work of the Inspectorate and reduce expenditure incurred on travelling allowance."

[4] The letter was received by the District Magistrate, on 11-7-1950, and was dealt with by the Additional District Magistrate, who forwarded the same to the City Magistrate of Lucknow for disposal on 13-7-1950.

[5] On the record of this case, there are two complaints, bearing the date 8th July and signed by the Chief Inspector of Factories. One of them has been exhibited and marked EX. P-1 in the case and the other, which is a copy of the same complaint, has been marked 'Duplicate.' A look at these complaints goes to show that the complaint which is marked 'Duplicate' is the original, while the complaint which has been exhibited is a carbon copy.

[6] The order-sheet of the case before me opens with the order-sheet, dated 13-7-1950, which shows that the complaint was put up before the City Magistrate on that date and the case was registered, and the accused, the present applicant, was summoned to appear before the Court.

[7] On 28-8-1950, an application was made on behalf of the applicant in the Court of the City Magistrate of Lucknow. In this application it was asserted that the Court had no jurisdiction to take cognizance of the offence as no complaint had been made within three months of the date

on which the alleged offence came to the knowledge of an Inspector. It was pointed out that the offence complained of had come to the notice of an Inspector on 12-4-1950, while the cognizance of the offence was actually taken on 13-7-1950. The City Magistrate overruled the objection on the ground that a complaint in respect of the offence had, in fact, been made within the prescribed period; and as such it was immaterial when the cognizance was actually taken.

[8] The matter was taken up in revision before the Sessions Judge of Lucknow, who found no force in the revision and upheld the order of the City Magistrate. In his order rejecting the revision, the learned Sessions Judge pointed out that the complaint in the case was received by the District magistrate not as Inspector of Factories but as District Magistrate on 11-7-1950, that is, within three months of the date on which the offence came to the knowledge of an Inspector and that the complaint must, therefore, be deemed to have been made within the prescribed period of three months and as such the City Magistrate, to whom the complaint was transferred, was justified in taking cognizance.

[9] The applicant has now come up to this Court in revision and the same objection has been repeated before me. In my opinion, the view taken by the Courts below in this case is perfectly correct. Section 106, Factories Act, which provides the limitation for prosecutions, is as follows :

"No Court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector."

In order to enable any Court to take cognizance of an offence punishable under the Act, the only condition imposed by the said section is that a complaint in respect of the offence complained of must be made within three months of the date on which commission of the offence came to the knowledge of an Inspector. In the present case, the commission of the offence came to the knowledge of an Inspector on 12-4-1950; and before the expiry of three months from the said date the Chief Inspector of Factories made a complaint in respect of the offence said to have been committed by the applicant to the District Magistrate of Lucknow, by means of a letter, dated 8-7-1950.

[10] Learned counsel for the applicant has contended that the letter was merely a communication from the Chief Inspector of Factories to the District Magistrate who, in view of the provisions of s. 8 (4), Factories Act, was himself an Inspector of his district. The letter, which has been quoted above 'in extenso', clearly shows that the letter was addressed to the District Magistrate as such and the complaints were enclosed with the letter for being forwarded to the Court concerned for further action. It was further stated in the letter that the copies of the complaint had already been forwarded to the City Magistrate of Lucknow, which was the Court concerned. The complaints which were enclosed with the letter mentioned the offences said to have been committed by the applicant and a request was made for his prosecution. A request was made in the letter for the communication of the date and place fixed for the hearing of the case; and the procedure to be followed in informing the Inspector and the Pleader in-charge of the prosecutions of such cases was also indicated. At the stage at which the letter was sent a decision had been taken to prosecute the applicant for the offence said to have been committed by him and at that stage there was no point in the Chief Inspector of Factories informing the District Magistrate as Inspector of Factories about the offences said to have been committed by the applicant.

In my opinion, therefore, the letter and its accompaniments were 'complaint' within the meaning of that expression used in s. 106, Factories Act. It follows, therefore, that a complaint of the offence was, in fact, made within the time prescribed by s. 106, Factories Act, and that being so, the City Magistrate was quite competent to take cognizance of the offence complained of.

[11] Further, it may be pointed out in this connection that, as indicated in the letter of the Chief Inspector of Factories, copies of complaint had been forwarded to the City Magistrate of Lucknow direct, and the fact that they had reached the City Magistrate's Court is evident from the fact that on the record of this case there are, as already stated, two copies of the complaint. The copy of the complaint, which is dated 8-7-1950, must have, in the ordinary course, reached the City Magistrate on or before 11th July 1950. The letter, dated 8th July 1950, from Chief Inspector of Factories to the District Magistrate had reached the latter on 11-7-1950, and that is the date mentioned as the date of complaint in the record of the proceedings of the summary trial in this case. The complaint of the offence had, therefore, reached not only the District Magistrate but also the Court concerned, —the City Magistrate of Lucknow—within the prescribed period of 3 months.

[12] It remains for me to consider an unreported decision of this Court, to which my attention has been invited by the learned counsel for applicant. It is the decision of this Court in a Criminal Reference *P. C. Bhargava* v. *Rex*, decided on 12-5-1949. That decision, no doubt, supports the argument advanced on behalf of the applicant. But, I find that that case is distinguishable on two grounds. In that case, firstly, there was no evidence, as in this case, that a copy of the complaint had been sent by the Chief Inspector of Factories direct to the City Magistrate and it had reached his Court within the prescribed period, and, secondly, it was found that the Chief Inspector of Factories had reported the matter to the District Magistrate as

Inspector for the District of Lucknow, while, as pointed out above, that is not the case here.

[13] For the reasons stated above, I am of opinion that the decision of the Courts below is correct and there is no reason to interfere with it in revision. The revision is, accordingly, rejected. The order staying proceedings is discharged. Let the record be returned to the Court concerned as soon as possible.

C/R.G.D. *Revision dismissed.*

A.I.R. 1953 Allahabad 326 *[Vol. 40, C. N. 141]*

BRIJ MOHAN LALL J.

Makhan Lal Jain and another, Petitioners v. *The Amrit Banaspati Co. Ltd. and others, Opposite Party.*

Company Case No. 45 of 1951, D/- 19-11-1952.

(a) Companies Act (1913 as amended by Act 52 of 1951), S. 153C (3) — 'Consent in writing', meaning of (Words and Phrases — 'Consent in writing') — (Evidence Act (1872), S. 91)—(Civil P. C. (1908), S. 92).

The expression "consent in writing" in S. 153C (3), Companies Act, obviously implies that the writing itself should indicate that the persons who have affixed their signatures have applied their minds to the question before them and have given their consent to certain action being taken. If a petitioner obtains another share-holder's signature on a blank piece of paper and wishes to supplement it by an affidavit or an oral sworn statement of himself or his agent, the signature on the blank paper does not become consent in writing. [Para 6]

The law requires that the consent should be in writing, i. e., in the form of a document. Therefore, the document itself should prove that the consent has been given. No evidence, either by way of affidavit or of oral sworn statement in Court, can be given under S. 91, Evidence Act, to prove that such consent was given. [Para 8]

Anno. Evi. Act, S. 91 N. 3, 19.

(b) Companies Act (1913 as amended by Act 52 of 1951), S. 153C (3) – 'Consent in writing'.

Under S. 153C the obtaining of the consent is a condition precedent to the making of the petition and must have been obtained prior to the presentation of the application. A consent given subsequent to the filing of the petition is invalid. [Para 10]

A. Sanyal, J. Swarup and Hari Swarup, for Petitioners; C. K. Daphtari, S. N. Verma, B. L. Gupta, Satyendranath Varma and Bhagwan Das, for Opposite Party.

Order.—This is an application under ss. 153C and 153D recently inserted in the Companies Act (7 of 1913) by the amending Act (52 of 1951). The petitioners are two share-holders in the Amrit Banaspati Company Limited, Ghaziabad, hereafter described, for brevity's sake, as the company. They have made various allegations of mismanagement and foul play against the company, its Directors and Managing Agents. But it is unnecessary to go into those allegations at this stage because a preliminary objection has been taken by the learned counsel for the opposite parties and the petition fails, in my opinion, on that preliminary ground alone.

[2] It is contended on behalf of the opposite parties that the requirements of sub-s. (3) of S. 153C have not been complied with. The relevant portion of this sub-section reads as follows :

"(3) No application under sub-s. (1) shall be made by any member, unless—

(a) in the case of a company having a share capital, the member complaining—

(i) has obtained the consent in writing of not less than one hundred in number of the members of the company or not less than one-tenth in number of the members, whichever is less, or

(ii) holds not less than one-tenth of the issued share capital of the company upon which all calls and other sums due have been paid; and

(b) . . . . . ."

[3] It is conceded by the petitioners that they do not hold one-tenth of the issued share capital of the company and, therefore, they do not fall under cl. (ii). They maintain that their case falls under the first part of cl. (i) inasmuch as they allege to have obtained the consent in writing of more than hundred share-holders. They do not rely on the second part of cl. (i).

[4] What the petitioners did was to attach with the petition several sheets of papers which bear the signatures (together with addresses) of as many as 117 share-holders. It is to be remembered that these persons are not signatories to the petition and they are not supposed to have joined the petition as petitioners. It is the petitioners' case that they have given their consent only.

[5] Sometime afterwards the petitioners produced the consent in writing of 30 other share-holders. On the date of hearing, consent of 22 other share-holders was produced. In the cases of second and third sets of share-holders an endorsement was made at the top of each sheet to the effect that the share-holders were expressing their approval of the application filed by the petitioners in this Court. But no such endorsement is to be found in the case of 117 share-holders whose signatures were filed along with the petition. They do not write anything at the top of the sheet on which their signatures are to be found. Looking at the sheets themselves, one cannot ascertain why the signatures were affixed. The petitioners felt that there was this lacuna and to fill it up they filed an affidavit of one Jagannath who is himself a share-holder and who describes himself as the Mukhtar-i-Khas of Gobardhan Das Poddar, one of the petitioners. He has sworn in this affidavit that he, in company with one Lala Banwari Lal and "other persons" (whose names have not been disclosed), went round to various share-holders and obtained their consent to move an application in this Court. The question that arises is whether, supplemented by this affidavit, the sheets containing the signatures of 117 share-holders, contain the "consent in writing" of the said share-holders.

[6] The expression "consent in writing" obviously implies that the writing itself should indicate that the persons who have affixed their signatures have applied their minds to the ques-

tion before them and have given their consent to certain action being taken. If a petitioner obtains another share-holder's signature on a blank piece of paper and wishes to supplement it by an affidavit or an oral sworn statement of himself or his agent, the signature on the blank paper does not become consent in writing. By way of analogy, reference may be made to s. 92, Civil P. C., which requires the consent in writing of the Advocate-General for a suit instituted under that section. If certain persons institute a suit under s. 92 and produce a blank piece of paper bearing the Advocate-General's signature, supplemented by their own affidavit to the effect that the Advocate-General had affixed his signature in token of his consent, they cannot be said to have complied with the requirements of s. 92. At the most, one may presume that consent was given. But the signature cannot amount to "consent in writing", because the document on which the signature is to be found does not, by itself, indicate why the signature was affixed.

[7] In this connection, reference may also be made to s. 91, Evidence Act. The relevant portion of that section may be quoted as follows:

"....in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof . . . of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

[8] In the present case, the law requires that the consent should be in writing, i. e., in the form of a document. Therefore, the document itself should prove that the consent has been given. No evidence, either by way of affidavit or of oral sworn statement in Court, can be given to prove that such consent was given. I am consequently of the opinion that in obtaining the signatures of 117 share-holders on blank sheets the petitioners did not secure the consent in writing of the said share-holders.

[9] If the signatures of these 117 share-holders are to be excluded from consideration, the consent of the remaining two sets of share-holders, totalling 52 in all, will not be of help to the petitioners. Even if their consent be presumed to be valid, the number falls short of hundred. But it may be pointed out that their consent also does not comply with the requirements of the said sub-s. (3). The contents of that sub-section have been quoted above, but a portion thereof will bear repetition. The material words are:

"No application under sub-s. (1) shall be made by any member, unless . . . the member complaining has obtained the consent in writing. . . ."

[10] The obtaining of the consent is a condition precedent to the making of the petition. In other words, consent must have been obtained prior to the presentation of the application. The two sets of share-holders, who subsequently gave their consent, have clearly indicated in the document embodying their consent that the petition had already been filed and that they were expressing their approval thereof. Their subsequent consent is not a valid consent under sub-s. (3).

[11] I am, therefore, of the opinion that the requirements of law regarding the obtaining of consent in writing have not been complied with and consequently this petition is not maintainable. It should fail on the preliminary ground.

[12] The opposite parties are entitled to their costs. Opposite parties 1 and 2 shall receive a sum of Rs. 500 each as costs and such of the remaining opposite parties as have engaged separate counsel shall get a sum of Rs. 200 each as costs.

B/K.S. *Petition rejected.*

A.I.R. 1953 Allahabad 327 *[Vol. 40, C. N. 142]*

(LUCKNOW BENCH)

BEG J.

Pyare and others—Appellants v. *The State.*

Cri. App. No. 229 of 1951, D/- 9-6-1952.

Penal Code (1860), Ss. 103, 147, 148, 304, 323 and 325— Right of private defence of property — Dispute regarding cutting of sugarcane crop— Rioting— Each party charging other as aggressor—Title legally with accused under decree had right of private defence — (Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 160 (3) and 180). [Paras 9 and 10]

Anno. Penal Code, S. 103 N. 1.

H. K. Ghose — for Appellants; B. L. Kaul for Dy. Govt. Advocate—for the State.

Judgment. — This is an appeal by Pyare, Basantoo, Nanhoo, Tika, Jabba and Kundan who have been convicted and sentenced under various sections of the Penal Code. Under s. 304, Penal Code, all of them except Nanhoo have been sentenced to four years' rigorous imprisonment and a fine of Rs. 30 each, or in default one month's further rigorous imprisonment. Under that section Nanhoo has been sentenced to one year's rigorous imprisonment and a fine of Rs. 30 or in default one month's further rigorous imprisonment. Under ss. 325 and 323, Penal Code, all the appellants were sentenced to three months' and and six months' rigorous imprisonment each respectively. Under s. 147, Penal Code, all the appellants except Kundan were sentenced to three month's rigorous imprisonment. Kundan was convicted under s. 148, Penal Code, and sentenced to six months' rigorous imprisonment. All the sentences passed on each of the accused were to run concurrently. Two other persons, Mulla and Mangoo were also charged along with the aforesaid appellants but they were acquitted.

[2] The accused were charged with being members of an unlawful assembly formed with the common object of forcibly dispossessing Khuman and Udan from their sugarcane field on 19-11-1949, at about six gharis after sunrise in the 'har' of village Umaria, police station Shahabad, district Hardoi. They were further charged with having committed culpable homicide not amounting to murder by causing the death of Khuman as well

as with having caused injuries on Gulzari Lal, Gajraj and Chhotey Lal.

[3] The incident in question was the result of a dispute between a party of Kisans who may be called the Kisans or the appellants' party on the one hand and a party of Brahmans and Ahirs who may be described as the complainant's party. It may be mentioned that the appellants Pyare, Basantoo and Nanhoo are own brothers and are Kisans by caste. Tika, Jabba and Kundan, the other three appellants are their cousins and also Kisans by caste. The dispute between these two parties arose over the ownership and possession of a plot of land with an area of about 18 bighas 1 biswa situate in Umaria Kalan and has been going on for sometime. This plot has been the bone of contention between them in the revenue Courts. The admitted facts relating to the dispute between the parties may be mentioned at the outset. It would appear that on 10-11-1948, Pyare, appellant, and others filed an application that the entries existing in the Patwari's papers in favour of the complainant's party were erroneous and were made as a result of the collusion of the Patwari with the complainant's party. On 23-1-1949, the tahsildar made a report against the party of the Kisans appellants. On 5-2-1949, the case relating to entries was decided against the Kisans appellants: vide EX. 32.

Subsequent to the adverse decision of this case against them, two suits were filed and the evidence relating to these two suits is, in my opinion, of crucial importance in the decision of the present case. One of these suits was filed by Pyare Kisan and others including Jabba who had lost in the case relating to entries. This suit was filed against Pyare Brahman, Raghoo and Ram Roop who belonged to the complainant's party. This suit was filed on 9-4-1949. It was a suit under ss. 180 and 59, U. P. Tenancy Act. The plaintiffs claimed ejectment of the defendants and compensation for the unlawful possession of the said land by the defendants. The plaint of this suit is EX. 13. The other suit was filed by Tika appellant, against the same defendants on the same date under ss. 180 and 59, U. P. Tenancy Act. On 15-10-1949, both the suits were decreed—vide EXS. 28 and 29. On 18-11-1949 actual dakhal dehani of the said plots in favour of the decree-holders, Pyare and others as well as Tika was made in the said suits—vide EXS. 26 and 27. The effect of the plaintiffs obtaining a decree in their suits under S. 180, U. P. Tenancy Act, was that the crops existing or standing on the said land at the time of delivery of possession vested in the decree-holders irrespective of the fact as to whether they were sown by the decree-holders or the judgment-debtors—vide S. 160 (3), U. P. Tenancy Act.

[4] It may be taken as admitted by parties that on 19-11-1949 at about 9 P.M. when the incident is alleged to have occurred, the sugarcane crop was actually standing on the plots in dispute. The cases set up by the complainant and the accused regarding what happened on that date are conflicting. According to the case of the complainant he and his party were in possession of the said plot and while they were cutting the crop, the appellants' party came and attacked them causing the death of Khuman and injuries to Gulzari Lal, Gajraj and Chhotey Lal. On the other hand according to the case of the appellants they were in possession of the crop and were cutting the same when the complainant's party came, attacked them and caused injuries to Nanhoo, Jabba, Pyare and Basantoo. Both the parties made first information reports at the thana giving their own version of the incident. Both the reports were made on 19-11-1949 at 1-10 P.M. The report on behalf of the appellants' party was made by Pyare Kisan and other on behalf of the complainant's party was made by Udan at the same time and on the same date.

[5] The medical evidence indicates that Khuman, deceased, had seven injuries, Gulzari Lal had twelve injuries, Gajraj three and Chhotey Lall five. Altogether therefore there were twenty seven injuries on the complainant's side. On the other hand, the medical evidence also shows that on the side of the appellants, Nanhoo received twelve injuries, Jabba three, Pyare six and Basantoo five. Thus there were altogether twenty-six injuries on the side of the appellants. The results of the fight, therefore, seem to have been equally balanced.

[6] Seven witnesses were produced on behalf of the prosecution in support of its case. Their names are Udan P. W. 1, Gulzarii, P. W. 2, Gajraj P. W. 3, Chhotey Lal P. W. 4, Sheo Charan P. W. 5, Rameshwar P. W. 8 and Jaddu P. W. 9. They stated that the complainant's party was in possession of the crop and while they were cutting it, the Kisan or the appellants' party came and attacked them. According to the prosecution case the Brahman and Ahir party were entitled to this crop and were in possession of it.

[7] The trial Court relying on EX. 31 which was the report of the tahsildar against the Kisan party prior to the suits under ss. 180 and 59, U. P. Tenancy Act, and other documentary evidence believed these witnesses and came to the conclusion that in view of the circumstances disclosed thereby the complainant's party were in possession and the appellants or the Kisan party must have been the aggressors. The trial Court also relied on the medical evidence for arriving at that conclusion.

[8] As I have mentioned above, the injuries on both sides seem to have been equally balanced, and in a case of this nature it is very difficult to come to a definite conclusion as to which party was the aggressor merely from the number of injuries suffered by one party or the other.

[9] The main argument advanced by the learned counsel for the appellants is that his clients were not the aggressors since they had obtained a decree in their favour, and further they had obtained

actual dakhal dehani against the complainant's party and were in possession of the said plot. In support of this argument, the learned counsel invited my attention to the large number of injuries received by the appellants' party in this fight. In the alternative his argument was that even supposing the appellants' party was the first to attack, they would be protected by the law relating to the private defence of property. In this connection he strongly relied on s. 160, U. P. Tenancy Act. Sub-ss. (1) and (2) of s. 160 deal with the case of a person who has sown the crop and is not a trespasser. In such a case the person who has swon the crop or the tenant is entitled in law either to remove the crop or to have the value of the crop assessed and paid to him or to have it adjusted against the claim of the decree-holder. Sub-section (3) of s. 160, however, deals with the case of a trespasser under s. 180. He has no claim to the crop and even if such a crop was sown by him the benefits conferred by sub-ss. (1) and (2) on a bona fide claimant are not available to him. The law seems to have deliberately made a distinction between the case of a person with an ostensible title and a rank trespasser and granted certain concessions to the former while denying the same to the latter. Section 180, U. P. Tenancy Act, is meant for the ejectment of a trespasser. Sub-section (3) of s. 160 accordingly runs as follows :

"Nothing in this section shall apply to a person ejected from land under the provisions of S. 180 and any crops or trees existing on such land at the time of the delivery of possession shall vest in the decree-holders."

Pyare and others as well as Tika who belonged to the Kisan party had admittedly obtained a decree against the complainant's party under s. 180, U. P. Tenancy Act. They had also obtained dakhal dehani against them. The effect of these proceedings was to vest title in the crop in the Kisan party with the result that the complainant's party had no title left in law and they could not justifiably lay any claim to it thereafter. Even if the Kisan party went to the spot to dispossess the complainant's party while the latter were cutting the crop, they would be acting in defence of the property which had vested in them as a result of aforesaid proceedings. The position, therefore, in law would be that if the case of the accused-appellants that they were attacked by the complainant's party is accepted they would be protected both by the law relating to private defence of person as well as of property. If on the other hand the case of the complainant that he and his party were cutting the crop when they were attacked by the appellants' party is accepted then also the appellants would be protected by the law of private defence of property. As mentioned above by me, the property had vested in the appellants' party. They had title to the property and they would have a right to stop anyone from causing damage to that property. Under s. 103, Penal Code, the right of a person exercising the right of private defence of property extends to the voluntary causing of death if the offence, the committing of which or the attempting to commit which occasions the exercise of the right, be an offence of theft or mischief under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. In this fight, Nanhoo a member of the appellants' party exercising the right of private defence of property had actually received three grievous injuries. The appellants would, therefore, be fully protected by the law of private defence of property.

[10] Thus whichever view of the case is taken, i. e., whether the appellants attacked first or were the first to be attacked, they are completely shielded by the law of private defence. This appeal must, therefore, succeed.

[11] I accordingly allow this appeal, set aside the conviction of Pyare, Basantoo, Nanhoo, Tika, Jabba and Kundan and acquit them. They are on bail. They need not surrender.

C./K.S. *Accused acquitted.*

A.I.R. 1953 Allahabad 329 *[Vol. 40, C. N. 143]*

KAUL J.

Baldeo Dass—Applicant v. *Joshi Gauri Dutt and others—Opposite Party.*

Civil Revn. No. 362 of 1949, D/- 18-9-1952.

Civil P. C. (1908), O. 23, R. 1—Vague allegations of legal grounds for withdrawal.

Application if an attempt to introduce new matter in controversy cannot be allowed: A. I. R. 1951 All. 845 (F.B.), *Rel. on.* [Paras 5, 6]

The fact that one of the parties was a minor and could bring at any time a fresh suit, is an irrelevant consideration under O. 23, R. 1. [Para 7]

Anno. C. P. C., O. 23 R. 1 N. 2, 25, 26.

Satish Chandra and Radha Krishna — for Applicant; A. Sanyal — for Respondents 1, 2 and 3.

REFERENCE: Para-

('51) 1951-49 All. L. J. 607 : (A. I. R. 1951 All. 845 F. B.). 5

Order.—This is an application for revision of an appellate order passed by the learned Civil Judge of Banaras granting permission to certain plaintiffs to withdraw their suit with liberty to bring a fresh suit under O. 23, R. 1, Civil P. C.

[2] The material facts lie within a short compass:

One Joshi Ratan Shanker was granted a lease of some lands by the zamindar, Mt. Basant Kunwar. The rent due in respect of the lease fell in arrears and a decree for recovery of the same was obtained by the zamindar. In execution of that decree some of the leased plots were sold at a court auction and purchased by one Baldeo Dass. Thereupon a suit was instituted by the three sons of Joshi Ratan Shanker, one of whom was a minor. It was averred that the decree for rent was fraudulently obtained, that the sale of the leased lands was set aside by the Tahsildar on deposit of

the decretal amount and that this order was subsequently set aside by the Tahsildar which he could not do for want of legal authority and that the entire proceeding before the Tahsildar was *ultra vires*. On the above grounds they prayed for the following reliefs:

"(a) By the decree of the Court it be declared that the entire proceedings in Suit No. 718 of 1942 in the Court of Tahsildar, Banaras, *Basant Kunwar* v. *Joshi Ratan Shanker*, relating to plots Nos. 149, 150, 162, 169 and 170 of village Mawaiya, Pargana Sheopur, Banaras and execution proceedings of the said decree are void, ultra vires and ineffectual against the rights of the plaintiffs and defendant 3 and do not confer any right on defendants 1 and 2, valued at Rs. 176.

(b) By a perpetual injunction defendant 1 be restrained from interfering with the peaceful enjoyment of the premises consisting of plots Nos. 169/52, 170/62 and 149/3-48, which are a part of the premises described below in any way or mode whatsoever.

Valued at Rs. 2,500 of which 1/10th (one tenth) is Rs. 250.

(c) Costs of the suit be decreed against defendants 1 and 2.

(d) If the plaintiffs be found to be entitled to any relief or reliefs in addition to or instead of the aforesaid reliefs the same may also be granted."

[3] The learned Munsif, Banaras, before whom the matter came up for hearing, held that the civil Court had no jurisdiction to entertain the suit, that the lease obtained by Joshi Ratan Shanker was not taken on behalf of the joint family, that his sons had no interest in the lease and that the suit was barred by limitation. He accordingly dismissed the suit. The plaintiffs went in appeal and the matter came up for consideration before the Additional Civil Judge of Banaras.

[4] It appears that after the arguments in appeal were concluded, an application was made on behalf of the plaintiffs-appellants seeking permission to amend their plaint. The learned Judge rejected that application as he was of opinion that it attempted to introduce entirely new matter in the controversy. Thereupon the petitioner made an application for permission to withdraw the suit with liberty to bring a fresh suit under O. 23, R. 1, Civil P. C. The relevant portion of the application ran thus:

"1. In this case since a few material allegations on legal grounds for avoiding and setting aside the Revenue Court decree has not been specified in the plaint.

2. Those allegations are entirely legal and their omission makes the suit legally untenable and liable to be dismissed on formal technical grounds.

3. That this is plaintiff-appellant's first attempt to get the plaint amended.

4. That since the amendment application has been opposed and disallowed plaintiffs have got only alternative of having the suit withdrawn.

Under the circumstances the plaintiff-appellant prays that the plaintiff-appellant may be allowed to withdraw the suit with permission to file a fresh suit."

This application was allowed by the learned Judge who passed the following order:

"Suit allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action only if the costs of the contesting defendants in the trial Court and in the appellate Court are paid beforehand."

[5] The present revision application was filed by the purchaser Baldeo Dass challenging the legality of the order passed by the Court below. It is now well settled that a Court has jurisdiction to grant permission to withdraw from a suit with liberty to bring a fresh suit under O. 23, R. 1, Civil P. C., only if there is a formal defect or a defect of an analogous character as a result of which the suit is bound to fail. In the absence of any such defect the Court has no authority to grant permission to withdraw a suit with liberty to bring a fresh suit: see *Abdul Ghafoor* v. *Abdul Rahman*, 1951-49 ALL. L. J. 607.

[6] It was contended by the learned counsel for the petitioner that there was no defect either formal or of an analogous character in the plaint presented to the trial Court and accordingly the learned Judge in appeal had no jurisdiction to exercise the powers conferred by O. 23, R. 1. It will be noted that the application for permission to withdraw from the suit with liberty to bring a fresh suit made by the applicant's counsel was extremely vague and indefinite. It says that "a few material allegations of legal grounds for avoiding and setting aside the revenue Court decree have not been specified in the plaint." The "allegations of the legal grounds" referred to are not specifically mentioned. It is true that a reference was made in this application to the previous application for amendment of the plaint which was rejected by the learned Civil Judge because it sought to introduce "new matter" in the controversy. It was frankly conceded by the learned counsel for the opposite parties that the learned Judge's view of the matter sought to be introduced by amendment of the plaint was not wrong. Apart from the grounds which were mentioned in the plaint, it was sought to challenge the proceedings which culminated in the sale of the leased lands on the ground of negligence of the plaintiff's own father, Joshi Ratan Shanker. Therefore, the learned Judge was right in rejecting the application for amendment. The application for permission to withdraw from the suit with liberty to bring a fresh suit was only a device to introduce new matter into controversy indirectly. When the attempt to introduce that matter directly in the controversy failed, the plaintiffs applied for permission to withdraw the suit and introduce this matter in the fresh suit which they intended to file. I am clear that on the finding arrived at by the learned Judge there was no defect in the plaint which was of a formal or of an analogous character.

[7] A reference is made by the learned Judge to the fact that one of the parties was a minor and that he could at any time bring a fresh suit. Even if the view taken by the learned Judge of the rights of the minor was right, there can be no doubt that this consideration was irrelevant to the matter which he had to determine under O. 23, R. 1, Civil P. C.

[8] For the reasons given above, the application is allowed, the order dated 21-7-1948, passed by the learned Additional Civil Judge of Banaras granting the plaintiffs permission to withdraw from the suit with liberty to bring a fresh suit is set aside. The record shall be returned to the Court below with the direction that the appeal in which the said order was passed be disposed of in accordance with law. The opposite parties 1 to 3 will get their costs.

C/R.G.D. *Revision allowed.*

A.I.R. 1953 Allahabad 331 *[Vol 40, C. N. 144]*

V. BHARGAVA J.

Mt. Ram Kali—Appellant v. *Pahilwan Singh and others—Respondents.*

Second Appeal No. 1311 of 1947, D/-20-11-1952.

(a) Hindu Law — Succession — Property owned by two women as holders of life-estates—Relinquishment by one.

Where a property is jointly owned by two Hindu women as holders of life-estates and on the death of either of them the whole of the life-estate is to pass to the other, in such a case, if there is relinquishment by one without specifying in whose favour the relinquishment takes effect the right to the property would naturally pass to the other joint owner : 23 Mad. 504 and A. I. R. 1925 Mad. 1267, *Disting.* (Para 4)

(b) Civil P. C. (1908), O. 1, R. 10 — Suits by co-owners.

One joint owner out of several can always eject a trespasser and obtain a decree for possession against the trespasser. It is only the joint owner or anyone claiming through the joint owner who can come and resist such claims for possession. Consequently, on the disclaimer by one of the joint owners that he does not want a decree in his favour, the other joint owner is entitled to a decree for possession over the whole property. (Para 6)

Anno. C. P. C., O, 1 R. 10 N. 18 Pt. 5.

Bishun Chandra Saxena, for Appellant; Lachmi Narain Gupta, for Respondents.

REFERENCES : Courtwise/Chronological / Paras

(1900) 23 Mad. 504 : (10 Mad. L. J. 253) 5

('25) 48 Mad. 933 : (A.I.R. 1925 Mad. 1267) 5

Judgment. — This is a Second Appeal arising out of a suit brought by the plaintiff-appellant and the plaintiff-respondent for possession of certain properties against the defendants-respondents.

[2] The property in suit admittedly belonged, once upon a time, to one Dharam Singh. The plaintiff-appellant came to the Court with the allegation that, after the death of Dharam Singh, there was a partition between his sons and this property came to the separate share of Indar Singh so that Indar Singh became the sole owner of this property. Indar Singh having died, the plaintiffs claimed that they were entitled to possession of this property as daughters of Indar Singh who died leaving no sons or widow. The defendants-respondents are all collaterals of Indar Singh and they, or some of them, would be the reversioners of Indar Singh on the death of the two plaintiffs. Both the lower Courts have held that there had been a partition by virtue of which Indar Singh had become the sole owner of the property in suit. A further objection of the defendants-respondents that there had been a re-union between Indar Singh and his brothers was also repelled by the Courts below.

[3] The trial Court decreed the suit 'in toto' but the lower appellate Court modified the decree and granted a decree in respect of only half share in the property on the ground that the plaintiff-respondent, Shrimati Javitri, had made a statement that she did not want any decree in her favour. It is against this part of the decree that the other plaintiff, Shrimati Ram Kali, has filed this appeal claiming that, even if Shrimati Javitri did not ask for decree in respect of her share, a decree for possession in respect of the whole property should have been passed in favour of the plaintiff-appellant, Shrimati Ram Kali.

With this appeal there is a cross-objection filed on behalf of the defendant-respondent challenging the finding that Indar Singh had become the sole owner of this property under a partition and also challenging the finding that there had been no re-union between Indar Singh and other members of the family. The question whether there was a partition between Indar Singh and the defendants-respondents or their predecessors as also the question whether there had been a re-union are both questions of fact and the learned counsel has not been able to show how these questions can be reagitated in this Second Appeal in which the findings of fact by the lower appellate Court have to be accepted and only questions of law can be gone into. The cross-objection, therefore, fails.

[4] So far as the appeal is concerned the view taken by the lower appellate Court is that the decree for the whole share of Indar Singh in favour of Shrimati Ram Kali was not justified on the ground that Shrimati Javitri did not claim any share which meant that she had relinquished her share. The learned Judge of the lower Court went on to state that it did not appear from her (Shrimati Javitri's) statement in whose favour she had relinquished her share. But, in any case, it was not in favour of Shrimati Ram Kali and consequently the latter could not get a decree in respect of her share. In arriving at this decision, it is clear that the learned Civil Judge did not properly consider the effect of the relinquishment by Shrimati Javitri.

The property was found by the learned Civil Judge himself to be jointly owned by Shrimati Ram Kali and Shrimati Javitri as holders of life-estates. On the death of either of them, the whole of the life-estate was to pass to the other. In such a case, if there is relinquishment by one without specifying in whose favour the relinquishment takes effect the right to the property would naturally pass to the other joint owner. A trespasser in possession without any right cannot claim that, because one joint owner has relinquished her right, the trespasser is entitled to con-

tinue in possession of that share. The defendants-respondents are, no doubt, reversioners but they possess no right at all in the property until the succession opens on the death of the holders of the life-estate.

The reversion in their favour could have been accelerated by the holders of the life-estate by relinquishing their rights in their favour and, in case Shrimati Javitri had really relinquished her share in this property in favour of defendant-respondent, it might have been open to the defendant-respondent to claim that they must be allowed to remain in possession in respect of the half share to which Shrimati Javitri was entitled. In this case the lower Court has not found that there was any such relinquishment in favour of the defendant-respondent. Consequently, on a relinquishment without specification of the person in whose favour the relinquishment was made, the joint owner would be entitled to all the rights.

[5] Learned counsel for the respondents referred me to two decisions of the Madras High Court in *Kanni Ammal* v. *Ammakannu Ammal*, 23 Mad. 504 and *Sundarasiva Row* v. *Viyamma*, 48 Mad. 933 in which there were two women who were joint owners of a property held as their life-estate. In one case, one of them transferred the property to a third person and in the other case there was a surrender in favour of a third person. In both those cases, the third person claiming the right to continue in possession of the property claimed through one of the holders of the life-estate and, since the two holders of the life-estate did not hold as tenants-in-common but as joint tenants, it was held that the persons in whose favour the transfer or surrender had been made had a good title against the other joint owner. In this case the defendants-respondents are not claiming through Shrimati Javitri and no title has passed to or through her. They are mere trespassers and they cannot, therefore, claim to continue in possession against the other joint owner.

[6] The case may be looked at from another point of view. In the statement which Shrimati Javitri gave, she nowhere stated that she relinquished her share. All she said was that she did not want a decree in respect of her share. This statement goes no further than a disclaimer on her part to continue before the Court as a claimant for the decree for possession. The suit should be treated as if she had not appeared as a plaintiff. The suit would then be dealt with as a suit by one of two joint owners for possession against a third person who had no title to the property. The law is well established that one joint owner out of several can always eject a trespasser and obtain a decree for possession against the trespasser. It is only the joint owner or anyone claiming through the joint owner who can come and resist such claims for possession.

Consequently, in this case, on the disclaimer by Shrimati Javitri that she wanted no decree in her favour, Shrimati Ram Kali was entitled to a decree for possession over the whole property. Obviously no decree could be passed in her favour for joint possession with trespassers and she could not seek partition against trespassers. Partition could be sought only against persons jointly holding land under some legal right. The refusal to grant the decree for possession of the whole property was, therefore, not justified.

[7] The appeal is consequently allowed and the suit for possession in favour of Shrimati Ram Kali is decreed with costs in all the Courts. Even though Shrimati Javitri has not claimed possession in her own right, the possession of Shrimati Ram Kali will enure to her benefit as a joint owner.

B/V.R.B. *Appeal allowed.*

A.I.R. 1953 Allahabad 332 *[Vol. 40, C. N. 145.]*

MUSHTAQ AHMAD J.

Rukmi Sewak ana others, Defendants — Applicants v. *Mt. Munesari, Plaintiff — Opposite-Party.*

Civil Revn. No. 469 of 1948, D/- 12-11-1952.

(a) Partition Act (1893), S. 4—Residence.

All that is necessary under S. 4 is that any member of the family, who is also a share-holder, is prepared to buy the share of the transferee. The fact of residing in the house is not one of the ingredients of the right to invoke the same. [Para 8]

(b) Partition Act (1893), S. 4—Who can claim benefit.

A widow of a deceased member of an undivided family who has only a life interest in a part of the house is entitled to claim benefit of S. 4. [Para 8]

Anno. Partition Act, S. 4, N. 1.

(c) Partition Act (1893), S. 4—Applicability.

Section 4 not only applies to a case where the transferee of a share is the plaintiff but also to a case where he is a defendant. A. I. R. 1941 Pat. 4; A. I. R. 1929 Cal. 269 and A. I. R. 1947 Cal. 426, *Rel. on.* [Para 9]

Anno. Partition Act. S. 4, N. 1.

Ambika Pd. and Anandji — for Applicants; K. N. Sinha — for Opposite Party.

REFERENCES : Courtwise/Chronological/ Paras.

('29) A. I. R. 1929 Cal. 269 : (116 Ind. Cas. 161) 9

('47) A. I. R. 1947 Cal. 426 : (I. L. R. (1948) 1 Cal. 248) 9

('41) A. I. R. 1941 Pat. 4 : (190 Ind. Cas. 117) 9

Order. — This is an application in revision by the first three defendants in a suit for partition of a one-third share in a house. There was also a relief in the plaint that the plaintiff might be awarded the entire house on the principle embodied in S. 4, Partition Act, 4 of 1893.

[2] The original owner of the house was one Parag who had two sons, Mahabir and Sahdeo. The former left a daughter Mt. Munesari, the plaintiff-opposite party, and the latter two sons, Shyam Narain and Bal Makund, defendants 4 and 5 respectively. On 2-7-1918, Parag made a will of the house, bequeathing a life interest in a one-

third share to the plaintiff and an absolute interest in the remaining two-thirds to defendants 4 and 5. Some time later defendants 4 and 5 mortgaged the entire house to defendants 1 to 3, the present applicants. In 1938 the plaintiff sued for redemption of the mortgage and obtained a decree. Pending an appeal filed by defendants 1 to 3 against that decree these defendants purchased the proprietary title in the house from their mortgagors, defendants 4 and 5, and hence the decree passed by the appellate Court in the redemption suit was confined only to the one-third share in which the plaintiff had a life interest. The plaintiff then obtained formal possession over that share. Afterwards she filed the suit giving rise to this application, claiming the reliefs I have already mentioned, offering Rs. 234 as price for the two-thirds share of defendants 1 to 3 (applicants) in case she was allotted the entire house.

[3] The defence taken by defendants 1 to 3 was that as a mere life estate holder the plaintiff was not entitled to sue for partition, much less to claim the entire house under S. 4, Partition Act, that the plaintiff was not entitled to the latter relief also because she never dwelled in the house, that the house was not capable of partition, so that no decree for partition could be passed at all and that these defendants having spent Rs. 200 on repairs no decree could be passed in the plaintiff's favour except on condition of payment of that sum.

[4] The trial Court decreed the suit for partition of a one-third share without allowing to the plaintiff the benefit of S. 4, Partition Act. There was a finding that these defendants had spent Rs. 50 on repairs and that the plaintiff was liable to pay one-third of this amount which was made a charge on her one-third share.

[5] An appeal by the plaintiff and a cross objection by defendants 1 to 3 were filed against this decree. The former was allowed and the latter disallowed, and the case was remanded to the trial Court with the direction that the plaintiff should be given the benefit of S. 4 of the aforesaid Act. The present application is against that order.

[6] Mr. Ambika Prasad, learned counsel for the defendants-applicants, has mainly argued the question of applicability or otherwise of S. 4, Partition Act. According to him this section did not apply, firstly because the plaintiff never resided in the house, secondly because she was a mere life estate holder, in which capacity she could not even claim a decree for partition and thirdly because that section could be invoked only where the transferee of a share was the plaintiff, and not where he was a defendant, in a suit for partition.

[7] As regards the first grounds, I am not prepared to hold that there is any substance in them. Section 4 of the Act is worded thus :

"Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder . . . . . "

[8] On the bare language of this section one would find that the fact of residing in the house is not one of the ingredients of the right to invoke the same. All that is necessary is that any member of the family, who is also a share-holder, is prepared to buy the share of the transferee. On the other question of the plaintiff not being entitled either to a decree for partition simpliciter or to invoke the provisions of S. 4 of the Act, there seems to be no reason why the relief should be denied to a lady having a right only to live in the house for her lifetime. If the object underlying a relief for partition or even the allotment of the entire house to a particular co sharer under S. 4 of the Act is to secure to him the maximum convenience and benefit by not subjecting the house to a partition but by keeping it intact, that object would hold good even where the plaintiff is not the owner of an absolute but of a mere life interest.

[9] As regards the third ground urged by the learned counsel for not applying S. 4 of the Act he relies mainly on the language of the section itself. No doubt there are among others the words "and such transferee sues for partition", that is, the section is to apply only where the transferee is the plaintiff. Prima facie one should think that there is no sound basis for making a distinction between a case in which the transferee is the plaintiff and one in which he or she is a defendant, when the object underlying the section is as I have mentioned above. This question appears to have received judicial consideration in a number of cases, in which it was held that in a suit for partition each party, whether plaintiff or defendant, was entitled to have his share divided and that, if he was the defendant, he was to be treated as a plaintiff for purposes of the suit. These are cases in *Sheo har Prasad* v. *Kishun Prasad*, A. I. R. 1941 Pat. 4: *Satya Bhama* v. *Jatindra Mohan*, A. I. R. 1929 Cal. 269 and *Abu Isa Thakur* v. *Dinabandhu*, A. I. R. 1947 Cal 426. There is no case of this Court against these cases, and I find myself in entire agreement with the view taken in them, though it is not quite justified by the strict phraseology of the section. It is a sound and perfectly understandable view, and I must adopt it without hesitation.

[10] Accordingly, I affirm the order of the Court below and dismiss this application with costs.

B/K.S. *Application dismissed.*

A.I.R. 1953 Allahabad 334 *[Vol. 40, C.N. 146]*

(LUCKNOW BENCH)

V. BHARGAVA J.

Ganga Prasad—Applicant v. *The State.*

Criminal Revn. No. 2 of 1952, D/- 1-8-1952.

U. P. Panchayat Raj Act (26 of 1947), Ss. 52, 56 – Case pending before Sessions Judge – No necessity of transfer. [Paras 1, 2]

S. D. Mishra—for Applicant; B. L. Kaul—for Govt. Advocate, for the State.

REFERENCE Para.

('52) 1952 All. L. J. 304 : (A.I.R. 1952 All. 818). 2

Order. — This revision has been filed by one Ganga Prasad who was convicted by a Magistrate of the first class for offences punishable under S. 523, Penal Code and S. 121, Railways Act, and sentenced to two months' rigorous imprisonment for the former and to a fine of RS. 50, for the latter offence. In default of the payment of fine, he was to undergo simple imprisonment for one month. Ganga Prasad appealed before the learned Sessions Judge who set aside the conviction and sentence of Ganga Prasad appellant for the offence punishable under S. 121, Railways Act, but upheld his conviction and sentence for the offence punishable under S. 323, Penal Code.

[2] Learned counsel has urged that once the learned Sessions Judge had set aside the conviction of the appellant under S. 121, Railways Act, the case became one of which a Panchayati Adalat could have taken cognizance under S. 52, U. P. Panchayat Raj Act, 1947, and hence the case should have been sent to the Panchayati Adalat and the conviction and sentence of the appellant under S. 323, Penal Code, should also have been set aside by the learned Sessions Judge. This argument advanced by the learned counsel ignores the effect of the language which has been used by the Legislature in S. 56, U. P. Panchayat Raj Act. The provisions of this section require only those cases to be transferred to the Panchayati Adalat in which it appears, at any stage of the proceedings "pending before a Magistrate," that the case is triable by a Panchayati Adalat. One of the requirements, therefore, is that the fact that the case is triable by a Panchayati Adalat should appear in a criminal case pending before a Magistrate. If the case does not happen to be pending before a Magistrate, there is no need to transfer the case. It seems that the Legislature desired that cases need be transferred only if they are still pending in the Court of a Magistrate but, if they have been concluded in the Court of a Magistrate and are pending at any later stage before the Sessions Judge or the High Court, it should not be necessary to transfer them to the Panchayati Adalat.

In the present case, it never appeared to the Magistrate during the time that the case was pending in his Court that the case was triable by a Panchayati Adalat because the Magistrate was, right up to the delivery of the judgment, of the opinion that the charge under S. 121, Railways Act, an offence which could not have been tried by a Panchayati Adalat, was also established. When the case came up in appeal before the learned Sessions Judge, the learned Judge had several courses open to him under the provisions of S. 423, Criminal P. C. One of these was to set aside the conviction and sentence passed by the learned Magistrate and to send back the case for re-trial. If this course had been adopted by the learned Sessions Judge, it would also have been necessary, on the finding that the accused was liable to be convicted for an offence punishable under S. 323, Penal Code, only, to send the case to the Panchayati Adalat for trial. In that case the learned Sessions Judge could give a direction to the Magistrate to transfer the case to the Panchayati Adalat but even if no such direction was given, it would have been incumbent on the Magistrate to send the case to the Panchayati Adalat for trial.

On the other hand, it was open to the learned Sessions Judge to confirm the conviction and sentence passed by the Magistrate in respect of the offence punishable under S. 323, Penal Code. If he chose to confirm the sentence in appeal, the case did not become a case pending before a Magistrate after it appeared that the only offence made out was an offence punishable under S. 323, Penal Code, and might have been tried by the Panchayati Adalat under S. 52, U. P. Panchayat Raj Act. In the present case, this is the course chosen by the learned Sessions Judge and it cannot be said that he acted at all illegally. Learned counsel referred me to the decision of a learned Single Judge of this Court in *Aj dhia Singh* v *Baleshwar Singh*, 1952 ALL. L. J. 304 in support of his contention that it was the duty of the learned Sessions Judge in this case also to direct that the case be sent to the Panchayati Adalat for trial. The views expressed in that case cannot be applied to the facts of the case before me. In that case, the learned Sessions Judge had chosen the first alternative mentioned by me and, having set aside the conviction and sentence passed by the Magistrate, he sent back the case to the Magistrate. Thereupon, of course, it could be held that it was the duty of the learned Sessions Judge to give a direction to the Magistrate to transfer the case to the Panchayati Adalat.

In that case, the question whether the learned Sessions Judge was, in all circumstances, bound to set aside the conviction and send back the case with a direction that the case be transferred to the Panchayati Adalat was never considered. In fact, the effect of the words 'pending before a Magistrate' used in S 56, U. P. Panchayat Raj Act, 1947, did not come up for discussion at all, obviously because, the learned Sessions Judge, by setting aside the conviction and sending a direction to the Magistrate to transfer the case to the Panchayati Adalat had converted the case into a case

pending before the Magistrate and S. 56 of the Act had clearly become applicable. In the case before me, S. 56 is clearly inapplicable and the order passed by the learned Sessions Judge is, therefore, correct.

[3] There is no force in the revision and it is dismissed. The applicant shall surrender to his bail to undergo the remaining part of his sentence.

C/D.H. *Revision dismissed.*

A.I.R. 1953 Allahabad 335 *[Vol. 40, C. N. 147]*

(LUCKNOW BENCH)

V. BHARGAVA J.

Harakh Narain—Appellant v. *Mst. Kalwati and another—Respondents.*

Exn. Decree Appeal No. 1 of 1947, D/- 3-12-1952.

Limitation Act (1908), Art. 182—Instalment decree: A. I. R. 1943 Bom. 36 and A. I. R. 1943 Bom. 63, *Dissent.*

Instalment decree passed in 1937—Each annual instalment to fall due on 31st December of each year—Default clause providing that in case of non-payment of three instalments entire unrealised amount was to become due—None of instalments paid — First application in 1944 merely praying for substitution of names of legal representatives of deceased decree holder in decree allowed and names substituted — Second application for execution on 23-11-1945 for realisation of entire amount of decree by enforcing default clause — Application held was barred by limitation as right to enforce default clause accrued on 31-12-1939 — Court can however treat application as one for recovery of individual instalments fallen due within three years of application and grant relief to decree-holder on that basis—Exercise of option to enforce default clause unsuccessfully cannot extinguish right of decree-holder to realise individual instalments unless there is something in the decree itself which affects such right. A. I. R. 1941 Oudh 93; A. I. R. 1942 Oudh 219 and A. I. R. 1943 Nag. 170, *Rel. on.* [Paras 2, 6]

Anno. Lim. Act, Art. 182 N 136.

P. N. Choudhari and Harish Chandra—for Appellant; K. N. Tondon—for Respondent 1.

REFERENCES : Courtwise/Chronological Paras.

('29) 51 All. 237 : (A. I. R. 1928 All 629 (F. B).) 5
('52) 1952 All. L. J. 583 : (A. I. R. 1952 All. 900 (F. B.)) 6
('43) A. I. R. 1943 Bom. 36 : (I. L. R. (1943) Bom. 55) 4a
('43) A. I. R. 1943 Bom. 63 : (205 Ind. Cas. 447) 4a
('43) A. I. R. 1943 Nag 170 : (I. L. R. (1943) Nag 334) 5
('36) 11 Luck. 276 : (A. I. R. 1935 Oudh 465 (F, B.)) 5
('41) 16 Luck. 495 : (A. I. R. 1941 Oudh 93) 5
('42) 17 Luck. 449 : (A. I. R. 1942 Oudh 219) 3, 5

Judgment. — This second appeal arises out of proceedings for execution of a decree obtained by the decree-holders-respondents against the judgment-debtor-appellant on 23-8-1933. The decree was for money. An amendment of the decree took place on 2-7-1936 and there on 6-1-1937, there was an adjustment. After this adjustment the amount remaining due under the decree was Rs. 678-4-6. At that time, the decree was converted into an instalment decree and it was laid down that the amount must be paid in ten instalments, the first nine instalments being of Rs. 67 and the tenth one of Rs. 75-4-6. The instalments were to fall due on 31st December of each year so that the first instalment of Rs. 67 fell due on 31-12-1937. There was an additional clause that in case of default in payment of three instalments, the entire amount then unrealised under the decree was to become due. It is the admitted case of the parties that not a single instalment was paid so that three defaults had been committed by 31-12-1939. The first application as a step in aid of execution was presented to Court on 15-12-1944. But in that application, the only prayer was that the decree-holder having died, his daughters might be substituted as his legal representatives in the decree. That application was allowed and substitution of names was granted.

The present execution application was presented on 23-11-1945, with the request that the entire amount under the decree might be realised by attachment of the property of the judgment-debtor, claiming that the entire amount had fallen due because of default of payment of three instalments. On 7-1-1946, an objection was filed by the appellant contending that the application for execution was barred by time. The objection relating to the limitation for execution for the whole amount under the decree under the default clause was upheld by both the lower Courts, but both those Courts held that the decree-holders were entitled to execute the decree in respect of those instalments which had fallen due within three years preceding the date of the application, i. e., within three years of 23-11-1945. They further held that the amount of the instalments which had not yet fallen due on 23-11-1945, could not be realised in this execution as the execution application in respect of those instalments was premature. The decree-holders have submitted to this order passed by the lower appellate Court, but the judgment-debtor has come up in appeal contending that the whole execution is time-barred and the execution application should have been dismissed in toto.

[2] The first contention that has been raised by the learned counsel for the appellant in this second appeal is that since the present execution application was not for realisation of instalments as such but was for realisation of the whole amount due under the decree on the basis of the default clause, the lower Courts should not have allowed realisation of the instalments, even though execution in respect of them might be within time, computing the limitation in respect of each instalment from the date on which that instalment fell due.

The decree sought to be executed was only one single decree and was for a sum of Rs. 678-4-6. After the compromise and adjustment of 6-1-1937, it permitted the judgment-debtor to pay the amount in instalments and consequently granted the right to the decree holders to realise those instalments as and when they fell due. A second optional right was given to the decree-holders to

realise the whole amount due if there was default in payment of three instalments. Thus the decree gave two alternative modes of realisation of the decretal amount to the decree-holders and as long as the decree-holders applied for execution for the whole amount, it was certainly within the competence of the Courts to permit the realisation of a smaller amount, as the prayer for realisation of the larger amount covers the prayer for realisation of the smaller amount. It is true that in the application, the prayer for realisation was based on the ground that the whole amount of the decree had become due as a result of default in payment of three instalments, but that whole amount was made up of the sum which was payable in nine instalments of Rs. 67 and the tenth instalment of Rs. 75-4-6; and consequently, when dealing with the execution application, the Court could competently break up that amount and allow execution in respect of those items making up the whole amount sought to be realised which the decree-holders could competently realise in this execution application. This preliminary objection that the lower Courts were wrong in treating this application as an application for realisation of the amounts of individual instalments therefore fails.

[3] A very similar case came up before a Bench of the erstwhile Chief Court of Oudh in *Peoples Bank of Northern India Ltd.* v. *Aijaz Ali*, 17 Luck. 449. In that case there had similarly been default in paying the instalments and four applications for realisation of the amount were presented in the year 1933. Then again a fifth application for execution in respect of the whole amount of the decree was presented on 20-4-1937. The Court allowed execution of this fifth application only in respect of the instalments which were within time on 20-4-1937. The view I have taken is thus fully supported by that decision.

[4] The second point which has been urged by learned counsel is that, in the first execution application dated 15-12-1944, as well as in the present application, the decree-holders had already exercised the option given to them of realising the whole amount on the default clause and consequently the decree-holders had no further rights to realise the instalments as such. So far as the application of 15-12-1944, is concerned, in that application there was obviously no exercise of any option to realise on the default clause. That was an application merely for substitution of the legal representatives of the decree-holder. It was mentioned in that application that the entire decretal amount of Rs. 678-4-6 was realisable in accordance with the compromise of 6-1-1937, in ten instalments. There was also a mention that, in case of default of three instalments the entire amount was to become due. That application consequently mentioned all the terms of the amended decree and the mere prayer for substitution cannot therefore be read as an indication that the decree-holders intended to rely on the default clause when applying subsequently for realisation of the amount due under the decree and were not intending to realise the amounts of the instalments as such.

Learned counsel for the appellant has pointed out that, in that application dated 15-12-1944, there was a mention that that application was within time because the judgment-debtor was an agriculturist and U. P. Act 10 of 1937 was applicable to the execution application. His argument is that this mention of the protection in U. P. Act 10 of 1937 was only necessary in case the decree-holders wanted to execute the decree for the entire sum relying on the default clause and this mention must, therefore, be considered as indicating that the decree-holders had exercised the option to realise the decretal amount under the default clause. Firstly, even if the decree-holders had intended to realise the amounts of the instalments as such, it would probably have been necessary to mention U. P. Act 10 of 1937 so as to show that the application, even in respect of the instalments which had fallen due more than 3 years before 15-12-1944, was within time. Consequently this mention of U. P. Act 10 of 1937 was necessary as the decree-holders wanted to show that their execution for the entire amount realisable under the default clause would be within time if they in future wanted to proceed in that manner and this protection sought by the decree-holders could in no way be interpreted as showing that they were entirely giving up their other right of realising the instalments as such. The application of 15-12-1944, provides no basis for the argument that the decree-holders, having exercised their option to realise the amount under the default clause, were no longer competent to realise the instalments as such. So far as the present application of 23-11-1945, is concerned, I have already had occasion to say earlier that, even though the execution was sought on the basis of the default clause, it was competent for the Courts during the pendency of the execution application to permit the decree-holders to treat it as an application for execution in respect of individual instalments that were due and the execution in respect of which was within time.

[4a] Learned counsel contended that, once the decree-holders have exercised the option to realise on the default clause, the decree subsequently ceases to remain an instalment decree and the only remedy thereafter left to the decree-holders is to realise the entire amount under the default clause. In support of this contention learned counsel has referred me to two decisions of the Bombay High Court in *Hanmant Bhimrao* v. *Gururao Swamirao*, A. I. R. 1943 Bom. 36 and in *Lakshman Krishna* v. *Parvatibai*, A. I. R. 1943 Bom. 63. In the former case there was a difference of opinion between two learned Judges of the Bombay High Court and the case was referred

on difference to the learned Chief Justice, held as follows :

"That decree was originally a decree for payment by annual instalments. As soon as default was made, the decree-holder was given two inconsistent rights; he could continue under the decree to recover the amount by instalments, or he could recover the whole amount at once; but he could not do both. He was bound to limit his *darkhast* to a principal sum either of Rs. 1850 or Rs. 300. He had alternative rights and the debtor was subject to alternative obligations. The creditor having elected to enforce his right to recover the whole debt in one lump sum, the future obligation of the debtor was fixed accordingly, and, in my opinion, it was not open to the creditor subsequently to turn round, and seek to enforce the decree as an instalment decree."

In the latter case the judgment of the Divisional Bench was delivered by Broomfield J. who agreed with the decision of the Chief Justice in the case cited above in the following words :

"What has been decided in that case is that if a decree-holder elects to take advantage of a default clause such as that with which we are concerned and applies in execution to recover the whole amount of the decree, he cannot afterwards, even though his *darkhast* is infructuous, treat the decree as an instalment decree. Several English cases were referred to in the judgment, but briefly the ratio decidendi was that the decree-holder in such a case has alternative but inconsistent rights. It is not a case merely of alternative remedies. If he chooses to exercise one of the two inconsistent rights, he ceases to be able to exercise the other."

In both these cases no reason at all is given why the learned Judges of the Bombay High Court held that, on the exercise of the option to proceed on the default clause, the primary right to realise the instalments as such became extinguished. In the former case, the learned Chief Justice merely expressed it as his opinion that, the creditor having elected to enforce his right to recover the whole debt in one lump sum it was not open to him subsequently to turn round and seek to enforce the decree as an instalment decree. If two alternative modes of realising the money are granted by the decree to the decree-holder and no limitation is placed by the decree itself that, on the pursuance of one mode of realisation the other mode would no longer be open to him, there is no reason to hold that the discretion of the decree-holder to proceed to realise the money by one mode at one time and by a different mode at another time is in any way fettered. In the second case, the learned Judges proceeded on the assumption that the two modes of recovery, viz. recovery of amounts of individual instalments as such and the recovery of the whole amount on the basis of the default clause, were two inconsistent rights. How and why they were held to be inconsistent does not appear to have been explained.

[5] This question was carefully considered by a learned Judge of the Nagpur High Court in *Firm Hardeo Dwarkadas* v. *Firm Binjraj Hariram*, A. I. R. 1943 Nag. 170, and I may say with respect that I entirely agree with the view of the learned Judge that the only principle on which it can be held that the decree-holder, having exercised the right to realise the money by one mode cannot proceed to realize by the other mode will be one based on the law of estoppel. If the decree-holder by proceeding by one mode gives reason to the judgment-debtor to believe that he is finally exercising his option, and the judgment-debtor actually acts on that belief, it may be held that the decree-holder would be estopped from going back on that understanding given by him and it would not be open to him to proceed by the alternative mode.

The point also came up before a learned single Judge of the erstwhile Chief Court of Oudh in *Gurdin Bhant* v. *Chhedi Bhant*, 16 Luck. 495. The learned Judge held :

"In my opinion, even to that extent his appeal would have been entirely without force because, the moment the decree-holder exercised successfully the option to execute his decree for the whole amount, he at once converted the decree from being an instalment decree into an ordinary decree for the realisation of the full decretal amount. He could not again claim to realise any of the instalments as they fell due or rather within three years from the date on which they fell due."

It is to be noticed that the learned Judge emphasised the fact that the decree-holder had successfully exercised the option to execute the decree for the whole amount. A successful exercise of that option would bring the principle of estoppel into play. But where there has been no successful exercise of the option that principle would not apply.

A case which came before the erstwhile Chief Court of Oudh which was very similar in fact to the case before me is that of *Peoples Bank of Northern India Ltd.* v. *Aijaz Ali*, 17 Luck. 449, which has already been cited by me above in another connection. In that case, preceding the application which came up for consideration before the Court, there had been four earlier applications in which the decree-holder had sought to realise the whole amount due under the decree on the basis of the default clause. In the fifth application, one of the questions that was urged before the Bench was as to whether having once elected to ask for one kind of relief provided by the decree, the decree-holder could afterwards change his mind and ask for the other. The first point that was raised before the Bench was that, since the decree made it obligatory on the decree-holder to execute on the first default ; he had no option in the matter and could not subsequently rely on provisions for payment by instalments which by reason of the default had ceased to be operative. The other contention was put in the alternative on the ground that this first one would become immaterial if it could be held that the decree-holder having elected to proceed to realise the entire amount on the basis of the default clause, he was thereafter debarred from changing his mind and asking for the instalments as such. This second point was overruled by the Bench, though in the judgment the learned Judges did not specifically mention why they were overruling this

contention. The learned Judges relied on a Full Bench decision of the Allahabad High Court in *Joti Prasad* v. *Sri Chand*, 51 ALL. 237, and on a Full Bench decision of the Chief Court of Oudh in *Ajodhia Prasad* v. *Bansi Lal*, 11 Luck. 276. The decision in that case supports the view that I have taken in the case under consideration. It is also supported by the decision of the Nagpur High Court in the case mentioned above.

[6] The rights of a decree-holder under an instalment decree came up for consideration very recently before a Full Bench of this Court, of which I was a member, in *Sheo Lal* v. *L. Devi Das*, 1952 ALL. L. J. 583. The point which is raised in the present case before me did not arise there, but one aspect of the decision in that case is relevant and may be mentioned. In answering one of the questions referred, the Full Bench held that

"the decree-holder will have a right to apply for realisation of each successive instalment as it falls due, provided the decree is not so worded that the only right left to the decree-holder after the first default is to realise the whole decretal amount."

This decision shows that, where the right to realise the whole amount on the basis of default is granted to the decree-holder on occurring of the default it does not extinguish his right to continue to realise each successive instalment as it falls due, unless there is a specific provision to that effect in the decree. I consider that this same principle can be applied when considering the effect of the exercise of the option to proceed under one clause of the decree instead of the other. If the occurrence of the default does not extinguish the right to realise the instalment the exercise of the option should not also affect the right to realise the instalments unless there is something in the decree itself indicating that the exercise of the option would extinguish the primary right granted by the decree to realise the amount in instalments. Of course if additional circumstances come into existence and the principle of estoppel stands in the way of the decree-holder, the position may be different; but while there are no other considerations as in the case before me, the right of the decree-holder to proceed to realise instalments cannot be affected by the circumstance that at one time he might have expressed his intention to proceed on the default clause.

[7] In these circumstances, the order passed by the lower appellate Court is correct. The appeal fails and is dismissed with costs.

[8] The stay order dated 23-2-1949 is vacated.

[9] Leave to appeal to a Bench is granted.

A/K.S. *Appeal dismissed.*

A. I. R. 1953 Allahabad 338 *[Vol. 40, C.N. 148]*

(LUCKNOW BENCH)

MISRA J.

Rahmat Ali and another, Accused-Applicants v. *The State.*

Criminal Revn. No. 323 of 1951, D/- 21-8-1952.

Penal Code (1860), Ss. 96 & 99 — Private defence — Right of—Extent.

Land on which wall was being constructed by accused not belonging to complainant. Wall not obstructing passage. Nevertheless complainant coming determined to prevent accused from carrying on construction and demolishing a part of wall. Complainant armed with stick. Prosecution failing to establish that initial blow was struck by accused.

Held (i) That there was clear possibility that complainant commenced wielding his stick and the accused were entitled to the right of private defence.

(ii) That the view that the accused could have gone to the Police station and obtained necessary assistance was unwarranted.

(iii) That the accused did not exceed their right of private defence in inflicting the injuries that they did. A. I. R. 1930 Lah. 93, *Rel. on.* (Paras 4, 5 and 6)

Anno. Penal Code, S 96 N 1; S 99 N 6.

H. Husain and H. N. Misra, for Applicants; Addl. Govt. Advocate, for the State.

REFERENCE. Para.

('30) 31 Cri. L. J. 654 : (A. I. R. 1930 Lah. 93) 4

Order. — Rahmat Ali and Rifaqat Ali, applicants in this criminal revision were convicted by the learned Assistant Sessions Judge of Unnao of offences under ss. 308 and 323, Penal Code. The former was sentenced to rigorous imprisonment for one year under the first count, and under s. 323 to one month's rigorous imprisonment. Rifaqat Ali was sentenced to three months' rigorous imprisonment for the offence under s. 308, Penal Code, and to fifteen days' rigorous imprisonment under s. 323, Penal Code, but he was given the benefit of s. 4, First Offenders Act, and was ordered to give two sureties of Rs. 1000 and a personal bond in like amount to appear and receive sentence, if necessary, within a period of one year. In appeal Rahmat Ali's conviction under s. 308, Penal Code, was altered to one under s. 325, Penal Code, but his conviction under s. 323 was left unaltered. His sentence was reduced from one year's rigorous imprisonment under the first named section to three months' simple imprisonment and a fine of Rs. 150 or one month's further simple imprisonment in default. For the offence under s. 323 he was awarded one month's simple imprisonment and a fine of Rs. 50 or one week's further simple imprisonment in default. The order in respect of Rifaqat Ali was upheld. Dissatisfied with the decision of the Court below the applicants have come up to this Court by way of revision.

[2] Only one point has been argued by the learned counsel in support of his clients's application and that is to the effect that the accused were entitled to the right of private defence on the facts found proved by the lower appellate Court.

[3] The case for the prosecution was that on 20.8.1950, there was a *marpit* between the accused Rahmat Ali and his son Rifaqat Ali on one side and Abdul Wahid and his party on the other. The dispute arose in connection with the erection of a wall which Rahmat Ali was constructing in front of his shop in the town of Unnao. It was

said that on Abdul Wahid's remonstrating with the accused, he and his brother Abdul Ahad were attacked and beaten and that the accused continued the assault even after Abdul Wahid had fallen on the ground. The medical evidence showed that Abdul Wahid received twelve injuries including one grievous injury. Rahmat Ali had five simple injuries and Rifaqat Ali had two. The Learned Sessions Judge after a close examination of the evidence arrived at the following conclusions :

1. That the wall which was being constructed by Rahmat Ali was in front of his shop,
2. That there was no dispute between the parties in respect of the land on which the construction was being put up,
3. That it did not cause any obstruction to the passage to the house of Abdul Wahid,
4. That the complainant and his party arrived at the spot at about 4.30 P. M. and wanted to prevent the accused from proceeding with the construction, and
5. That they demolished the wall and this resulted in a free lathi fight between the complainant and his brother on the one side and the accused on the other.

[4] It may be mentioned here that two other persons Rahat Ali and Gaya Prasad were also sent up for trial along with the applicants but they were acquitted by the Learned Assistant Sessions Judge. The Learned Sessions Judge in appeal considered that Abdul Wahid and Abdul Ahad in the course of their evidence suppressed certain facts and exaggerated others and the story put forward by them could not be relied upon with confidence. He did not, for example, accept the story that Abdul Wahid was beaten even after he had fallen on the ground and he rejected the theory that the accused's party were the aggressors. His view was as follows :

"....there was a quarrel between the appellants and the complainants over the construction of a wall and there was an exchange of blunt weapon blows in which both parties received injuries. I cannot agree with the learned lower Court that it could be specifically said that the accused were the first to be attacked or were the aggressors ... Although the appellants have failed to establish the facts on the basis of which their plea of self-defence could be acceptable in any sense, the circumstance that the complainants had gone over to the appellants to prevent them from constructing the wall, had partly demolished the wall, and had somehow inflicted injuries on them in the course of the fight cannot be minimised too much."

The right of private defence was negatived by the learned Judge because in the view taken by him the applicants could have gone to the police station which was within a short distance of the place of occurrence and obtained necessary assistance for preventing the complainant's party from taking the law into their own hands. I am clear that this view of the law of private defence is unwarranted. It was found by the learned Judge that the land on which the construction was being put up by Rahmat Ali did not belong to Abdul Wahid or his brother and that the wall did not obstruct the passage to his house but that Abdul Wahid nevertheless came determined to prevent Rahmat Ali from carrying on the construction and demolished a part of the wall. According to the defence he was armed with a stick. He was thus apparently bent on using force. The prosecution has failed to establish that the initial blow was struck by the accused and there is thus a clear possibility that Abdul Wahid commenced wielding his stick. The observation of the learned Judge that Rahmat Ali should, in these circumstances, have proceeded to the thana and obtain police help does not appear to be justified. As stated in *Mahandi* v. *Emperor*, 31 Cri. L. J. 654 (Lah.) the law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. The right of self-defence as defined in ss. 96 and 97, Penal Code, contemplates that if a man is attacked he would be justified in the eye of law if he holds his ground and delivers a counter attack provided always that the injury which he inflicts in self-defence is not out of all proportion to the injury with which he was threatened. Looked at in this light it is impossible in the circumstances to which reference has been made earlier in the course of this judgment to get over the plea of private defence set up on behalf of the applicants. It was urged on behalf of the State that the right was in any event exceeded. The argument was based upon a comparison of the injuries found on the persons of the accused and on Abdul Wahid, it being maintained that inasmuch as Abdul Wahid received twelve injuries as against seven on the persons of Rahmat Ali and Rifaqat Ali and four out of those on Abdul Wahid injuries were on the head, one being a grievous injury, the accused must be taken to have used more force than was necessary.

[5] Obviously when two parties begin to use lathis or blunt weapons, one by way of attack and the other by way of defence, it is impossible to count the blows inflicted by the assailants and to expect that an equal number of blows would be given in retaliation. Similarly it would be an unwarranted restriction on the right of private defence to hold the defender liable if the blows dealt by him prove to be somewhat heavier than those from which he endeavoured to save himself. The law of private defence is not based on the theory of retaliation—a blow for a blow or a tooth for a tooth. The acts of an accused person done in good faith for the purpose of resisting unlawful aggression are protected because of necessity that the defender should be able to help himself and repel the attack. The blows dealt on him do not necessarily always indicate what further injuries would have been inflicted if he did not act betimes. It is not only the injuries already inflicted but the injuries which the attackers might inflict if the defender does not save himself that must be taken into consideration.

[6] On the facts and circumstances of this case I have no hesitation in holding that the accused were entitled to the right of private defence and

that they did not exceed that right in inflicting the injuries that they did on Abdul Wahid. I accordingly accept the revision application, set aside the order of the Court below and acquit Rahmat Ali and Rifiqat Ali of the charge in respect of which they have been convicted. Rahmat Ali is on bail. He was ordered to be present at today's hearing but an affidavit filed by his son, Rifiqat Ali shows that he is seriously ill and could not present himself at today's hearing. He need not surrender. Let his bail bonds be cancelled. The fines if paid will be refunded.

C/H.G.P. *Revision allowed.*

A.I.R. 1953 Allahabad 340 *[Vol. 40, C. N. 149.]*

AGARWALA J.

Girja Prasad and others, Applicants v. *Zalim Singh, Opposite Party.*

Criminal Revn. No. 94 of 1951, D/- 15-12-1952.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 49—Constitution of Bench.

Where both parties reside in the same village, if one panch of that village is a member of the Bench it is quite sufficient to comply with the provisions of the Act. [Para 2]

(b) U. P. Panchayat Raj Act (26 of 1947), S. 83—Appointment of Commissioners.

In the investigation by the Panchayati Adalat outsiders may be appointed as commissioners and the Panchayati Adalat can rely upon their report : A. I. R. 1952 All. 785, *Disting.* [Para 4]

(c) U. P. Panchayat Raj Act (26 of 1947), S. 83—Oath to accused—(Criminal P. C. (1898), S. 342).

The mere fact that the accused had been examined on oath does not prejudice the trial : A. I. R. 1953 All. 144, *Disting.* [Para 6]

Anno. Cr. P. C., S. 342 N. 31.

R. B. Misra, for Applicants; C. B. Misra, for Opposite Party.

REFERENCES : Courtwise/Chronological/ Paras.
('51) 1951 All L. J. 719 : (A. I. R. 1952 All. 785 : 1952 Cri. L. J. 1273). 5
('52) 1952 All. L. J. 565 : (A. I. R. 1953 All. 144 : 1953 Cri. L. J. 392). 6

Order.—The complaint against the applicants which was presented before the Panchayati Adalat of Bhagwatipur was that the applicants had cut away a tree belonging to the complainant and standing in his land and that when the complainant remonstrated with the applicants he was assaulted with lathis by them. The tree was claimed by the applicants to belong to them. The Panchayati Adalat went into the matter and found that the tree belonged to the complainant and that the applicants were not justified in cutting it. Each of the applicants were, therefore, convicted and sentenced to a fine of Rs. 25. The applicants went up in revision to the Sub-Divisional Magistrate. The revision was dismissed.

[2] In this application before me it has been urged that the constitution of the Panchayati Adalat which tried the case was not in accordance with the provisions of S. 49 of the U. P. Panchayat Raj Act inasmuch as only one panch out of the five panches was taken from the village in which the complainant and the accused lived. It is urged that both parties live in the same village and since S. 49 requires that one panch from the village in which the complainant lives and another from the village in which the accused live must be taken and that three panches from other villages should be taken, the taking of only one panch from the village of the complainant and the accused was illegal and rendered the constitution of the Panchayati Adalat unconstitutional. In my opinion, this contention has no force. Section 49 provides that a Bench of five panches shall be formed for the trial of any case, suit or proceeding. It further provides that :

"Such a Bench shall include one panch who resides in the area of the Goan Sabha in which the plaintiff of a suit or proceeding or the complainant of a case resides, and likewise one panch residing in the area of the Gaon Sabha in which the defendant or the accused resides, and three panches residing in the area of the Gaon Sabha in which neither party resides."

The provisions quoted above apparently contemplate the contingency in which the complainant and the accused reside in different villages. They do not contemplate the contingency in which both of them reside in the same village.

The idea underlying the provision that one panch from each of the villages in which the complainant and the accused reside should be included in the Bench of the panches, is to make available to the Panchayati Adalat the services of a person acquainted with the locality in which each party resides. His knowledge of the locality is expected in cases tried by the Panchayati Adalat, which are of a petty and local nature, to help in the decision of such cases. The object of the section is fully secured by there being on the Panchayati Adalat a panch who has knowledge of the locality of both the parties. In a case in which both parties reside in the same village the section does not lay down that two panches of the same village should necessarily be included in the composition of the Bench. In such an event if one panch of the village in which both parties reside is a member of the Bench it is quite sufficient to comply with the provisions of the Act. In this view of the matter the constitution of the Panchayati Adalat was not illegal or irregular.

[3] The second point urged is that the Panchayati Adalat had no jurisdiction to award the wood of the tree to the complainant. As the Code of Criminal Procedure does not apply to the procedure of the Panchayati Adalat, the Panchayati Adalat had no jurisdiction to make an order for the return of the property in connection with which the offence was committed. But the Panchayati Adalat in the present case has done nothing of the kind. The statement in the judgment that the tree was justly awarded to the complainant merely meant that the tree was found to belong to the complainant and not that the wood was awarded to him. Learned counsel for the opposite party states that for the wood a

separate decree had been obtained by him against the applicants. Hence the order of the Panchayati Adalat will not be construed as awarding the wood to the complainant.

[4] The third point urged before me is that in an investigation made by the Panchayati Adalat outsiders were appointed as Commissioners and the Panchayati Adalat relied upon their report. I do not consider that the procedure was illegal. The Civil Procedure Code, the Criminal Procedure Code and the Evidence Act do not apply to the proceedings of the Panchayati Adalat. The Panchayati Adalat is entitled to appoint Commissioners and to rely upon their report. It is not necessary for the Panchayati Adalat to examine the Commissioners on oath before their statements can be taken into account. Further it appears from the record that the Panchayati Adalat had before it other evidence taken on oath on the basis of which it decided the case in favour of the complainant. There is, therefore, no force in this point.

[5] Learned counsel has relied upon a decision of my brother P. L. Bhargava J. in *Sant Prasad* v. *State*, 1951 ALL. L. J. 719. In that case, the Panchayati Adalat associated other persons with it in the investigat on and trial of the case and it was held that this procedure vitiated the trial. I entirely agree with that decision. But here the Panchayati Adalat did not associate outsiders in the trial of the case. Outsiders were asked to make a report as Commissioners and there is nothing wrong in the Panchayati Adalat doing so.

[6] Lastly, it has been urged that oath was administered to the accused in the present case. I do not consider that the mere fact that the accused had been examined on oath prejudices the trial. Learned counsel has referred to *Pati* v. *Dubari*, 1952 ALL. L. J. 565. In that case the accused was not only put on oath but was also cross-examined. Prejudice was, therefore, caused to him. In the present case the accused was not cross-examined and it has not been shown that any prejudice was caused to him.

[7] There is no force in this application and it is dismissed. The stay order is discharged.

B/D.H. *Application dismissed.*

A.I.R. 1953 Allahabad 341 *[Vol. 40, C. N. 150.]*

(LUCKNOW BENCH)

BEG J.

Dulla — Applicant v. *The State through Dwarka and others—Opposite Party.*

Criminal Ref. No. 17 of 1952, D/- 21-7-1952.

Criminal P. C. (1898), S. 145—Absence of danger of breach of the peace—Magistrate's further proceedings are without jurisdiction. [Para 5]

Anno. Criminal P. C., S. 145 N. 12 Pt. 12.

Farooq Hasan—for Applicant.

Order. — This is a reference by the learned Additional Sessions Judge of Unnao recommending that the order passed by Sri Niaz Ulla, Sub-Divisional Magistrate, Hasanganj Unnao, under S. 145, Criminal P. C., directing that the disputed property be released in favour of the opposite parties Dwarka and others be set aside.

[2] It would appear that the applicant Dulla had presented an application under S. 145, Criminal P. C., against Dwarka and others in respect of plot No. 138 detailed therein alleging that the plot in question was his tenancy land and that he was in possession of it. After calling for a police report the trial Court passed an order on 13-11-1950, that the said plot and the crop standing thereon be attached. Both the parties were called upon to file written statements in the case. Each of them claimed to be the tenant in possession of the plot in dispute. They were required to produce evidence in support of their case.

[3] The learned Magistrate minutely examined the evidence adduced by each of the parties and as a result of the findings thus arrived at on their respective claims and on the question of possession finally passed an order releasing the property in favour of Dwarka and others. The applicant Dulla went up in revision against the said order. The revisional Court has made a reference to this Court for setting aside the impugned order. I am of opinion that this reference must be accepted.

[4] The order of the learned Magistrate shows that there was nothing on the record which could suggest that there was any danger of a breach of the peace. Under the circumstances the learned Magistrate found that there was no likelihood of a breach of the peace in respect of the plot. In spite of it the trial Court went through the entire gamut of procedure prescribed by S. 145, Criminal P. C., for the purpose of determining in whose favour the release order should be passed.

[5] The procedure adopted is unwarranted by law. Once it is found that there is no danger of a breach of the peace, the foundation for action under S. 145, Criminal P. C., disappears. The Magistrate has no jurisdiction to proceed further and must immediately stay his hand. He cannot convert himself into a civil Court and go on to decide the case on merits or to give a finding either on the question of title or on the question of possession for any ulterior or subsidiary purpose. The only course open to him is to cancel his initial order and to quash all proceedings under S. 145, Criminal P. C.

[6] I accordingly accept the recommendation of the learned Additional Sessions Judge of Unnao, set aside the order and direct that the entire proceedings under S. 145, Criminal P. C., shall stand cancelled.

C/D.R.R. *Reference accepted.*

A.I.R. 1953 Allahabad 342 *[Vol. 40, C. N. 151]*

RAGHUBAR DAYAL AND AGARWALA JJ.

Lakhan Singh — Applicant v. *Balbir Singh and another—Opposite Party.*

Criminal Misc. No. 36 of 1951, D/- 30-4-1952.

(a) Contempt of Courts Act (32 of 1952), S. 3 — Articles in newspaper pending case.

An assertion that a fact exists and has been established as correct when the existence of that fact is in dispute in a pending case and its existence is yet to be determined, is likely to prejudice a fair trial of the case when the assertion assumes the shape of the opinion of persons unconnected with the case, like the editor of a newspaper. *Case law referred.* [Para 4]

(b) Constitution of India, Art. 19 (2) (as amended in 1951)—Reasonable restrictions.

The language of the Constitution after the amendment of Art. 19 requires the High Court to see whether the restrictions are "reasonable." The law of contempt as laid down by British and Indian Courts imposes nothing but reasonable restrictions on the exercise of the right of freedom of speech and expression and, therefore, the previous law continues in force even after the amendment of Art. 19. *American Case Law Ref.* [Paras 10, 16]

(c) Constitution of India, Art. 215—Power to punish contempt of Subordinate Court — (Contempt of Courts Act (1952) S. 3).

Article 215 vests in the High Court all the powers of a Court of record and all the powers of such a Court including the power to punish for contempt of itself. The phrase "the power to punish for contempt of itself" does not limit such powers of the High Court as it possesses as a Court of record or other powers with which it may be invested by law. The power to commit for contempt of Subordinate Courts has been expressly conferred upon it by the Contempt of Courts Act, 1952. [Para 17]

Hirday Narain Kapoor and Gopalji Mehrotra — for Applicant; Gopal Behari — for Opposite Party; Sri Rama, Deputy Govt. Advocate — for the State.

REFERENCES: Courtwise/Chronological/	Paras.
(1899) A. C. 549 : (68 L. J. P. C. 137).	5
(1742) 2 Atk. 469 : (26 E. R. 683).	5
(1941) 86 Law. Ed. 192 : (314 U. S. 252).	7, 13
(1946) 90 Law. Ed. 1295 : (328 U. S. 331).	8
(1947) 91 Law. Ed. 1546 : (331 U. S. 367).	14, 15
(1889) 58 L. J. Q. B. 490 : (61 L. T. 343).	6
(1900) 2 Q. B. 36 : (69 L. J. Q. B. 502).	5
(1907) 205 U. S. 454 : 51 Law. Ed. 879.	9
(1919) 249 U. S. 47 : 63 Law. Ed. 470: 39 S. Ct. 247.	12, 13, 15

Agarwala J.—This is an application praying that the opposite parties be committed for contempt of Court and be dealt with according to law. The opposite parties are two persons, Chaudhari Balbir Singh and Sri Balswarup Gupta. Chaudhari Balbir Singh is the Managing Editor, publisher and printer of an Urdu Weekly known as 'Hindustan Weekly, Meerut' and opposite party 2, Balswarup Gupta is alleged to be the Editor in-charge of the paper. The applicant is a *thekedar* of a country liquor shop at Muzaffarnager. He acquired the theka at a public auction held on 22-3-1951, for a period of one year. He was the thekedar of country liquor in the previous year also. On 6-2-1951, the Tahsildar seized some bottles containing liquor on suspicion that the liquor was diluted. As dilution of liquor was in contravention of the terms of the licence, a case under s. 64, Excise Act, was started on 6-4-1951 against the applicant after permission had been obtained for the same from the District Magistrate. The case is still pending in the Court of the Magistrate, Sri Uma Shanker. The Hindustan Weekly in a note dated 6-6-1951 referred to this case against the applicant in these words :

"We are informed that on 6-2-1951, Sri Khalaq Singh Tahsildar Muzaffarnagar, seized some bottles of liquor and the liquor was found to be diluted with water. Sri D. P. Singh, Collector of the District has made over charge of that case on 7th April to Sri S. N. Singh, Magistrate, First Class, under S. 64, Excise Act. The Collector has now transferred the case to the file of Sri Uma Shanker. The result of the case is being awaited with interest."

[2] In its issue of 27-6-1951 it published a note headed 'Zilla Muzaffarnagar ke thekedaran sharab'. It was in these terms:

"A correspondent informs us that the thekadaran of liquor at Muzaffarnagar have taken the theka at a very high price, which fact raises a suspicion that dishonesty and illegality will be committed, as there is no method by which the price may be paid to Government except by earning it by illegal means. It has also come to knowledge that although these thekedars obtained liquor at Rs. 2-4-0 per bottle they charge fancy prices from customers. People do not complain for the price so much as for the fact that even after paying a handsome price they do not get liquor of the strength which the Government has fixed, namely, 65 per cent. That the liquor is being diluted with water is proved by the fact that the liquor which was seized by the Collector in the preceding days contained diluted liquor of the strength of 46 per cent. It is hoped that the Excise Commissioner, U. P. will attend to this matter."

Again in its combined issue of 11 and 18-7-1951 it published an editorial note in which after pointing out how liquor was being openly sold in the district and city of Muzaffarnagar contrary to rules, it was stated:

"Some time ago the Collector and the Chairman, District Board, seized some liquor from the thekedar's place. It was proved to be diluted with water."

[3] The applicant's case is that the matter published in the issue of 27-6-1951 and 11/18-7-1951 was published with a view to prejudice the applicant before the public and before the Court and there was an attempt to fore-judge the case against the applicant while it was pending in Court. On behalf of the opposite parties it has been contended that the articles complained of do not constitute contempt of Court and that, in any case, after the amendment of Art. 19 (2) the restrictions placed upon the right of freedom of expression by the old law of contempt of Court could not be said to be reasonable within the meaning of the amended Art. 19 (2) and as such the opposite parties could not be held guilty of contempt of Court. After hearing arguments of the learned counsel for the opposite parties a petition accompanied by an affidavit has been sent to the Court by post by opposite party 2 in which it is stated that the opposite party 2 is a Secretary of the Saharanpur National Trading Co. Ltd., Meerut—the company which manages and conducts the paper "Hindustan Weekly Meerut" and that he is concerned only with the general office routine of the newspaper office in his capacity as Secretary of the company

and is not concerned with the publication of the offending items; that under Art. 215 of the Indian Constitution the High Court can punish for contempt of itself and cannot commit for contempt of Courts subordinate to it; that the affidavit of Lakhan Singh is incomplete inasmuch as it has not been mentioned therein as to who was in contempt and what are the attending circumstances and lastly that if contempt was at all committed it was of a very minor and technical nature and was likely to be overlooked.

[4] We have already quoted the publications against which objection has been taken by the applicant. Although the name of the applicant was not specifically mentioned in the note published in the issue of 6-6-1951, it is quite clear that the case against the applicant was referred to therein because it is not alleged that anybody else's liquor was seized and that anybody else was prosecuted on 7-4-1951 in the Court of the Magistrate mentioned in the note. In argument before us, no attempt was made to suggest that the article did not refer to the case against the applicant. In the article there was a clear reference to liquor having been seized from the possession of the "thekedar". This clearly referred to the applicant as he is the sole thekedar of country liquor at Muzaffarnagar. In the articles in question it has been stated that it has been established that the liquor seized from the applicant's possession was diluted, whereas this was the very fact which was in dispute in the case pending against the applicant. An assertion that a fact exists and has been established as correct when the existence of that fact is in dispute in a pending case and its existence is yet to be determined, is likely to prejudice a fair trial of the case when the assertion assumes the shape of the opinion of persons unconnected with the case, like the editor of a newspaper.

[5] It is well settled that a publication which prejudiced mankind against a party before the cause is heard amounts to contempt of Court. The famous statement of Lord Hardwicke, L. C. in *St. James's Evening Post case*, (1742) 2 Atk. 469, at p. 471 will bear quotation :

"There are three different sorts of contempt. One kind of contempt is scandalising the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the case is heard." See also *R.* v. *Gray*, (1900) 2 Q. B. 36 at p. 41 per Lord Russell of Killowen C. J., *McLeod* v. *St. Aubyn*, (1899) A. C. 549.

[6] It is not necessary that a comment on a pending case must actually prejudice the judge or jury before it can be said to amount to contempt, it is enough that it is calculated to create prejudice against the applicant. In *Hunt* v. *Clarke*, (1889) 58 L. J. Q. B. 490, Cotton L. J. observed :

"No doubt there may very well be observations made of such a character as that not only would they be technically a contempt, but such as that the Court, in order to secure causes being properly tried before it, ought to interfere. If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the Court should come to the conclusion that a Judge or a jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt and would be met with the necessary punishment in order to restrain such conduct."

[7] Administration of justice by an impartial judiciary is the basis of our system of jurisprudence and indeed of the jurisprudence of any civilised State. It is the concern not merely of immediate litigants. Its assurance is every one's concern. The method of administering justice prevalent in our Courts is that a conclusion to be reached in a case will be induced only by evidence and argument in open Court and not by outside influence whether of private talk or public print. To quote the words of Frankfurter J. and the other dissenting Judges in *Bridges* v. *California*, (1941) 86 Law Ed. 192 at p. 214,

"A trial is not a 'free trade in ideas', nor is the best test of truth in a Courtroom 'the power of the thought to get itself accepted in the competition of the market'."

Comment, however, forthright is one thing. Identification with respect to specific matters still in judicial suspense is quite another.

[8] In *Pennekamp* v. *Florida*, (1946) 90 Law Ed. 1295 at p. 1313, it was observed by Frankfurter J. :

"The press does have the right, which is its professional function, to criticise and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not least the administration of justice. But the public function which belongs to the press makes it an obligation of honour to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice. It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies. Such a restriction, which merely bars the operation of extraneous influence specifically directed to a concrete case, in no wise curtails the fullest discussion of public issues generally. It is not suggested that generalised discussion of a particular topic should be forbidden, or run the hazard of contempt proceedings, merely because some phases of such a general topic may be involved in a pending litigation. It is the focussed attempt to influence a particular decision that may have a corroding effect on the process of justice and it is such comment that justifies the corrective process . . . .

If men, including judges and journalists, were angels, there would be no problems of contempt of Court. Angelic Judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to Judges. The power to punish for contempt of Court is a safeguard not for judges as persons but for the function which they exercise. It is a condition of that function indispensable for a free society that in a particular controversy pending before a Court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence".

[9] Holmes J. laid down in *Patterson* v. *Colorado*, (1907) 205 U. S. 454 at p. 463 : 51 Law Ed. 879, that :

"When a case is finished, Courts are subject to the criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

It is clear to us that apart from any consideration of the effect of amended Art. 19 (2), according to the well-established principles of the law of contempt of Court the articles of 27-6-1951 and 11/18-7-1951 constitute a contempt of Court.

[10] It has been contended, however, that the Indian Constitution as amended by the Constitution (First Amendment) Act, 1951, has altered the situation and the previous law of contempt is no longer in force. Clause (1) (a) of Art. 19 of the Constitution grants to all citizens the right to freedom of speech and expression. This right is, however, subject to the provisions of cl (2) of that Article. Before its amendment cl. (2) stood as follows :

"(2) Nothing in sub-cl. (a) of cl. (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State".

The existing law relating to contempt of Court was, therefore, saved from the operation of Art. 19 (1) (a). Clause (2) of Art. 19 was, however, amended by the Constitution First Amendment Act, 1951. After the amendment the clause reads as follows :

"(2) Nothing in sub cl. (a) of cl. (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States public order decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

It will be observed that before the amendment the entire law relating to libel, slander, defamation, contempt of Court, decency or morality or any matter which undermines the security of, or tends to overthrow, the State was excluded from the operation of Art. 19 (1) (a). There was no question of any reasonableness of the law relating to the matters specified in cl. (2). After the amendment, if the existing law or future law relating to the matters mentioned in sub-cl. (2) contravenes the limits of 'reasonable restrictions' on the exercise of the right of freedom of speech, such law will be void. While in this regard the amended clause has restricted the scope of the said clause, it has extended its scope in another direction inasmuch as laws relating to friendly relations with foreign States, to public order and to incitement to an offence have been added. No doubt the expression 'reasonable restrictions' refers not merely to future laws but also to existing laws. We consider, however, that the law of contempt as laid down by British and Indian Courts imposes nothing but reasonable restrictions on the exercise of the right of freedom of speech and expression and therefore the previous law continues in force even after the amendment.

[11] Our attention has been drawn to the American view on the subject. Before we discuss the American view, however, it will be pertinent to notice that while the Indian Constitution specifically limits the right of freedom of speech in the manner already mentioned, the guarantee of freedom of speech and expression is not specifically restricted in the American Constitution. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law". The due process clause was interpreted by the United States Supreme Court as covering protection of the freedom of speech and of the press.

[12] The American Courts were, however, not slow to recognise the necessity of limiting the freedom of speech and expression. They evolved restrictions on the right of freedom of speech and expression under the doctrine of what is known as the "police power" of the State. The Federal Congress was held to possess an implied power to restrict the freedom guaranteed by the Constitution if it was necessary

"for the exercise of other express powers given to the United States as in connection with war power, and the Supreme Court has finally held that the provision against abridging the freedom of speech or of the press does not prohibit all legislation by Congress. (Willis, Constitution Law, 489.)"

As a result of approximating the law for the Federal Congress under the First Amendment and the law for the States under the Fourteenth Amendment, the American Courts have evolved the test of "clear and present danger" *Shenck* v. *United States*, (1919) 249 U. S. 47. The question was when do words give rise to unlawful acts ? Three possible answers were suggested: (1) when they directly urge or cause such acts, (2) when they might have an indirect or remote tendency to cause such acts, and (3) when there is a clear and present danger that they will cause such acts. The "clear and present danger" test is the test now applied.

[13] In *Bridges* v. *California*, (1941) 86 Law Ed. 192, Black J. delivering the opinion of the Supreme Court said (at page 203),

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

The publication in question (at p. 208) :

"after vigorously denouncing two members of a labour union who had previously been found guilty of assaulting non-union truck drivers closes with the observation. 'Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill.'"

The trial Court had punished the publisher because the publication had an "inherent tendency" to interfere with fair trial of a pending case and State Supreme Court punished him because the

publication had a "reasonable tendency" to interfere with the orderly administration of justice. Black J. of the Supreme Court (Federal) observed (at p. 208):

"In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression."

Four Judges of the Supreme Court, however, gave a dissenting opinion and held that the publication amounted to contempt of Court. As regards the phrase "clear and present danger" they observed (at p. 221) :

"The Constitution, as we have recently had occasion to remark is not a formulary. Nor does it require displacement of an historic test (the test of reasonable tendency) by a phrase which first gained currency on 3-3-1919, *Schenck* v. *United State*, (1919) 249 U.S. 47 : 63 Law. Ed. 470 : 39 S. Ct. 247. Our duty is not ended with the recitation of phrases that are the shorthand of a complicated historic process. The phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension."

[14] In *Graig* v. *Harney*, (1947) 91 Law Ed. 1546, a Judge was criticised in strong language as to his decision and procedure followed by him in a particular trial still pending before him. It was held :

"The vehemence of the language used is not alone the measure of the power to punish for contempt of Court. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

With this opinion of the Court, Frankfurter J. and the Chief Justice dissented, and observed that the publication in question was contempt of Court.

[15] It is interesting to note what was stated by certain Judges about the phrase "clear and present danger" which was first used by Holmes J. in *Schenck's case* (1919-249 U. S. 47 : 63 Law Ed. 470 : 39 S. Ct. 247). The minority of the Judges remarked in *Graig* v. *Harney*, (1947) 91 Law Ed. 1546 that :

"Only the pungent pen of Holmes J. could adequately comment on such a perversion of the purpose of his phrase."

[16] From the above it will be clear that strong difference of opinion exists even in America about the application of the clear and present danger test. We are not bound to apply any such test. Conditions in India are different from those prevailing in America. The language of our Constitution after the amendment of Art. 19 requires us to see whether the restrictions are "reasonable." As we have already stated we think the restrictions placed by the law of contempt as it is understood in England and in this country are "reasonable."

[17] As regards the plea that Art. 215 of the Constitution impliedly debars the High Court from punishing contempts of subordinate Courts, it is enough to say that the plea has no force. Article 215 vests in the High Court all the powers of a Court of record and all the powers of such a Court including the power to punish for contempt of itself. The phrase "the power to punish for contempt of itself" does not limit such powers of the High Court as it possesses as a Court of record or other powers with which it may be invested by law. The phrase has been used merely by way of extra precaution—*ex abundanti cautela*. The power to commit for contempt of subordinate Courts had been expressly conferred upon it by the Contempt of Courts Act, 12 of 1926 which has been recently replaced by Act 32 of 1952.

[18] The plea that the affidavit of Lakhan Singh is incomplete has no force. It is clear that the applicant alleged that both the opposite parties were guilty of contempt of Court. The circumstances in which contempt was committed were mentioned in the affidavit.

[19] Opposite party 2 Balswarup Gupta was alleged by the applicant to be the editor-in-charge of the paper. This allegation, supported as it was by the applicant's affidavit, was not challenged before us by the learned counsel for the opposite parties. A belated attempt was made by opposite party 2 to challenge this fact after the reservation of judgment in the case by means of an application sent by post. We are not prepared to allow this question of fact to be agitated before us in this manner when the applicant has had no opportunity to meet it. We hold that opposite party 2 was the editor-in-charge of the paper as alleged by the applicant and is equally guilty of contempt along with opposite party 1.

[20] Opposite parties were on a previous occasion dealt with for similar contempt and were fined Rs. 50 and in default of payment were ordered to undergo simple imprisonment for a period of two weeks. It appears that the previous order of fine has had no effect on them. More deterrent sentence is, therefore, called for. It was stated in the affidavit filed on his behalf that if the Court considered that the articles amounted to contempt of Court he was extremely sorry and withdraws the articles. This is not an unconditional apology and does not show a change of heart and contempt cannot be purged by it.

[21] We, therefore, order that each of the opposite parties shall pay a fine of Rs. 250 and shall also pay costs of the applicant which we assess at Rs. 100 and costs of the Assistant Government Advocate which we assess at Rs. 80. One month is allowed to pay the fine and costs. In case of default of payment of fine the opposite parties shall undergo simple imprisonment for one month.

A/V.S.B. *Fines imposed.*

A.I.R. 1953 Allahabad 315 *[Vol. 40, C. N. 152]*

P. L. BHARGAVA J.

Vidya Niwas, Applicant v. *State.*

Criminal Revn. No. 295 of 1952, D/- 27-8-1952.

(a) Whipping Act (1909), S. 3 — Offence under S. 378.

The punishment of whipping can be awarded only in lieu of the punishment to which the accused is otherwise liable. Imposition of an additional sentence of whipping is therefore illegal. [Paras 3 & 4]

Anno. Whipping Act, S. 3 N. 2.

(b) Penal Code (1860), S. 379—Whipping Act (1909), S. 3 — Accused, a history-sheeter under police surveillance found picking pockets at Cinema booking-house — Accused convicted under S. 379, Penal Code and sentenced to 1 year's rigorous imprisonment—Held punishment with only whipping was not sufficient though one year's rigorous imprisonment was excessive and was reduced to 6 months. [Para 5]

Anno. I. P. C., S. 379 N. 23; Whipping Act, S. 3, N 2.

D. Sanyal and Sripat Narain Singh, for Applicant; Addl. Govt. Advocate, for the State.

Order. — The applicant, Vidya Niwas, has been convicted and sentenced to undergo rigorous imprisonment for one year under S. 379, Penal Code; and in addition to the punishment awarded to him under the Penal Code he has also been punished with whipping to receive 12 stripes under the Whipping Act. Against his conviction and sentence, he preferred an appeal to the Sessions Judge of Gorakhpur. The appeal was heard by the Additional Sessions Judge of Gorakhpur, who upheld the conviction as well as the sentences imposed upon the applicant. Now, the applicant has filed this revision. The revision was admitted on the question of sentence only.

[2] It has been argued on behalf of the applicant that the sentence imposed upon the applicant is not only excessive but it is also illegal. The sentence imposed upon the applicant is said to be illegal, inasmuch as in addition to the sentence of imprisonment under the Penal Code, punishment of whipping has also been imposed, in direct contravention of the provisions of S. 3, Whipping Act which lays down :

"3. Whoever commits any of the following offences, namely :

(a) theft, as defined in S. 378, Penal Code other than theft by a clerk or servant of property in possession of his master ;

(b) theft in a building, tent or vessel, as defined in S. 380 of the said Code ;

(c) theft after preparation for causing death or hurt, as defined in S. 382 of the said Code ;

(d) lurking house-trespass; or house-breaking, as defined in Ss. 443 and 445 of the said Code in order to the committing of any offence punishable with whipping under this section ;

(e) lurking house-trespass by night, or house-breaking by night, as defined in Ss. 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section ;

may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code."

[3] The applicant having been found guilty of an offence of theft, as defined in S. 378, Penal Code, he could not, therefore, have been punished with whipping in addition to the sentence of imprisonment. In view of the provisions contained in S. 3, Whipping Act, the punishment of whipping could have been awarded only in lieu of the punishment to which the applicant was otherwise liable. Section 4 of the Whipping Act makes a provision for the imposition of the punishment of whipping in lieu of or in addition to any other punishment to which any accused may be liable : but that is permissible only when any of the offences mentioned in that section are committed. The offence of theft is not one of the offences mentioned in S. 4 of the Whipping Act.

[4] Consequently, the applicant could not have been punished with whipping in addition to imprisonment awarded under S. 379, Penal Code. The imposition of the punishment under the Penal Code as well as under the Whipping Act is, therefore, illegal.

[5] Learned counsel for the applicant has contended that the sentence of one year's rigorous imprisonment imposed upon the applicant under S. 379, Penal Code, is excessive ; and that, in the circumstances of the case only the punishment of whipping may be maintained. The applicant was found picking the pocket in a crowd which had collected at the window of the booking office of a cinema hall. It further appears from the evidence on the record that the applicant is a history-sheeter and had been under the surveillance of the police. Having regard to the nature of the offence committed by the applicant, I am not prepared to accept the suggestion that the applicant should only be punished with whipping. The sentence of one year's rigorous imprisonment, in the circumstances of the case, however, does appear to be excessive : and I reduce it to a period of six months. The sentence under the Whipping Act is set aside. Subject to this modification, the revision is rejected.

C/D.R.R. *Order accordingly.*

A. I. R. 1953 Allahabad 346 *[Vol. 40, C.N. 153]*

BRIJ MOHAN LALL J.

Moti Ram—Appellant v. *Smt. Hasina Begam —Respondent.*

Civil Revn. No. 1465 of 1952, D/- 23-12-1952.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7—Overrides S. 16, Provincial Small Cause Courts Act—(Government of India Act (1935), S. 107 (2)—Provincial Small Cause Courts Act (1887), S. 16.)

A plain reading of S. 7 of the U. P. Act indicates that a special jurisdiction has been conferred by that section on the Munsif to try a suit for rent in circumstances mentioned in the section.

The suit is not cognisable by the Small Cause Court as the provisions of the U. P. Act which is passed before the Constitution with the Governor-General's assent override S. 16, Small Cause Courts Act, by virtue of S. 107 (2), Government of India Act (1935). [Paras 2, 3]

Anno. Govt. of India Act, S. 107 N. 1.

Dhar—for Appellant.

Order. — This is an application in revision by a tenant. An application for ejectment from an accommodation was presented against him under S. 7B, U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), by the landlord. He de-

posited the rent in Court under sub-s. (7) of the said section and filed an objection about the rate of rent. The landlord was called upon by the learned Munsif to pay the court-fee which he did. Thereafter, the proceedings were converted under sub-s. (8) into a suit. The learned Munsif held a trial and recorded a finding that the landlord's version about the rate of rent was correct. He gave him a decree for the amount claimed, i. e., Rs. 227-8-0. It is against this decision that this petition of revision has been filed.

[2] The contention put forward on behalf of the applicant (tenant) is that the moment the proceedings were converted into a suit the learned Munsif lost jurisdiction to try it. It is urged that the plaint should have been returned for presentation to the Court of Small Causes, which Court alone is ordinarily competent to try a suit for arrears of rent. This contention does not appear to be correct. A plain reading of s. 7 will indicate that a special jurisdiction has been conferred by this section on the Munsif to try a suit for rent in circumstances mentioned in the section. Sub-section (11) of s. 7B runs as follows :

"Whenever the Munsif finds that the application by the landlord or the objection by the tenant was frivolous or vexatious, he shall award special costs to the tenant or the landlord, as the case may be, up to the amount of the claim."

It will appear from the very language of this sub-section that the Munsif has been given power to award special costs against the landlord as well as against the tenant if the former's application or the latter's objection is found to be frivolous or vexatious. There can be no finding that the application or the objection is frivolous or vexatious unless the learned Munsif records evidence and enters into the merits of the case. It is, therefore, obvious that sub-s. (11) makes it clear beyond doubt that the learned Munsif has jurisdiction to hear and decide a suit for arrears of rent in circumstances mentioned in s. 7 of the Act.

[3] It is argued by the learned counsel for the applicant that s. 16, Provincial Small Cause Courts Act (9 of 1887), lays down in mandatory terms that a suit which is cognizable by the said Court shall not be triable by any other Court. But this provision should be deemed to be repealed by s. 7B, U. P. (Temporary) Control of Rent and Eviction Act, qua suits of this nature in the State of U. P. The U. P. Act was passed before the coming into force of the Constitution. The Governor General's assent was taken, and, therefore, by virtue of s. 107 (2), Government of India Act, 1935, the provisions of the U. P. (Temporary) Control of Rent and Eviction Act override s. 16, Provincial Small Cause Courts Act. I am, therefore, of the opinion that the learned Munsif had jurisdiction to try the suit.

[4] I do not wish to express any opinion at this stage as to whether or not the decision of the learned Munsif was appealable to the learned District Judge. If it was, no revision lay. But since the revision has no force it fails on merits. It is hereby dismissed.

B/D.R.R. *Revision dismissed.*

A.I.R. 1953 Allahabad 347 *[Vol. 40, C. N. 154]*

AGARWALA J.

Rama Shanker Lal, Applicant v. *State of Uttar Pradesh.*

Criminal Revn. No. 972 of 1951, D/- 12-12-1952.

(a) U. P. Panchayat Raj Rules (1949), R. 101 — Death of complainant during revision.

The words 'Criminal Case' in R. 101 refer to a criminal case pending before a Panchayati Adalat. Even if the phrase "criminal case" were taken to include a revision before a sub-divisional Magistrate, the abatement would be of the revision and not of the order of the Panchayati Adalat. The order of the Panchayati Adalat therefore does not become void simply because the complainant has died while the revision against that order was pending before the Sub-Divisional Magistrate. [Paras 4, 5]

(b) Constitution of India, Art. 227 — Criminal case in Panchayati Adalat — Some panches not signing order sheet on same date—Omission amounts to mere irregularity—Does not affect merits of case—No interference under Art. 227 on that ground—(U. P. Panchayat Raj Act (1947), S. 83.) [Para 6]

Ambika Prasad, for Applicant.

Order.—This is an application under Art. 227 of the Constitution. The applicant was convicted under ss. 323 and 447, I. P. C., by a Panchayati Adalat and fined Rs. 50 and 25 respectively for the two offences. The order of the Panchayati Adalat was confirmed on revision by the Sub-Divisional Magistrate.

[2] Two points have been taken before me. The first point urged is that the complainant died during the pendency of the revision before the learned Sub Divisional Magistrate but after the decision by the Panchayati Adalat, and that therefore the case abated and the order of the Panchayati Adalat became null and void.

[3] Ordinarily, a criminal complaint does not abate on the death of a complainant, because it is the State which is, in fact, the prosecutor; the complainant being merely a person helping the State in punishing the guilty. Reliance has been placed on R. 101 of the Panchayat Raj Rules which runs as follows :

"If, during the pendency of a criminal case, other than a police-case, either the complainant or the accused dies, the case shall abate, but if during the pendency of a civil suit or revenue proceeding any party dies the legal representative of the said party shall be made a party to the suit or proceeding, as the case may be, subject to the provisions of S. 67 of the Act."

[4] The phrase "criminal case" has been used in contradistinction with the phrase "police case," and the parties are named as 'complainant' and 'accused.' These names, 'complainant' and 'accused' are appropriate to a proceeding in the trial Court and not to a proceeding in the appellate or revisional Court. Further the word 'case' itself has been defined in s. 2 (c) as meaning "A criminal proceeding in respect of an offence triable by a Panchayati Adalat." For these reasons, I am

of opinion that the words 'criminal case' in R. 101 refer to a criminal case pending before a Panchayati Adalat. Even if the phrase "criminal case" were taken to include a revision before a Sub-Divisional Magistrate, the abatement would be of the revision and not of the order of the Panchayati Adalat.

[5] I am, therefore, of the opinion that the order of the Panchayati Adalat does not become void simply because the complainant has died while the revision against that order was pending before the Sub-Divisional Magistrate.

[6] It was next urged that some of the Panches did not sign the order-sheet on same dates. This point was not taken before the learned Sub-Divisional Magistrate. In any case, this was a mere irregularity not affecting the merits of the case and I am not prepared to exercise my powers under Art. 227 and interfere on such a ground.

[7] There is no force in this revision and it is dismissed.

A/D.R.R. *Application dismissed.*

A.I.R. 1953 Allahabad 343 *[Vol. 40, C. N. 155.]*

AGARWALA AND CHATURVEDI JJ.

Durgeshwar Dayal — Applicant v. *The Secretary, Bar Council, Allahabad and another — Opposite Party.*

Writ. Appln. No. 53 of 1953, D/- 8-1-1953.

Bar Councils Act (1926), S. 8 — Preparation of list for amalgamated High Court Procedure—(Constitution of India, Art. 226).

In an application to decide whether the advocates who were advocates before 31-5-1952 and who had already paid enrolment fee to the old Bar Councils are liable to pay a further sum of Rs. 10 as enrolment fee to the new Bar Council, to be created for the amalgamated High Court of Allahabad, the Judges of the High Court need not be impleaded as opposite parties. It is enough that the joint Registrar is impleaded. [Paras 4, 5]

S. K. Verma — for Applicant.

Agarwala J. — This is an application by Durgeshwar Dayal Seth, an advocate, practising in this Court, praying that his name may be ordered to be included in the new roll of advocates which is being prepared without payment of any sum of money. The facts briefly are as follows :

[2] The petitioner was called to the Bar on 18-11-1935 and was enrolled as an advocate of the High Court of Judicature at Allahabad on 23-2-1938. The petitioner's name was duly entered on the roll of advocates of the Court under S. 8 (2) (b), Bar Councils Act, and the petitioner has been practising in the Court since the date of his enrolment. By an order made by the Governor General of India called the United Provinces High Courts (Amalgamation) Order 1948, the High Court of Judicature at Allahabad and the Chief Court in Oudh were amalgamated and a new Court called the High Court of Judicature at Allahabad was created. The first proviso to Art. 8 of the said Amalgamation Order provided :

"Provided that, subject to any rule made or direction given by the new High Court in the exercise of the powers conferred by this Article, any person who, immediately before the appointed day, is an advocate entitled to practise or an attorney entitled to act in either of the existing High Courts, shall be recognised as an advocate or an attorney entitled to practise or to act, as the case may be, in the new High Court."

[3] There were separate Bar Councils attached to the erstwhile High Court of Judicature at Allahabad and the Chief Court of Oudh. By the amalgamation the anomaly of the existence of two Bar Councils had to be remedied. With that object, the Indian Bar Councils (Uttar Pradesh Amendment) Act of 1950 was enacted. By this Act, the Bar Councils of Allahabad and of Oudh were abolished and a provision was made for the creation of a new Bar Council for the new amalgamated Court. By a notification dated 24-5-1952 issued under sub-s. (3) of s 1, Bar Councils Act, 1926, and published in the U. P. Gazette dated 31-5-1952, the provisions of ss. 7 to 16 of the Bar Councils Act were made applicable to the new High Court of Judicature at Allahabad. A fresh list of advocates is being prepared under S. 8, Bar Councils Act. Sub-section (2) of that section directs the High Court to prepare and maintain a roll of advocates of the High Court in which shall be entered the names of

"(a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section comes into force in respect thereof; and

(b) all other persons who have been admitted to be advocates of the High Court under this Act."

Then follows the following proviso :

"Provided that such persons shall have paid in respect of enrolment the stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in cl. (a), and in other cases such amount as may be prescribed."

[4] The Joint Registrar has demanded a sum of Rs. 10 as enrolment fee under the above proviso to be paid to the new Bar Council by all those advocates who were advocates of the Court on 31-5-1952 the date when ss. 7 to 16 were made applicable to the new High Court. The Secretary, Bar Council, has also notified to the same effect. The question raised in the present application is whether the applicant and other advocates who were advocates before 31-5-1952 and who had already paid enrolment fee to the old Bar Councils are liable to pay a further sum of Rs. 10 as enrolment fee to the new Bar Council. The question is of importance and we are inclined to decide this case on hearing the other side. But a point of procedure may be decided at this stage.

[5] Besides impleading the Secretary, Bar Council, and the Joint Registrar of this Court, as opposite parties Nos. 2 and 3, the applicant has also impleaded the Hon'ble Judges of the Allahabad High Court as opposite party No. 1. This, in our opinion, is not correct. The prayer of the applicant is that the High Court may be pleased to

perform the duty cast upon it by S. 8 (2), Bar Councils Act, and it is true that the Joint Registrar of this Court has made the disputed notification on behalf of the Court. If the Judges of the High Court are impleaded as parties, it will be difficult, if not impossible. for any Judge of the High Court to hear the case. It is wholly unnecessary to implead the Judges of the High Court as opposite parties. It is enough that the Joint Registrar is impleaded. If the applicant is entitled to the relief claimed by him, an order can be made by the Court to that effect and it will be carried out by the officers of the Court and by the Bar Council. We, therefore, direct the applicant to delete the Hon'ble Judges of the High Court from the array of parties.

[6] Issue notice. Learned counsel suggests that the case should be listed for hearing on the 19th of this month. Let this be done.

A/D.R.R. *Order accordingly.*

A.I.R. 1953 Allahabad 349 *[Vol. 40, C. N. 156.]*

(LUCKNOW BENCH)

KIDWAI J.

Shakir Khan, Applicant v. *The State.*

Criminal Revn. No. 266 of 1951, D/- 14-4 1952.

Criminal P. C. (1898), S. 350 — Resummoning of witnesses.

Where a Magistrate was transferred and after intermediate transfer of another Magistrate, the Magistrate again got jurisdiction, still the accused has a right under the section : A. I. R. 1950 All. 669, *Relied on; Case law referred.* [Paras 7 & 8]

Anno. Cr. P. C., S. 350 N. 2, 14.

Mohd. Husain, for Applicant; Umashankar Srivastava for Deputy Govt. Advocate, for the State.

REFERENCES : Courtwise/Chronological/ Paras

('38) A. I. R. 1938 All. 536 : (39 Cri. L. J. 978). 5
('50) A. I. R. 1950 All. 669 : (1950 All. L. J. 599). 3, 4
('41) A. I. R. 1941 Lah. 322 : (43 Cri. L. J. 165). 5
('25) A. I. R. 1925 Mad. 174 : (26 Cri. L. J. 510). 4
('34) A. I. R. 1934 Mad. 475 : (35 Cri L. J. 1363). 4
('31) A. I. R. 1931 Nag. 39 : (32 Cri. L. J. 603) 4
('36) A. I. R. 1936 Nag. 153 : (37 Cri. L. J. 983). 4
('36) A. I. R. 1936 Nag. 220 : (38 Cri. L. J. 15). 4

Order. — Proceedings were going on under s. 110, Cr. P. C., before Sri. C. K. Verma, S. D. M. Maharajganj, district Rae Bareli. Sri C. K. Verma was transferred on 20-3-1951 and became S. D. M., Rae Bareli. He was succeeded by Sri Vishnu Prakash, before whom the accused claimed that the witnesses should be recalled. Orders were passed to this effect on 29-3-1951. On 14-4-1951 Sri Vishnu Prakash recorded the statements of Ram Ratan and Adhar. He was then transferred to some other district and on 4-7-1951 the case was retransferred to Sri C. K. Verma. Before him the accused applied for resummoning of the witnesses. This application was rejected on 17-7-1951. The accused went in revision but the learned Sessions Judge rejected his application. He has now come up to this Court in revision.

[2] The matter is governed by s. 350, Criminal P. C., which reads as follows :

"Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an enquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the enquiry or trial.

Provided as follows : (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard."

[3] In the present case the Magistrate did not *suo motu* decide to recommence the trial. It was the accused who claimed the right to resummon the witnesses. The distinction between the two is to be found laid down in *State* v. *Bansu*, A. I. R. 1950 ALL. 669, but it is not material for the purposes of this case. Here the question is whether Sri C. K. Verma can be deemed to be another Magistrate or whether he will be considered to be the Magistrate who has all along been seised of the case and whatever took place before Sri Vishnu Prakash can be ignored.

[4] In *Sardar Khan Sahib* v. *Athaulla*, A. I. R. 1925 Mad. 174 and *Ramalingam Pillai* v. *Emperor*, A. I. R. 1934 Mad. 475, it was laid down that if the second Magistrate merely ordered *de novo* trial at the request of the accused, it had the effect of wiping out everything that had been done by the first Magistrate and that consequently when the case was transferred to the first Magistrate, the accused were justified in asking for a *de novo* trial. This view is supported by the decisions of the Nagpur High Court in *Sheorajsai* v. *Dani*, A. I. R. 1931 Nag. 39 and *Tukaram Janba* v. *Emperor*, A. I. R. 1936 Nag. 153 and *Emperor* v. *Ganpat*, A. I. R. 1936 Nag. 220. The distinction, however, between a retrial and the re-summoning of witnesses has been clearly laid down by a Bench of this Court in *State* v. *Bansu*, A. I. R. 1950 ALL. 669, to which I have already referred. In that case it is clearly pointed out that if a Magistrate decides to proceed afresh *suo motu*, he recommences the trial which means that everything done before is wiped out. On the other hand the accused only has a right to resummon the witnesses which is not the same thing as *de novo* trial. With respect I agree with this view of the section.

[5] It is, however, not necessary for the applicant to go to this extent because the cases upon which both the lower Courts have relied, namely *Shyamapado Deb* v. *Sunder Das*, A. I. R. 1938 ALL. 536 and *Ghaus Mohammad* v. *Emperor*, A. I. R. 1941 Lah. 322, themselves justify the resummoning of witnesses in a case such as this.

[6] As I have already pointed out Sri Vishnu Prakash recorded statements. He was, therefore, a Magistrate who heard and recorded a part of the evidence in the enquiry or trial when he was transferred and the case was again sent to Sri C. K. Varma. Sri C. K. Varma must be deemed

within the meaning of the two authorities which I have just mentioned to be another Magistrate.

[7] In the Allahabad case the learned Judge says that in order to attract the provisions of S. 350, Cr. P C., the first Magistrate must have two qualifications. He must have heard and recorded the whole or any part of the evidence and he must cease to have exercised jurisdiction. This is also the view of the Lahore High Court. In both those cases the first Magistrate had not heard and recorded any part of the evidence. He did not, therefore, possess the first qualification. In these circumstances it was held that S. 350, Cr. P. C., did not apply to this case.

[8] In the present case the learned Magistrate Sri Vishnu Prakash possessed both the qualifications namely he heard and recorded part of the evidence and he ceased to have jurisdiction. Section 350, Cr. P. C., therefore, did apply to this case. When the case went back to Sri C. K. Varma, he must be deemed in the circumstances to be another Magistrate and the accused has a right under cl. (1) (a) of S. 350, Cr. P. C., to claim to have the witnesses resummoned.

[9] This position becomes still more clear when we remember that the statements of Ram Ratan and Adhar were recorded by Sri Vishnu Prakash, If C. K. Varma is deemed not to be another Magistrate it does not appear what is to happen to the statements of Ram Ratan and Adhar. They cannot be resummoned before Sri C. K. Varma. This means either that their statements must be ignored or that in spite of the right conferred upon an accused person their statements are to be read as part of the proceedings of Sri C. K. Varma without their being resummoned which is a result which is far from what S. 350, Cr. P. C., contemplates. I, therefore, hold that the accused was entitled to have the witnesses resummoned and reheard even when Sri C. K. Varma was once more seized of the case.

[10] I, therefore, allow the application, set aside the order of the learned Magistrate, dated 17-7-1951, and remit the case to him to proceed to resummon and rehear the witnesses under the provisions of S. 350, Cr. P. C.

C/D.R.R. *Application allowed.*

A.I.R. 1953 Allahabad 350 *(Vol. 40, C.N. 157)*

(LUCKNOW BENCH)

AGARWALA J.

Mt. Thekura and others, Defendants-Appellants v. *Sukhraj Singh, Plaintiff-Respondent.*

Second Appeal No. 116 of 1947, D/- 4-11-1952.

(a) Stamp Act (1899), S. 2 (15) — List of properties allotted to co-owners.

A partition Chitti signed by only some of co-sharers which merely records the fact that certain property was allotted to certain co-sharer at a private partition is not an instrument of partition and as such it is not required to be stamped. A. I. R. 1946 P. C. 51, *Disting.* [Paras 5, 6]

Anno. Stamp Act, S. 2 (15) N 10.

(b) Registration Act (1908), Ss. 17 (1) (b) and 49 — Partition list—(Stamp Act (1899), S. 35).

A partition Chitti which merely records that certain persons named therein have been allotted certain properties described therein at a private partition need not be registered under S. 17 (1) (b). A. I. R. 1946 All. 200, *Doubted but foll.* [Para 8]

Even if it requires registration, it can be used for the collateral purpose of proving the nature of possession in view of S. 49. [Para 8]

Distinction between S. 35, Stamp Act, and S. 49, Registration Act, pointed out. [Para 8]

Anno. Reg. Act, S 17 N 81 Pts 13, 14; S 49 N 14, 29.

J. S. Trivedi, for Appellants.

REFERENCES : Courtwise/Chronological/ Paras.

('46) A. I. R. 1946 All. 200 : (I. L. R. (1945) All. 921) 8

('46) 1946 Oudh W. N. 216 : (A. I. R. 1946 P. C. 51) 7

Judgment. — This is a defendants' appeal arising out of a suit for possession of a portion of plot NO. 278B in Mahal Chitta Singh and demolition of a building erected on it by the defendant-appellant. The plaintiff and one Jagannath were co-sharers in Mahal Chitta Singh. Jagannath gave permission to the defendant-appellant to construct a building on the plot in suit. In pursuance of the permission, the defendant-appellant raised a construction on the plot. The plaintiff-respondent filed a suit, which has given rise to this appeal, for demolition of this construction and for possession of the plot on the ground that one co-sharer had no right to give permission to make constructions on a joint piece of land.

[2] In defence, it was urged that there was a private partition between the cosharers in the mahal and the plot in suit had fallen to the lot of Jagannath's predecessor-in-title. In support of this plea a partition *chithi* showing the plots which had been allotted to Jagannath's predecessor-in-title was produced by the defendant-appellant. Relying on this document, as also on other documents, the trial Court held in favour of the defendants and dismissed the suit. The lower appellate Court, however, held that the chittha was an instrument which required stamp and also registration and that not being stamped nor registered it was not admissible in evidence even for a collateral purpose, namely, for the purpose of showing the nature of possession of Jagannath or his predecessor-in-title. The lower appellate Court, therefore, decreed the suit for possession and demolition.

[3] In this second appeal it has been urged on behalf of the defendant-appellant that the partition *chitthi* was admissible in evidence, that neither stamp duty was payable on it nor did it require registration and that, in any case, even if it required registration but no stamp duty, it was admissible in evidence for the collateral purpose of showing the nature of Jagannath's possession.

[4] Unfortunately, the respondent is not represented before me—his counsel having intimated to this Court that he had no instructions in the case.

[5] The partition *chittha*, EX. A-4/DWI is in the following terms :

"Chitthi (that is, memorandum) of private partition, mahal Chatta Singh, ten annas pukhtadari, mauza Mandoli, pargana Mahona, tahsil Malihabad, zila Lucknow, relating to the lot of Sheomangal Singh wa Jadunath Singh wa Rameshwar Bux Singh, corresponding to 1336 Fasli."

Then follow the numbers of the plots with their description and at the end there is a total of the area and the revenue of the whole lot. The document is signed by Sheo Mangal Singh and Bhagwan Bux Singh. Bhagwan Bux Singh was the other cosharer. The questions are whether this document required to be stamped under the Stamp Act and to be registered under the Registration Act. The Stamp Act defines an "instrument" as follows :

"'Instrument' includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or *recorded*."

Ex. A4/DWI is certainly a document which records the fact that certain property was allotted to the lot of certain persons at a private partition. It is signed by two of the co-sharers. It is, therefore, clearly a document by which a right or liability is purported to be "recorded". But every instrument is not required to be stamped under the Stamp Act. The Stamp Act requires only certain kinds of instruments to be stamped. Unless EX. A4/DWI is an instrument of partition, it does not seem to fall under the category of any other instrument liable to be stamped under sch. I, Stamp Act. Can it be called "an instrument of partition"? An "instrument of partition" has been defined as meaning

"any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue-authority or any civil Court and an award by an arbitrator directing a partition."

For an instrument to be an "Instrument of partition" it is necessary that there should be more than one owner of the property, that they should divide the property or agree to divide the property in severalty. The document must, on the face of it, show that the co-owners of a particular property have agreed to divide that property or have actually divided that property in a particular manner.

[6] The document in question does not exhibit an agreement between the parties to divide the property. It does not also exhibit a division of property. In order that there may be a division of property within the meaning of the expression "Instrument of partition", the deed of partition must mention the entire property which is divided and its division must be shown in separate lots between the co-owners. Nothing of the sort has been done in EX. A-4/DWI. It merely records that certain property was allotted to certain cosharers. This falls short of what the definition of the expression "Instrument of partition" requires. In my opinion the chittha in question EX. A-4/DWI is not an "Instrument of partition." As such, it did not require to be stamped.

[7] The lower appellate Court has relied on a decision of the Privy Council in *Ram Rattan* v. *Parma Nand*, 1946 Oudh W. N. 216 (P. C.) In that case it was held by the Judicial Committee that certain documents which were marked C and D and which were stated to be "Partition Chitthas" required to be stamped under the Stamp Act and that not being so stamped, were not admissible in evidence for any purpose whatsoever—even for a collateral purpose. The terms of the documents C and D are not mentioned in the judgment. It is quite possible that the two documents in that case taken together amounted, in substance, to "an instrument of partition", as defined in the Stamp Act. The same, in my opinion, cannot be said about EX. A4/DWI in the present case.

[8] The next question is whether the document EX. A4/DWI requires registration. In my opinion it is an instrument which required registration. Section 17, Registration Act, states what documents must be registered. The relevant clause (b) runs as follows :

"Other non testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in the present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property."

In my judgment, the document EX. A4/DWI does purport to "declare" the right, title or interest of certain cosharers in certain property. It says that certain persons named therein have been allotted the property described therein at a private partition. If the matter were *res integra*, I would have held that this chittha, EX. A4/DWI, fell within the purview of cl. (b) of S. 17, Registration Act, and required registration. As against this view, however, learned counsel for the appellant has invited my attention to the case of *Abdul Haq* v. *Mohammad Hashim*, A. I. R. 1946 ALL. 200. In that case certain Chitthas of partition were held not to require registration. It was observed :

"The question whether partition Chitthas require registration under S. 17 (1) (b) must be decided with reference to the contents and nature of the document and the surrounding circumstances in each particular case."

The terms of the chitthas in that particular case have not been set out. The question whether the document required registration was considered on the footing whether the document was a deed of partition or not. Apparently, it was not brought to their Lordships' notice that even though the document is not a deed of partition, it may require registration. Section 17, cl. (b) lays down that a document must be registered if it declares "any right, title or interest in immoveable property of the value of one hundred rupees or more. It is not necessary, therefore, that under the Registration Act partition chitthas must amount to partition deeds. It is enough that they merely declare a particular cosharer's right in a particular lot allotted to him at a particular partition. Their

Lordships further held that even if the document required registration, it could be used for the collateral purposes of showing the nature and character of possession of the party concerned. This follows from s. 49, Registration Act. I respectfully agree with this view and hold that even if EX. A4/DWI required registration it could be used for the collateral purpose stated above. The distinction between s. 49, Registration Act, and s. 35, Stamp Act, may here be noted. If a document is not stamped, s. 35, Stamp Act, makes it inadmissible for any purpose whatsoever i. e., it cannot be used even for a collateral purpose. But if the document is either properly stamped or is not required to be stamped but is required to be registered, s. 49 declares it to be inadmissible for the purpose of effecting any right in immoveable property, comprised therein, or be received as evidence of any transaction affecting such property, but it permits such document to be used as evidence of any collateral transaction not required to be effected by a registered instrument.

[9] The learned Judge of the Court below was in error in excluding the document from consideration. In view of the above, the appeal must be allowed, the order of the Court below set aside and that of the trial Court restored. As the respondent is not represented I make no order as to costs of this appeal. The appellant will have his costs in both the Courts below.

B/K.S. *Appeal allowed.*

A.I.R. 1953 Allahabad 352 *[Vol. 40, C. N. 158]*

SAPRU AND CHATURVEDI JJ.

Raghunath Narain Mathur, Applicant v. *Union of India, Opposite Party.*

Misc. Writ Appln. No. 672 of 1952, D/- 28-11-1952.

(a) Constitution of India, Art. 310 — Compulsory retirement — (State Railway Establishment Code, Vol. II, Rule 2046 (2) (a)).

The Railway authorities have an unfettered option to retire a person at the age of 55, though, normally speaking, they are expected to continue persons in employment, unless they are inefficient, until they reach the age of 60. The word "ordinarily" in Rule 2046 (2) (a) does not take away their right to retire him. [Para 3]

(b) Constitution of India, Art. 226—Interference.

Railway authorities—No statutory or legal duty to keep railway servant in employment until age of 60 — No grievance made out — No interference by High Court. [Para 3]

Dr. N. P. Asthana and Hari Swarup, for Applicant.

Sapru J.—This is an application under ART. 226 of the Constitution which has been presented to this Court by a Railway clerk who has been given notice by the Railway authorities that he will have to retire on the attainment of 55 years of age.

[2] Now, our attention has been drawn to a recent change in the State Railway Establishment Code, vol. II. Sub-rule (2) (a) of R. 2046 of that Code lays down that :

"A ministerial servant who is not governed by sub cl. (b) may be required to retire at the age of 55 years but should ordinarily be retained in service, if he continues efficient, up to the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing, and with the sanction of the competent authority."

[3] The point which has been urged is that a right has been conferred under this rule on an employee to be retained in service till the age of 60. That right, however, is subject to the reservation that he must be efficient. Dr. Asthana's argument is that the word "ordinarily" restricts the discretion of the Railway authorities and that they are, except where the employee is inefficient, expected to retain a Railway employee in service until he reaches the age of 60. He contends, therefore, that the applicant is entitled to continue in service until the age of 60 years. It is further urged that his services could be dispensed with only after he had been given an opportunity to show cause why he should not be retired at the age of 55. Dr. Asthana says that he could be retired only if he was found to be inefficient and charges of inefficiency should have been supplied to him for an explanation. We are unable to accept this argument as correct. The Railway authorities have an unfettered option, in our opinion, to retire a person at the age of 55, though, normally speaking, they are expected to continue persons in employment, unless they are inefficient, until they reach the age of 60. But it is solely for them to decide whether a man shall be retained or not after the age of 55. The word "ordinarily" does not take away their rights to retire him and it cannot be ignored. So in order to arrive at the conclusion whether a person is or is not sufficiently efficient to be allowed to be retained in service till the age of 60, it is not necessary for them to frame regular charges and give the employee an opportunity of explanation. Be that as it may, the important point about this case is that what in the case of the applicant the Railway authorities did was neither to dismiss nor to censure him. They have merely exercised the right which they possess under the terms of his contract of service to indicate to him that his services will not be required after he reaches the age of 55. They were, in any view of the case, under no statutory or legal duty to keep him in employment until the age of 60 and the applicant cannot make a grievance of the fact that the Railway authorities are not prepared to allow him to continue in office.

[4] Thus there is no force in this application. It is accordingly dismissed.

A/V.S.B. *Application dismissed.*

A.I.R. 1953 Allahabad 353 *[Vol. 40, C. N. 159]*

(LUCKNOW BENCH)

BEG J.

Swami Dayal, Accused-Applicant v. *State.*

Criminal Revn. No. 48 of 1951, D/- 26-4-1952.

(a) Arms Act (1878), Ss. 4, 19 (f)—Pistol in broken and unworkable condition—License is required for its possession — Pistol not losing its character as pistol and still usable as arm with some repairs—Possession of same without license is punishable : 6 Mad. 60 (F. B.), *held Dissented from in* 21 Mad. 360 (F. B.). [Para 5]

Anno. Arms Act, S. 4 N. 9; S. 19 N. 12.

(b) Criminal P. C. (1898), S. 103 — Search raid — Witnesses not from locality—Search held not necessarily vitiated especially where object of search would have been frustrated. [Para 6]

Anno. Cr. P. C., S. 103 N. 4, 7.

(c) Arms Act (1878), S. 19 (f) — Recovery of arm from room—Accused admitting that room belonged to him—It cannot be contended that room was not in his exclusive possession. [Para 7]

Anno. Arms Act, S. 19 N. 10.

(d) Criminal P. C. (1898), S. 439 — Point not taken in grounds of revision cannot be argued. [Para 7]

Anno. Cr. P. C., S. 439 N. 44.

Quazi Farooq Hasan for N. Banerji, for Applicant; S. N. Srivastava for Govt. Advocate, for the State.

REFERENCES : Courtwise/Chronological/ Paras.
('83) 6 Mad. 60 : (1 Weir 657 F. B.). 5
('93) 21 Mad. 360 : (1 Weir 659 F. B). 5
('47) 1947 Oudh W N 82 : (A.I.R. 1947 Oudh 114 : 48 Cri. L. J. 17). 7

Order. — The applicant Swami Dayal was employed as a gateman at a Railway level crossing at Gunti NO. 251/C near Motiganj Railway Station. During the night between 15 and 16-6-1949, a police party headed by the Circle Inspector Shri Sukhbir Singh went in search of some dacoits to village Nibhwa. They had an encounter with the dacoits who fled away and were chased. In the early hours of the morning the police party happened to pass by the outpost where the accused Swami Dayal was posted. The Circle Inspector made a search of the room occupied by the accused and recovered a country made pistol (EX. II) from there in the presence of the search witnesses. Thereupon the applicant Swami Dayal was prosecuted under S. 19 (f), Arms Act.

[2] The accused admitted that the room from which the pistol was alleged to have been recovered belonged to him. According to his statement, nothing incriminating was recovered from the room and the case was launched against him as a result of his enmity with the police.

[3] The trial Court found the accused guilty but in view of the fact that the pistol recovered was not in full working order passed a sentence of only two months' rigorous imprisonment with a fine of RS. 25 or in default rigorous imprisonment for one month.

[4] The accused went in appeal before the learned Sessions Judge of Gonda, who upheld the judgment of the trial Court and maintained the conviction and sentence of the accused.

[5] The accused has come in revision to this Court and the learned counsel appearing for him has urged three points in his favour. The first point argued by him is that the pistol itself was not quite fit for use and, therefore, it could not be an "arm" within the definition of that term in s. 4, Arms Act. He invited my attention to the statement in the recovery list that the handle of the pistol was partly rotten and both its triggers were out of order and a string was tied to the barrel in two places. The finding of the trial Court regarding the condition of the pistol is that it was partly broken and unworkable. Under the above circumstances his argument was that admitting that the pistol was recovered, it had ceased to be an arm under the Arms Act. The evidence indicates that the pistol had not lost its character as pistol. With a certain amount of repair it could easily be used as an arm. Under these circumstances I am of opinion that the article recovered should be considered to be an article for which a licence was needed and the possession of the same would be punishable under the Arms Act.

In this connection the learned counsel relied strongly on *Queen* v. *Sidappa*, 6 Mad. 60 (F.B.), a Full Bench decision of the Madras High Court, in which it was laid down that a gun rendered unserviceable by the loss of the trigger does not fall within the definition of "arms" in S. 4, Arms Act, 1878, and that the possession of such a weapon without a license is no offence. This ruling would no doubt to a certain extent support his contention. I, however, find that the law laid down in this ruling was subsequently reconsidered by a Full Bench of the Madras High Court reported in *Queen-Empress* v. *Jayarami Reddi*, 21 Mad. 360 (F.B.) and the view taken in the previous case was dissented from. According to the view taken in this case the test in such a case is not so much whether the particular weapon is serviceable as a fire arm but whether it has lost its specific character and has ceased to be a fire arm. I respectfully agree with the view expressed in this ruling. If a contrary view were to be held, it will enable any person wanting to circumvent the provisions of law to take out some small part like a screw from an arm and keep the arm in his possession and it would not be possible to convict him merely on the ground that the instrument itself was unworkable at the time. The first point raised by the learned counsel, therefore, appears to have no force.

[6] The second point argued by the learned counsel was that the provisions of S. 103, Criminal P. C., with regard to search were not strictly complied with as the witnesses were not the witnesses of the locality. The statement of the Circle Inspector showed that he had proceeded from the police station on information that a gang of dacoits had collected in the cabin of Swami Dayal gate-keeper for the purpose of committing dacoity.

When he reached the spot, he came to know that the gang had already left the room of Swami Dayal and were on the move for the purpose of committing dacoity. He traced them, surrounded them and apprehended a number of them. Some of them confessed their crime. The Sub-Inspector came back and immediately took the search of the room of Swami Dayal and recovered this incriminating article from the said place. It is evident that under the above circumstances the Sub-Inspector had no time to go to the village or to the station and to collect men from there for the purpose of effecting a search. In cases where such a raid is contemplated, it is usual for the police officer to take witnesses along with him so that they may serve as search witnesses when the occasion arises. Under such circumstances if he goes to look for independent witnesses, the very purpose of search might be defeated. A search is not vitiated by non-compliance with the provisions of S. 103, Criminal P. C., a breach of which will only put the Court on guard and incline it to scrutinise evidence of witnesses more closely. The effect of such irregularity will, however, depend on the circumstances of each particular case. In view of the special circumstances and the difficulty in which the Circle Inspector was placed, I think the conduct of search by him with the aid of the search witnesses available to him at the time cannot be characterised to be in any way improper; and cannot, in any case, have the effect of sweeping away the results of such a search. The search appears to me to be a genuine one.

[7] The third point raised by the learned counsel is that the room in question was not in exclusive possession of the accused. In this connection he has relied on *Chitta* v. *Emperor*, 1947 Oudh W. N. 82. This point was not taken in the grounds of revision. Even on merits I do not think that it can bear scrutiny for a moment. The accused himself has admitted in his statement that the cabin belonged to him. He has not stated that any one else was living with him at the time. Under these circumstances I am of opinion that this point also has no force.

[8] Having heard learned counsel at length I am of opinion that this revision has no substance. It is accordingly dismissed.

C/R.G.D. *Revision dismissed.*

A.I.R. 1953 Allahabad 354 *[Vol. 40, C. N. 160]*

SAPRU AND CHATURVEDI JJ.

Ram Narain Tewari, Applicant v. *Ram Chander Sharma and others, Opposite Party.*

Writ Case No. 7900 of 1951, D/- 16-12-1952.

Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 17 — Rules under, Rr. 6 and 7—(Constitution of India, Art. 226.)

Where a tenanted portion of the house occupied by the landlord falls vacant and the Rent Control Officer allots the same to a third person on ground that his need is most genuine, without even applying his mind to the question whether the claim of the landlord was bona fide or not and without even consulting the landlord whether the tenant is acceptable to him, the order of allotment contravenes Rr. 6 and 7 and cannot stand. [Prs. 3, 4]

P. N. Shukla, for Applicant; J. N. Agarwala, for Opposite Party.

Sapru J.—This application has been presented on behalf of Sri Ram Narain Tewari's trust by his managing trustee, Har Narain Swami. The dispute relates to house NO. 60/8 Purani Dal Mandi, Kanpur. Of this house the trust is admittedly the owner. According to the case put forward by the trust in the affidavit, which has been filed on behalf of it by Lokendra Bahadur, the pairokar of the trust, the trust was occupying a substantial portion of this house. The other portion was in the occupation of one Shyam Lal Vaid. He died and his nephew had to leave the house.

[2] It is necessary to go into the circumstances which compelled him to leave the house. On the house being vacated the trust started, according to the affidavit filed by it, immediately taking occupation : and wrote to the Rent Control and Eviction Officer on 10-9-1951, that it had started occupying the house. An application was also sent by the trust to the Rent Control and Eviction Officer for the allotment of that portion to it. The Rent Control and Eviction Officer did not, however, allot that portion to the trust. An allotment order was, however, made by him in favour of opposite party NO. 1 on the ground that the need of the applicant was most genuine. In passing this order the Rent Control and Eviction Officer overlooked the provisions of RR. 6 and 7 framed under S. 17, Rent Control and Eviction Act. Rule 6 requires the District Magistrate to permit the landlord to occupy an accommodation which has fallen vacant or is likely to fall vacant if it is bona fide needed by him (i. e. the landlord). There is nothing to show in the order which was passed by the Rent Control and Eviction Officer, that he exercised his mind on the point whether the need of the landlord was of a bona fide character or not. The sole consideration with him appears to have been the fact that the need of the applicant was most genuine. To the question whether the need of the landlord, which was a trust in this case, was of a bona fide character, he did not apply his mind at all.

[3] The second error into which the Rent Control and Eviction Officer has fallen is this. Undoubtedly a portion of this house was in the occupation of the landlord, for it was in the occupation of the agents of the trust. Their occupation was on behalf of the trust landlord. Before passing any order in regard to the allotment of that portion, it was obligatory on the Rent Control and Eviction Officer under R. 7 framed under S. 17 of the Act to consult the owner and to make, as far as possible, the allotment in accordance with the wishes of the owner. The purpose behind this rule appears to be to provide an opportunity to the landlord to have his say

in regard to any proposed allotment of his house. Possibly, this rule has been enacted as it is intended that a person, who is unacceptable to the landlord, should not be forced upon him if he, i.e., the landlord, is occupying a portion of the house himself. In any view of the case it was incumbent on the Rent Control and Eviction Officer to consult the landlord before proceeding to make arrangements in regard to the vacant accommodation and this he has failed to do in this case.

[4] Looking, therefore, at the case from the point of view of both Rr. 6 and 7, we have been driven to the conclusion that the order of the District Magistrate cannot be allowed to stand. There is, as we have pointed out, no real controversy as regards the facts. We, therefore, set aside the order of the Rent Control and Eviction Officer dated 15-10-1951, and direct him to re allot the disputed portion of the house after consulting the landlord. He must in doing so keep in view the provisions of Rr. 6 and 7 of S. 17, Rent Control and Eviction Act. We allow this application with costs.

[5] We have looked at the counter-affidavit filed on behalf of the opposite parties and are satisfied that a denial of the facts stated in para. 2 of the affidavit cannot be read into it.

A/K.S. *Application allowed.*

A.I.R. 1953 Allahabad 355 *[Vol. 40, C.N. 161]*

RAGHUBAR DAYAL AND ATMA CHARAN JJ.

State v. *Hiralal, Respondent.*

Criminal Appeal No. 640 of 1951, D/- 6-1-1953.

Forest Act (1927), Ss. 30, 32 and 33 — U. P. Forest Rules, R. 6.

Rule 6 in its general form cannot be said to be framed within the rule-making power of the Government under S. 30 or S. 32. Consequently, any contravention of the Rule does not make out any offence under S. 33.

[Paras 3 and 11]

Anno. Forest Act, S. 30 N. 1; S. 33 N. 1.

D. P. Uniyal, Dy. Govt. Advocate, for the State; G. P. Tandon, for Respondent.

Raghubar Dayal J. — This is a Government Appeal against the acquittal of Hira Lal of an offence under S. 33, Forest Act (16 of 1927) by the Additional Sessions Judge of Kumaun who set aside the order of conviction by a Judicial Magistrate of Lansdowne.

[2] Hira Lal, opposite party, constructed a house on a portion of plot No. 288 which was a *Qaiser-e-Hind* plot. Rule 6 of the Rules made by the Governor in 1939 and notified in Notification No. 357/XIV-1928, dated 3-8-1939 and published in the Government Gazette of U. P. dated 5-8-1939, Part I-A, at p. 249, is :

"No building shall be erected on unmeasured land without the permission of the Deputy Commissioner."

These rules were made under Ss. 30 and 32, Forest Act. Hiralal was prosecuted because he made these constructions without the permission of the Deputy Commissioner. His defence was that the shop was constructed by his father who died in 1939. This defence was not believed.

[3] The relevant portion of S. 30, cl. (c) of the Forest Act is :

"The Provincial Government may by notification in the Official Gazette prohibit from a date fixed as aforesaid the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, of any land in any such forest."

Section 33. The relevant portion of S. 33, sub-s. (i) (c) is :

"Any person who commits any of the following offences namely, contrary to any prohibition under S. 30 breaks up or clears for cultivation or any other purpose any land in any protected forest, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both."

It is clear that the prohibition about erecting any building ordered under R. 6 mentioned above does not come within the powers given to the Provincial Government under S. 30, cl. (c) and that even if such a power can be deemed to come under S. 30, any contravention of the rule does not make out any offence under S. 33. No other clause of S. 33 of sub-s. (1) except cl. (c) can have any bearing on this question and even cl. (c) refers to the breaking up or clearing for cultivation or any other purpose of any land in any protected forest contrary to any prohibition under S. 30. The construction of a house by itself does not come within the expression of breaking up or clearing land.

[4] There was no allegation against the applicant that he had cleared up or broken land. There was no evidence about it. The opposite party was not questioned about it by the learned Magistrate. On the other hand, the evidence on the record makes it quite possible that the land of plot 288 was actually broken up or cleared by Ram Dayal, father of the opposite party. (His Lordship referred to the evidence on the point and proceeded.)

[5-9] In view of this statement it is quite possible that the land had been cleared and broken up by Ram Dayal, father of the accused and that the accused himself did not commit any offence under S. 33 in connection with the clearing and breaking of land.

[10] Further the rule about not constructing the house without the permission of the Deputy Commissioner does not appear to come under any of the provisions mentioned in S. 32 with respect to which the Provincial Government could make rules. It might have come under the provisions of cl. (k) of that rule which gives the Government power to make rules to regulate protection and management of any portion of the forest closed under S. 32. There is nothing on the record to show that plot No. 288 lies in any such closed area of the forest.

[11] The learned Deputy Government Advocate has been unable to show us any notification under S. 30 declaring that any portion of the forest would be closed for a certain term. It follows,

therefore, that this R. 6 in its general form cannot be said to be framed within the rule-making power of the Government under S. 30 or S. 32, Forest Act.

[12] The result is that the opposite party cannot be held guilty of contravening any rule made under S. 32, Forest Act.

[13] In view of the above, we are of opinion that Hiralal has been rightly acquitted of the offence under S. 33, Forest Act. We, therefore, dismiss the appeal.

A/V.R.B. *Appeal dismissed.*

A.I.R. 1953 Allahabad 356 *[Vol. 40, C. N. 162]*

RAGHUBAR DAYAL AND AGARWALA JJ.

Parshottam — Appellant v. *State.*

Criminal Appeal No. 793 of 1952, D/- 16-10-1952.

(a) Penal Code (1860), Ss. 302, 304 and 325 — Applicability.

Quarrel between accused and deceased for latter's refusal to allow accused to take water from his channel—Next day accused following deceased with lathi and after some distance suddenly giving him lathi blow on leg—Deceased falling down—Accused giving another severe and smashing lathi blow on head of deceased resulting in fracture of skull, compression of brain with profuse bleeding and ultimately resulting in his death—Intention to cause death, held must be presumed in the circumstances as the attack was deliberate, planned and cold-blooded—Offence falls under S. 302 and not under S. 304 or S. 325 : 19 Mad. 483 and A. I. R. 1953 All. 203, *Rel. on*; 1936 All. L. J. 333, *Disting.* [Paras 8, 11]

Anno. Penal Code, S. 300, N. 33, 34; S. 304, N. 1; S. 325, N. 4.

(b) Penal Code (1860), S. 302—Sentence—(Criminal P. C. (1898), S. 367 (5)).

Death caused by single injury caused by lathi blow on head—Attack premeditated, cold-blooded and well calculated—Appropriate sentence is death—Mere fact that State Government may commute sentence of death into one for transportation for life is no ground for awarding lesser penalty. [Para 12]

Anno. Penal Code, S. 302, N. 2.

P. C. Chaturvedi — for Appellant; Assistant Government Advocate, J. R. Bhatt—for the State.

REFERENCES : Courtwise/Chronological/ Paras.

('52) Hemant Prasad v. State, D/- 1-5-1952 (S. C.). 7
('07) 29 All. 282 : (5 Cri. L. J. 130). 9
('36) 1936 All. L. J. 333. 10, 11
('52) 1952 All. L. J. 546 : (A. I. R. 1953 All. 203). 10
('96) 19 Mad. 483 : (1 Weir 298). 9

Agarwala J.—This is an appeal by Parsotam Ahir, aged 40 years resident of Sakaldiha, police station Balua, district Banaras, against his conviction under S. 302, Penal Code, for the murder of Sri Raj Kishore Singh on 8-10-1950, and the sentence of death. There is also before us the usual reference for the confirmation of the sentence of death.

[2] Sri Raj Kishore Singh was a retired Additional Commissioner of this State. After retirement he settled down in village Sakaldiha and took to gardening. He used to go from his house every morning to his groves with his son, Sri Sanat Kumar Singh. Both of them used to return at about 9 A. M. for tea and again go to the groves and return at midday for their lunch. The appellant had his fields near the groves of Sri Raj Kishore Singh. There were certain ponds from which he used to water them, but it appears that in the year 1950 these ponds had not enough water for irrigation purposes. Sri Raj Kishore Singh used to water his groves from another pond nearby.

The prosecution case was that as the appellant could not obtain sufficient water from the other ponds, he tried to divert to his own plots the water of the pond from which Sri Raj Kishore used to water his groves. He could have done this only by diverting the channels which had been dug by Sri Raj Kishore Singh from the pond to his own groves. Sri Raj Kishore Singh was not agreeable to this and prevented the appellant from carrying out his intention. The appellant appears to have resented this very much and took it to heart. He complained about it to several persons, but no one would help him. This incident happened on 7-10-1950. The next day, that is, 8-10-1950, when Sri Raj Kishore Singh was returning from his groves at about midday after having sent his son to the labourers working in the groves, the appellant armed with a lathi followed Sri Raj Kishore Singh to some distance and when Sri Raj Kishore Singh was half way on the *mend* of the field of one Mahadeo Lohar, gave him a lathi blow on the right leg. On receiving the blow, Sri Raj Kishore Singh fell down on the ground and then the appellant gave him a smashing blow on the head, resulting in profuse bleeding and in the fracture of the skull bone. Raj Kishore Singh expired the next morning, at about 4 A. M.

[3] The incident is alleged to have been seen by Sri Raj Kishore Singh's son, Sanat Kumar Singh, and some other persons who were watering the fields in the neighbourhood at the time.

[4] The first information report of the incident was lodged by Sanat Kumar Singh on 8th october within about an hour of the incident. Dr. J. P. Gupta, medical officer in charge of the Sakaldiha Dispensary, was immediately called. He found that the injury on the head was grievous and thought that Sri Raj Kishore Singh who was unconscious might die and opined that the Civil Surgeon be called. The Civil Surgeon was also called from Banaras, but he could render no help and Sri Raj Kishore Singh expired, as already stated. Dr. J. P. Gupta examined the injuries when Sri Raj Kishore Singh was unconscious on 8th october at 5 P. M. He found that there was a bruise on the outer aspect of the right leg $2'' \times \frac{1}{2}''$ and also a contused wound $3'' \times \frac{1}{2}''$ upto the bone on the left side of the head, 5" above the ear with fracture of the skull bone, with symptoms of compression of the brain. The post-mortem examination was held on 9-10-1950 at Banaras at about 1-30 P. M. According to the report of the Civil Surgeon, there was a contused wound on the top of the head, on the left side, $2\frac{1}{2}''$ long $\times \frac{1}{2}''$ wide, bone deep, with contusion in

an area 12" × 10", and there was bleeding from the wound. He also found a contusion 16" × 6", on the right leg. Internal examination of the body showed a fissured fracture of the vault, running from ear to ear, 10" long. At the back it enclosed an area, with one limb 3½", another 4" and the third 3" all depressed. The membranes of the brain were deeply congested. The brain was covered with a blood clot on the right side, which was mostly ¼" thick. The cause of death, according to the doctor, was fracture of the skull as a sequel of the contused wound on the head caused by a blunt weapon such as lathi.

[5] The appellant denied the commission of the offence.

[6] The prosecution produced Sanat Kumar Singh, Dinger, Mossey, Dasa and Sarabjit as eye-witnesses of the occurrence in support of its case. We have examined their statements and have no reason to disbelieve them. In concurrence with the findings of the learned Sessions Judge, we are of opinion that the appellant caused the injuries to Sri Raj Kishore Singh which brought about his death, as alleged by the prosecution.

[7] The question then is what offence the appellant has committed. It was strenuously urged that the offence committed by the appellant should be considered to be one of causing grievous hurt under s. 325, Penal Code. In support of this contention, a recent unreported decision of the Supreme Court, *Hemant Prasad* v. *State*, decided by Fazl Ali and Vivian Bose JJ. on 1-5-1952, was cited. In our opinion, that decision has no application whatever to the facts of the present case. In that case the facts were that three persons suddenly came from behind and attacked the deceased with lathis while he was walking. The deceased would have normally taken another route, but since he had some particular business on the day of the marpit, he had taken that particular route. There was no evidence to show that the appellant knew that the deceased was to pass that way. The injuries caused to the deceased were four in number, including one contused wound on the back part of the crown of the head which caused a fracture of the skull and resulted in the death of the deceased. The other injuries were minor and simple in nature. There was no evidence as to which of the assailants had caused the minor injuries. In these circumstances, the Supreme Court held that it could not be presumed that the appellants had the common intention of murdering the deceased, but that the presumption could be made that the assailants had at least "the common intention of causing grievous hurt" to the deceased. Their Lordships, however, went on to observe :

"The question as to what was the common intention of the assailants will depend on the facts of each case, and where there is direct or circumstantial evidence to show that the intention of the assailants was to kill the victim, a conviction under S. 302, Penal Code, would be justified even in a case like the present."

Having regard to the facts of that particular case, their Lordships, however, held that the appellants in that case were guilty of causing grievous hurt only under s. 325, Penal Code.

[8] The present case differs from the case before the Supreme Court in several respects. In the first place, in the present case it is known who caused the fatal injury on the head which resulted in death. It was the appellant himself who caused it. In the second place, the circumstances attending the attack on the deceased suggest that the appellant had the intention to kill the deceased. The assailant took to heart the refusal of the deceased to allow him to carry water through the channels which had been constructed by the deceased to bring water from the pond to his own groves. A day later, the appellant complained about this to other persons and on receiving no help from them, he was seen the next day following the deceased armed with a lathi and, after the deceased had proceeded to some distance he struck the deceased on the leg and then when the deceased had fallen down on the ground, he gave him a smashing blow on the head. We have also seen that the blow struck was very severe, as it caused a big fracture and compression of the brain, and rupture of the membranes and profuse bleeding. The attack was deliberate and planned. It was cold-blooded as no quarrel had taken place immediately before the attack was made—the quarrel had taken place a day earlier. The smashing blow on the head was given when the deceased had fallen down. It was given on the most vital part of the body with great severity. All these circumstances, to our mind, point to only one conclusion, and to no other, namely, that the intention was not merely to cause injuries to the deceased but to kill him. The present case, in our opinion, falls within the general observations of the Supreme Court which had been quoted above by us.

[9] The Supreme Court relied *inter alia* on *Bhola Singh* v. *Emperor*, 29 ALL. 282. In that case *(Bhola Singh* v. *Emperor)* which was decided by this Court, reliance had been placed upon a Madras decision, *Queen-Empress* v. *Duma Baidya*, 19 Mad. 483. In similar circumstances, in the Madras case, one man had given a lathi blow on the head, fracturing the skull, and two other persons had inflicted other simple injuries on the deceased. It was held that the person who had inflicted the blow on the head which had resulted in the death of the deceased was guilty of murder. We think that the *ratio decidendi* of the Madras case applies to the facts of this case.

[10] It was further contended that if s. 325, Penal Code, did not apply to the facts of the present case, the case would at the most fall within the purview of s. 304, Penal Code, and in this connection a decision of this Court in *Perana* v. *Emperor*, 1936 ALL. L. J. 333, was cited. In that case the prosecution version that the attack on

the deceased was cold-blooded and that it was not due to any immediate quarrel between the assailants and the deceased, does not appear to have been accepted by the Court as would appear from the following observations :

"We think that it is almost certain that there must have been some quarrel about this matter and that that was the immediate cause of the trouble between the parties."

In the circumstances, the Bench did not draw the inference that there was an intention to kill but held that the accused intended to cause injuries which were likely to cause the death of the deceased. We have discussed this matter at length in a recent decision in *Behari* v. *State*, 1952 ALL. L. J. 546. We have pointed out that the nature of the offence committed will depend upon (a) the intention of the accused, (b) his knowledge and (c) the nature of the injury caused. We stated :

"Where actual injury caused was sufficient, in the ordinary course of nature, to cause death and it could not be said that the injury was accidentally or negligently caused, a strong presumption arises that the intention was to cause the injury which has been caused and as such the case would fall under cl. (3) of S. 300. It would be particularly so if the attack was premeditated, just as it was in the present case. This presumption may be rebutted. It is not the law that where death is caused by one lathi blow alone the offence will invariably fall under S. 304, Penal Code. In determining the intention other circumstances as have been already mentioned in the earlier part of the judgment will also have to be taken into consideration."

[11] In *Perana's case*, (1936 ALL. L. J. 333) the assault appears to have been made, as found by the Bench, in the heat of the quarrel. It could be assumed, in the circumstances, that it was not intended that death should be caused or that an injury sufficient, in the ordinary course of nature, to cause death should be caused. Death in such circumstances may be taken to be negligently or accidentally caused. Where, however, as in the present case, the attack is preplanned, the assailant follows the deceased for some distance and deliberately gives him a smashing blow on the head, it may legitimately be inferred that the intention was to kill the deceased. The inference as to intention will differ with the facts of each case. We are of opinion that in the present case the inference drawn by the learned Sessions Judge was correct and that the conviction of the appellant under s. 302, Penal Code, was justified.

[12] Lastly, it was strongly urged that the appropriate sentence in a case of this kind is one of transportation for life and not of death. Some instances in which the State Government had commuted the sentences of death passed by this Court to sentences of transportation for life were mentioned before us. The Government is empowered under the Code of Criminal Procedure to commute sentences of death into sentences of transportation for life. We have no reason to think that the State Government does not exercise its powers reasonably. There must have been circumstances sufficient in the eyes of the State Government to justify commutation of the sentence of death in the cases mentioned to us. However, that may be, we are not concerned with the action which the State Government may take after this Court passes its judgment. We are concerned with administering the law as we find it. If we find that according to the well-established principles of law we should award the sentence of death, we shall not fail to do so even though the State Government may commute it to a sentence of transportation for life. In the present case, we find no justification for awarding the lesser penalty by law. The attack on the deceased was cold-blooded, preplanned and well calculated. We think that, in the circumstances of the case, even though death was caused by one single injury, the appropriate sentence is one of death. We, therefore, dismiss this appeal, accept the reference and confirm the sentence of death, which shall be carried out according to law.

[13] Learned counsel has applied for leave to appeal to the Supreme Court. We do not consider that any case has been made out for granting leave to appeal to the Supreme Court. The prayer is accordingly rejected.

B/K.S. *Appeal dismissed.*

A.I.R. 1953 Allahabad 358 *[Vol. 40, C.N. 163]*

BIND BASNI PRASAD J.

Bhagwan and others, Convicts-Applicants v. *The State of Uttar Pradesh.*

Criminal Revn. No. 1500 of 1950, D/- 27-7-1951.

Penal Code (1860), Ss. 323 and 34—Sentence—(Criminal P. C. (1898), S. 32)—(Cattle Trespass Act (1871), S. 24).

It is becoming common now that when cattle stray into one's field and they are taken to the cattle-pound, the owners of the cattle attack the persons whose field they graze and injure them. This must be stopped with stern hands. Cattle owners should take care of the cattle and they should not cause injuries to the crop of others. This is particularly necessary in this agricultural country, at a time when there is food scarcity.

(In this case the High Court refused to reduce a sentence of one year's R. I. imposed on the accused persons for their conviction under S. 323/34, Penal Code.) [Para 4]

Anno. Penal Code, S. 323, N. 6 ; Cattle Trespass Act, S. 24 N. 3; Criminal P. C., S. 32 N. 3.

Jagdish Sahai, for Applicants; *A. G. A., for the State.*

Order. — This is a petition in revision arising out of a case in which the applicants were convicted under s. 323/34, I. P. C., and sentenced to one year's rigorous imprisonment.

[2] The cattle of the applicants were grazing the crop in the complainant's field and he was taking them to the cattle-pound when the applicants attacked the complainant and inflicted on his person a number of injuries. One of them was of a serious nature being an injury on the head, the rest were simple. The learned Magistrate convicted them of the offence under s. 323/34, I. P. C., and sentenced them to one year's rigorous imprisonment each. In appeal the learned

Sessions Judge altered the conviction to one under s. 323/34, but maintained the sentence.

[3] The finding of fact is clear and categorical that the injuries were caused to Sri Ram by the applicants. There is no good reason to interfere with that finding.

[4] Learned counsel has, however, pressed for the reduction of the sentence. Experience shows that it is becoming common now that when cattle stray into one's field and they are taken to the cattle-pound, the owners of the cattle attack the persons whose field they graze and injure them. This must be stopped with stern hands. Cattle owners should take care of the cattle and they should not cause injuries to the crop of others. This is particularly necessary in this agricultural country, at a time when there is food scarcity. Having regard to these circumstances and the serious injuries caused to Sri Ram, I see no good reason to reduce the sentence.

[5] The revision is dismissed. The bail bonds are cancelled. The applicants shall be taken into custody and serve out the remainder of their sentences.

B/K.S. *Revision dismissed.*

A.I.R. 1953 Allahabad 359 *[Vol. 40, C. N. 164]*

SANKAR SARAN AND KAUL JJ.

Dharam Karan Bahadur Asaf Jahi and another — Plaintiffs—Appellants v. *Sm. Shahzad Kunwar and others—Defendants—Respondents.*

F. A. No. 273 of 1944, D/- 29-11-1952.

(a) Hindu Law — Religious Endowments—Dedication—Property dedicated to deity — Founder does not remain to be owner but becomes a shebait—Only right of shebaitship can be disposed of.

Where a person purchases a house for the purposes of installing a deity therein, and instals a deity therein and converts the house into a temple, the whole building including the particular apartment wherein the deity was installed which was regarded as temple, and the deity is a dedicated property and the founder though he calls himself a proprietor cannot be regarded as owner thereof. Being thus a founder, the shebaitship vests in him and it is only this right which he can dispose of and not the ownership of the property. [Para 14]

The dedicated property vests in the idol only in an ideal sense and in the nature of things the possession and management of it must be entrusted to some other human being. [Para 16]

So when the founder gifts away the whole property and casts a burden on the donee to arrange for the seva puja of the deity, what passes to the donee is the shebaitship and not the ownership. [Para 18]

(b) Hindu law—Religious Endowments—Shebait — Succession.

Right of shebaitship originally rests in founder — Founder gifting the property and idol to her nephew casting upon him the duty of looking after seva puja etc., wrongly believing herself to be owner of property — Held that shebaitship was conferred upon nephew not as persona designata but in hereditary right, though no ownership could be transferred Upon death of nephew, shebaitship passes to his heirs and not to the heirs of the founder. [Paras 17, 18]

(c) Hindu law — Religious Endowments — Shebait and Pujari—Distinction pointed out—Pujaris performing puja for generations — This does not give the members to continue to be pujaries as of right. [Para 23]

Dr. N. P. Asthana — for Appellants; K. C. Saksena, B. N. Misra, S. S. Verma, K. C. Mittal and A. P. Pandey — for Respondents.

REFERENCES: Courtwise/Chronological/ Paras.

('74-75) 2 Ind. App. 145 : (4 Beng. L. R. 450 P. C.). 16
('88-89) 16 Ind. App. 137 : (17 Cal. 3 P. C.). 15
('22) 49 Ind. App. 237 : (A. I. R. 1922 P. C. 325). 23
('43) A. I. R. 1943 P. C. 89 : (I. L. R. (1943) 2 Cal. 137). 18
('90) 17 Cal. 557. 16
('23) 50 Cal. 233 : (A. I. R. 1923 Cal. 160). 23

Kaul J. — This was an appeal filed by the two plaintiffs, namely, Hon'ble Rajman Raja Dharam Karan Bahadur Asaf Jahi and Shri Thakur Radha Manoharji Maharaj Birajman. The first plaintiff died during the pendency of the appeal. His legal representatives were brought on the record and the appeal has been continued by them.

[2] The facts giving rise to the suit which has resulted in the present appeal are as follows:

[3] So far back as 1865, one Rani Mata Bibi, a rich lady belonging to Hyderabad, visited Mathura on a pilgrimage. While there, she purchased a house in Bindraban from one Gosain Bhajan Lal on 30-9-1865. Mata Bibi constructed a small temple in the said house and installed therein a deity known as Shri Thakur Radha Manoharji Maharaj. On 25-2-1869, Rani Mata Bibi executed a deed of gift relating to the house, the temple therein, and the idol installed in the said temple in favour of her brother's son Raja Inderjit. He was constituted the owner of the property and directed to arrange for the *Sewa Puja* and *Raj Bhog* of the deity. On his death, Raja Inderjit was succeeded by his son Raja Sheo Raj Bahadur. The last man died without leaving any issue and was succeeded by his nephew Raja Dharam Karan, who was plaintiff 1 in the trial Court.

[4] Raja Inderjit entered into possession of the property which formed the subject-matter of the deed of gift dated 25-2-1869, and appointed Gosain Jugal Lal as *Pujari* to do the *Sewa Puja* of the deity and look after the house in which the temple was located. Jugal Lal died leaving two sons, Gobardhan Lal and Chhedi Lal alias Chhote Lal. After Jugal Lal, his two sons continued to perform the duties which were entrusted to their father. Gobardhan Lal had a son Radhe Lal who predeceased his father leaving a widow, Brij Rani. After the death of one of the brothers, the other continued to do the *Sewa Puja*. When he also died, Chhedi Lal's widow Shahzad Kuer and Radhe Lal's widow Brij Rani performed the *Sewa Puja* in the said temple. Brij Rani is also dead and for a number of years the temple's service was carried on by Shahzad Kuer.

[5] On 7-2-1930, Shahzad Kuer, widow of Chhedi Lal, executed a will in favour of her daughter Lalli Bibi and her son-in-law Anand Gopal respondents 2 and 3. Under the will she treated the house and the temple, to which refer-

ence has been made above, as her personal property and devised the same to Lalli Bibi and Anand Gopal. Raja Dharam Karan came to know of this will sometime in 1941 and dismissed Shahzad Kuer from the post of *Pujari* of the temple. She was asked to hand over possession of the house, the temple, the idol and the articles pertaining to the said temple to him. She, however, refused to do so; hence the suit which has given rise to this appeal, was instituted.

[6] Raja Dharam Karan put forward a twofold claim. His case was that the house purchased by Rani Mata Bibi in Mathura, the temple constructed therein, the idol and other things connected with the worship of the deity were the properties of Rani Mata Bibi who made a gift of them to her brother's son Raja Inderjit. The donee thus became the owner of all these properties and after him, that right devolved upon Raja Sheo Raj Bahadur, who, in his turn, was succeeded by plaintiff 1.

[7] In the alternative, it was averred that in case the whole or any part of the property to which reference has been made be held to be dedicated property of Raja Inderjit and Raja Sheo Raj Bahadur and after them, Raja Dharam Karan was the *Shebait* of the said temple in succession, plaintiff 1 could maintain the suit for the benefit of plaintiff 2 (the deity Shri Thakur Radha Manoharji Maharaj) as *Shebait*.

[8] The plaint prayed for the following reliefs: (a) A decree may be passed awarding possession over the property to the plaintiffs or any one of them who may be found to be entitled thereto; (b) The idol of plaintiff 2 may be caused to be handed over to plaintiff 1 by defendant 1 or defendants 2 and 3 if it is proved that they are in possession thereof; (c) The articles mentioned at the foot of the plaint be delivered by defendant 1 to the plaintiffs or in the alternative pay to the plaintiffs Rs. 2000 as the price of the said articles. (d) Costs of the suit may be awarded; and (e) Any other relief which may, in the opinion of the Court, be beneficial to plaintiffs' interests, also be granted to them.

[9] A large number of pleas were raised in defence. Plaintiff 1 resided in Hyderabad and the suit in the lower Court was instituted through the agency (under special power of attorney) of Goswami Shri Brij Jiwan Lal. It was pleaded that Brij Jiwan Lal was not a duly authorised agent legally empowered to institute the suit, that the plaintiff had no right in law to maintain the suit, that the suit was bad for non-joinder of necessary parties and that defendants 2 and 3 were improperly joined in the suit.

As to the main defence, so far as it can be gathered from the written statement filed by Shahzad Kuer, her case was that the property in dispute was a temple dedicated to the idol Shri Radha Manoharji Maharaj, that the said idol was the ancestral idol of her husband's family and her husband and his ancestors were the *Shebaits* of the temple, that the property sold by Bhajan Lal could not convey any right to Rani Mata Bibi, nor could Rani Mata Bibi by executing a gift thereof confer any right therein on Raja Iderjit or any of his successors, that Rani Mata Bibi was a disciple of her husband Gosain Rash Behari Lal and from time to time used to offer gifts to him and his family deity, and lastly that plaintiff 1 had not been in possession of the property in dispute which had been in adverse possession of the first defendant and her husband's ancestors for more than 12 years. Accordingly, even if Rani Mata Bibi or Raja Inderjit or any of her successors had any right in the said property, they were extinguished.

[10] The learned Civil Judge of Mathura on an examination of the materials before him, held that the suit was instituted by a duly authorised person, that defendants 2 and 3 were rightly impleaded and that the objection based on the failure of the plaintiffs to implead the other two descendants of Raja Inderjit as parties to the suit was cured inasmuch as all such persons were subsequently impleaded. On the main question raised in the case, namely, whether the building in dispute was property dedicated to a deity and constituted a temple, the learned Judge's finding was that it is a temple dedicated to plaintiff 2 who is a juristic person. In view of this finding he came to conclude that the claim put forward by plaintiff 1 on the basis that the property in dispute was his personal property could not be sustained.

[11] On the line of claim based on the right of Shebaitship, the learned Judge was of opinion that a vivified idol cannot be the subject of a will or gift like moveable property. He was, however, of opinion that by the deed of gift dated 25-2-1869, Rani Mata Bibi, the founder of the temple, constituted Raja Inderjit as Shebait, but did not constitute him a fresh stock for a line of succession of Shebaitship. That on Raja Inderjit's death, the Shebaitship must be taken to have reverted to the family of Rani Mata Bibi's husband. He further opined that even if Sheo Raj Bahadur acquired the right of Shebaitship by adverse possession, it did not devolve upon plaintiff 1.

[12] It appears to have been argued before the learned Judge in the Court below that irrespective of the plaintiffs' right of Shebaitship, Gobardhan Lal was admittedly appointed a Pujari by Raja Inderjit and Raja Sheo Raj Bahadur and his successors having repudiated their character as licensees and asserted right of ownership to the property were liable to be ejected, by the successors of the licensors. This contention was repelled by the learned Judge as he held that defendant 1 Shahzad Kuer did not acquire a licence from anyone. As regards the claim in respect of the moveable mentioned at the foot of the plaint, the learned Judge came to the conclusion that it was not proved that they were entrusted to Shahzad

Kuer. It was further held by the learned Judge that the suit was barred by the law of limitation inasmuch as the plaintiff had not been in possession of the property in dispute for more than 12 years before the suit was instituted. In the result, he dismissed the suit with costs.

[13] The findings of the trial Judge in so far as they were against the appellants are challenged before us. The main points argued before us were : (a) Is the building in dispute the property of plaintiff 1 ? If not so, (b) Is plaintiff 1 a Shebait of the endowed property ? (c) What is the status of Shahzad Kuer ? and (d) Limitation.

[14] It was strenuously argued by the learned counsel for the appellants that there was no evidence of the dedication of the house in dispute to the deity. He argued that the mere fact that a small temple was built in the house and a deity installed therein would not make the whole house dedicated property. We are unable to accept this contention. Rani Mata Bibi belonged to Hyderabad. There is nothing on the record to suggest that she purchased the house in Bindraban for herself to live in, and having regard to the class to which she belonged, even if she wanted to have a house in Bindraban which she might have intended to visit at intervals, it is only a legitimate inference that she would not purchase such a small house even for that purpose. The fact that she constructed a temple in the house and installed a deity therein clearly indicated the object which she had in view when she purchased the house. The house in question so far as we are aware was never put to any use except as a habitation for the deity installed by Rani Mata Bibi and for the residence of the Pujaris—persons who were supposed to administer to the needs of the deity, i. e. Sewa Puja. The matter is, however, clinched by the deed of gift EX. 2 dated 25-2-1869, executed by Rani Mata Bibi in favour of her nephew Raja Inderjit. After reciting that she had purchased a house from Gosain Bhajan Lal for RS. 2000 she says :

"I built the temple of Thakur Radha Manoharji Maharaj in the aforesaid house and installed therein the idol of Thakur Radha Manoharji Maharaj which is installed in the aforesaid temple upto this day. The expenses relating to the *Raj Bhog* of Thakurji is met by me."

Then she adds :

"The present value of the aforesaid temple built by me is Rs. 12000 and it is in my proprietary possession and occupation upto this day,.....I have.....gifted the entire temple aforesaid bounded as set forth above, valued approximately at Rs. 12000 together with Thakurji Maharaj installed therein.....to Raja Inderjit Bahadur...who is related to me as my own brothers' son."

This deed makes it clear that the subject-matter of the gift comprised the house, the temple as well as the idol. The whole building was valued at RS. 12000 and she has described it as the aforesaid temple built by her. Thus there can be no doubt that the whole building including the particular apartment wherein the deity was installed was regarded as a 'temple' by the founder. In this view of the matter we agree with the conclusion arrived at by the learned Judge in the Court below that the property which formed the subject-matter of the gift was dedicated property and Rani Mata Bibi, though she calls herself its proprietor could not, in law, be regarded as the owner thereof. Being the founder of the Dev Asthan, the Shebaitship vested in her and it was only this right which she could dispose of.

[15] It was observed by Lord Hobhouse in the case of *Gossami Sri Gridhariji* v. *Romanlalji Gossamee*, 16 Ind. App. 137 (P. C.) that :

"According to Hindu Law, when the worship of a Thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he was dispossessed of it otherwise, or that there has been some usage, course of dealing, or circumstances to show a different mode of devolution."

[16] The next question we have to consider is whether plaintiff 1 was a shabait of this *Dev* Asthan. It was argued on behalf of the appellants that even if the property in dispute be held to be dedicated property, the deed of gift executed by Rani Mata Bibi should be construed as conveying the right of shebaitship to her nephew Raja Inderjit. Reliance in support of this contention is placed on *Khetter Chunder* v. *Hari Das*, 17 cal. 557. It was laid down in that case by a Bench of the Calcutta High Court that :

"A gift of an idol and of the lands with which it is endowed (being a private endowment) made with the concurrence of the whole family to another family for the purpose of carrying on the regular worship of the idol, if made for the benefit of the idol, is not invalid, and is one binding on succeeding shebaits."

The deed of gift executed by Rani Mata Bibi in favour of Raja Inderjit not only conveyed the property to him but also cast upon him the duty of arranging for the *Sewa Puja* and *Raj Bhog* of the deity. She says :

"I have put the donee in possession and occupation of the aforesaid gifted property. The donee should enter into possession and occupation of the aforesaid gifted property and should perform the *seva puja* and Raj Bhog of the said Thakurji, as a proprietor."

In fact, it would appear from an examination of this deed of gift that the sole purpose which the lady had in view in executing the document was to ensure the due performance of the *seva puja* of the deity which she had installed. She says :

"I have now grown old. No reliance can be placed on this life which is borrowed and unstationery. It is not known when the candle of my life may go out. On account of my old age I cannot make proper arrangements regarding the expenses of *Raj Bhog* of Thakurji Maharaj. I have, therefore, ...gifted the entire temple aforesaid bounded as set forth above.....to Raja Inderjit Bahadur."

We are satisfied on an examination of this document that the chief object with which it was executed was to ensure the Sewa Puja of the deity installed in the temple constructed by the founder of the institution. Though the word 'Shebait' is not used, it is clear that the lady intended the donee to be invested with that function. The dedicated property vests in the idol only in an

ideal sense and in the nature of things the possession and management of it must be entrusted to some other human being. It was observed by the Judicial Committee in *Prosunno Kumari Debya* v. *Golab Chand Baboo*, (2 Ind. App. 145 (P.C.)) that :

" 'The person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, estate of the idol might be destroyed or wasted, and its worship discontinued for want of necessary funds to preserve and maintain them. This human ministrant of the deity who is its manager and legal representative is known by the name of Shebait in Bengal and Northern India." (See Mukerjea's Hindu Law of Religious and Charitable Trust, 197).

[17] We find that throughout Raja Inderjit and his successors have been exercising the functions of a Shebait in relation to this temple. Though the actual service is carried on by the Gosains who reside in Bindraban and they are appointed by Raja Inderjit and his successors, to carry on the Sewa Puja, the funds for the upkeep of the temple and the Raj Bhog have always been supplied by Raja Inderjit and his successors. Ex. 135 is a Sanad by which Raja Inderjit appointed Jugal Lal, father-in-law of defendant 2 as *Pujari* (priest) of the idol installed in the temple in question. Ex. 134 is a copy of the Sanad granted by Raja Sheo Raj Bahadur, son and successor of Raja Inderjit in favour of Gobardhan Lal, the elder brother of Shahzad Kuer's husband. It shows that on the death "of the former priest" Gobardhan Lal, son of Jugal Lal was appointed the priest of the idol installed in the temple. Ex. 3 is an agreement executed by Jugal Lal on 11-3-1879 wherein he stated :

"I am residing in the temple built by Mata Bibi and made a gift of to the Raja Saheb aforesaid on this condition that whenever the aforesaid Raja Saheb shall order me to vacate the aforesaid temple, I shall vacate the same without any excuse or objection and shall not raise any plea."

Exhibits 7, 8, 9, 10, 11, 12 and a number of documents on record conclusively establish that the funds for the upkeep of the temple and for the Raj Bhog were throughout furnished by Raja Inderjit and his successors. There can thus be no doubt that after the execution of the deed of gift to which reference has been made Raja Inderjit and his successors have been acting as *de facto* shabaits of this Dev Asthan. The learned Judge in the Court below accepts this position so far as Raja Inderjit was concerned. He observed :

"My opinion therefore, is that the founder nominated Raja Inderjit as Shebait with effect from 25-2-1869 by her misconceived deed of gift."

By a method of reasoning, however, which we consider erroneous, the learned Judge has come to the conclusion that Raja Inderjit could not be 'a fresh stock of descent' for *shebaitship*. He says :

"The law here is that if Raja Inderjit was a fresh stock of descent for shabaitship then his heirs would be the present day shebait. But if he was not a fresh stock of descent then the shebaitship after the death of Raja Inderjit went to the founder's heirs. This principle applies to the present case."

The learned Judge arrived at this conclusion because he found no reference in the deed of gift to the successors or heirs of Raja Inderjit. He observed :

"The deed of gift mentioned that Raja Inderjit should arrange for the seva puja and rajbhog of the idol but it does not say who after him would do so. There is no reference at all to successors or heirs of Raja Inderjit. The position is that the founder framed no scheme for shebaitship when the service of the Thakurji plaintiff 2 was established, that on 25-2-1869 a deed was executed by which a shebait was constituted, and that no provision was made for shebaitship after Raja Inderjit."

He adds :

"A scheme by which Raja Inderjit's shebaitship was made hereditary for his heirs cannot possibly be fastened on this endowment."

We are unable to agree with the view taken by the learned Judge. Though the building in question was property that had been dedicated to the deity, under a misconception as to the correct legal position, Rani Mata Bibi treated it as property owned by her and as she wanted to arrange for the continuation of the Sewa Puja and Raj Bhog of the deity installed by her after her death, she made a gift of the property to Raja Inderjit and cast upon him the duty of arranging for the Sewa Puja and Raj Bhog. Naturally in the view which she took of the matter no question of prescribing a line of succession of Shebaits could arise. The right of shebaitship, it is well established, originally vests in the founder of the Deoasthan and would descend upon the heirs of the Shebait like other property. No specific formula is prescribed for appointment of a Shebait. By the deed of gift executed by Rani Mata Bibi she not only purported to convey the property in question, to Raja Inderjit but also invested him with the functions of a Shebait. It is not a case as appears to have been taken by the learned Judge in the Court below that a Shebaitship was conferred upon Raja Inderjit in person as a persona designata.

[18] In the case of *Bhabatarini Debi* v. *Ashalata Devi* (A. I. R. (30) 1943 P. C. 89) to which reference has been made by the learned Judge, the founder had directed that a designated person should hold the office during the person's life. That is not the case here. In the case before us, the property was made a gift of to Raja Inderjit and upon him was cast the duty of arranging for the Sewa Puja of the deity in his capacity as the owner of the temple. In a case like this, if the property is not conveyed to the donee, it must be held on a true construction of the deed that the hereditary right of shebaitship is conferred upon him. He was not appointed a shebait as a *persona designata*.

[19] It appears to have been argued before the learned Judge that even if Raja Inderjit was appointed a shebait as a *persona designata*, he and his successors would have acquired a permanent right to shebaitship by adverse possession. The

learned Judge has referred to a large number of documents including the Sanads granted by Raja Inderjit and Sheoraj Bahadur to Jugal Lal and Gobardhan Lal, and the acknowledgment by Jugal Lal (EX. 3) that he was residing in the building in question with the permission of the Raja Saheb and had undertaken to vacate it when so desired. He also referred to EXS. 214A to 234A (papers on the file pertaining to this temple maintained in the office of Raja Dharam Karan) which show that it was plaintiff 1 and his successors who had been looking after the upkeep of this temple and the necessities of the idol, i.e. Sewa Puja. Reference has also been made to EXS. 194A to 194A, letters which were written by Sheo Raj Bahadur to Shahzad Kuer or her predecessors advising the despatch of sums of money for the temple and the idol in response to the requests made by Shahzad Kuer and others to the plaintiff and his ancestors for funds. All these documents would, on the face of them, show that the descendants of Raja Inderjit were exercising the right of *shebaitship* in relation to this *Devasthan*.

[20] By a process of reasoning, however, which we cannot but call faulty, the learned Judge has come to the conclusion that all these documents, letters, petitions, etc., were written by Gobardhan Lal, Jugal Lal and Shahzad Kuer only to obtain funds for the upkeep of the temple and the deity's service. He appears to have been much impressed by the fact that Rani Mata Bibi became a disciple of Gosain Rash Behari Lal about the year 1856. It appeared to him that having become his disciple, all that was done by her and Raja Inderjit and his successors was only a tribute from a *Chela* to the *Guru*. Such a view is wholly inconsistent with the conferment of *Sanads* by Raja Inderjit and Raja Sheo Raj Bahadur on Jugal Lal and Gobardhan Lal, nor is the agreement (EX. 3) executed by Jugal Lal on 11-3-1879, expressly admitting that he was residing in the building with the permission of Raja Sheo Raj Bahadur and undertaking to vacate it when so desired by him consistent with the construction put upon these documents and the view taken by the learned Judge.

[21] We are of opinion that on the mass of material which is on record, the only legitimate inference that can be drawn is that Raja Inderjit and after him, Rajas Sheo Raj Bahadur and Dharam Karan acting as the shebaits in relation of this temple and that Jugal Lal, Gobardhan Lal and Chhedi Lal alias Chhote Lal were only *Pujaris*.

[22] The next point to consider is what is the position of respondent 1 Mt. Shahzad Kuer in relation to this temple. Is she Shebait as claimed by her or only a Pujari? As already shown by us there can no doubt as to the position occupied by Jugal Lal and Gobardhan Lal. They were granted *sanads* by Raja Inderjit and Raja Sheo Raj Bahadur, (see EXS. 134 and 135) appointing them Pujaris. There is an express admission made by Jugal Lal, father-in-law of Shahzad Kuer, that he was residing in the building in question with the permission of Raja Sheo Raj Bahadur. He undertook to vacate it whenever so desired by the Raja (EX. 3). EX. P. 138 is an agreement executed by Jugal Lal wherein he admits that all the articles (including the ornaments, clothes and utensils) dedicated to Shri Thakur Radha Manoharji Maharaj, the deity, installed by Rani Mata Bibi belonged to Raja Sheo Raj Bahadur; that he was entrusted with the custody of these articles under the supervision of Visheshwar Din Karinda of Raja Sheo Raj Bahadur. The agreement adds :

"Accordingly I have executed this agreement on my behalf in favour of Maharaja Sahab Raja Sheoraj Bahadur, and I covenant and give in writing that whenever the Maharaja aforesaid would make a demand of the articles, mentioned in the list, whether all or any number of them, I shall, without any objection hand them over forthwith to the Raja Saheb aforesaid."

[23] In view of these clear admissions, there can be no doubt as to the position occupied by Jugal Lal and his son Gobardhan Lal in relation to this temple. They were mere Pujaris. The difference between a Pujari and a Shebait is clear. A Pujari or Archaka as observed by Mukherjee in his recent book on the Hindu Law of Religious and Charitable Trusts, p. 198, is appointed by the founder or Shebait to conduct the worship. He is a servant of the Shebait and no part of the rights and obligations of the latter are transferred to him. He further observes :

"When the appointment of a Purohit has been at the will of the founder, the mere fact that the appointees have performed the worship for several generations will not confer an independent right upon the members of the family so appointed and will not entitle them as of right to be continued in office as priests." (See *Srinivasa Chariar* v. *Evalappa*, 49 Ind. App. 237 (P.C.) and *Kalikrishna* v. *Makhanlal*, 50 Cal. 233.

[24] It has been stated earlier how the present respondent 1 Shahzad Kuer came to be associated with this temple. (After considering the documentary evidence, their Lordships continued.) In view of the material to which reference has been made, there can be no doubt that the position occupied by Shahzad Kuer after the death of her husband and her husband's brother Gobardhan Lal was the same as was occupied by them in relation to this temple. We have already shown that they never had a status higher than that of a Pujari, and there is nothing on the record to show that Shahzad Kuer ever claimed a higher status till on 23-4-1938, when she executed a Mukhtar-i-nama to which reference has just been made. It is not clear when Raja Dharam Karan came to know of this assertion of a title to Shabaitship by Shahzad Kuer, but as the suit giving rise to the present appeal was instituted on 6-12-1941, no question of acquisition of a title to Shebaitship by adverse possession could arise. We hold accordingly that the position which Shahzad Kuer occupied was merely that of a Pujari. Neither Jugal Lal nor Gobardhan Lal

nor Shahzad Kuer's husband Chhedi Lal ever claimed to have a right to even this post of a Pujari which could not be put an end to. A Pujari, as we know, is only a servant of the Shebait and his services can be dispensed with at any time. Shahzad Kuer executed a will in respect of this property in favour of her daughter and son-in-law (EX. 77) and when Raja Dharam Karan came to know of it, Shahzad Kuer's services were dispensed with. She has, therefore, no right to continue in possession.

[25] On the material before us (EXS. 4, 61, 63, 64 and 65, communications addressed by Shahzad Kuer to the Nazim (Manager) of the Estate of Raja Dharam Karan) we are satisfied that there was no assertion of any title by her in respect of this property till 1938 except as a Pujari. Reference has already been made in another connection to EX. 68, a letter addressed by Shahzad Kuer to Raja Dharam Karan dated 28-1-1938, asking for a direction to the Nazim (Manager) of the addressee for payment of the arrears due on account of pay of the servant employed in the temple and also for her own allowance. All this is consistent only with the admission of the first appellant's right to Shebaitship to the temple. In this view of the matter no question of limitation arises. The appellant's claim was not barred either by ART. 124 or 142, Limitation Act. It was suggested at one stage that the endowment was created by the Nizam of Hyderabad and a daily allowance of RS. 2 was fixed by him for this temple, that this allowance was paid by Nizam through Raja Sheo Raj Bahadur and that the numerous demands made by Shahzad Kuer for this allowance were in respect of the sum which was due to her under a grant made by the Nizam. We are clear that this fantastic theory will not stand a moment's examination. Apart from the other evidence, the contents of EX. 68, a letter addressed by Shahzad Kuer to Raja Dharam Karan furnish a complete answer to any such contention.

[26] In view of the conclusions arrived at above, no other matter calls for consideration.

[27] The result is that the appellants' claim is decreed, the immoveable and moveable property in dispute is held to be dedicated property of which the deity appellant 2 must be held to be the owner. The legal representatives of the original appellant 1, whose names have been brought on record as successors of the previous Shebait are entitled to recover the same from respondent 1, Mt. Shahzad Kuer. For want of satisfactory evidence to prove that Mst. Shahzad Kuer was either entrusted by Raja Dharam Karan or that she received from the previous Pujaris all the moveables mentioned at the foot of the plaint a decree can be passed in favour of the plaintiff appellant for the recovery of only the articles mentioned in the list filed by Shahzad Kuer on 9-4-1942 (paper NO. 34C). If she fails to hand them over to the plaintiffs-appellants, she will be liable to pay them the market value thereof. This may be determined by the Court in the execution department, in case the articles are not delivered as directed by this Court. The appellants shall get their costs from respondents 1 and 2.

B/R.G.D. *Order accordingly.*

A.I.R. 1953 Allahabad 364 *[Vol. 40, C. N. 165]*

AGARWALA J.

Ram Naresh Singh and others—Applicants v. *State of Uttar Pradesh through Shankerpal Singh—Opposite Party.*

Criminal Revn. No. 1306 of 1951, D/- 12-12-1952.

Criminal P. C. (1898), S. 342—Cross-examination of accused on oath — (U. P. Panchayat Raj Act (26 of 1947), S. 83).

The object of the rule that an accused should not be put under oath and should not be cross-examined is to protect the interests of the accused, not those of the complainant. When the complainant himself cross-examines the accused and he is acquitted, the complainant cannot be heard to say that on account of his own act the trial was vitiated. A. I. R. 1953 All. 144, *Disting.* [Para 2]

Anno. Cr. P. C., S. 342, N. 31.

Vishwanath Singh—for Applicants; Krishna Shankar — for Opposite Party.

REFERENCE : Para

('52) 1952 All. L. J. 565 : (A. I. R. 1953 All. 144 : 1953 Cri. L. J. 392) 2

Order. — This application was originally filed as a revision but on an oral request of the learned counsel for the applicants I converted it into an application under ART. 227 of the Constitution. I gave an opportunity to the opposite party to file a counter-affidavit in support of his allegations, but it has not been filed.

[2] The facts of the case are not disputed. The applicants were prosecuted under SS. 323 and 504, Penal Code. The Panchayati Adalat administered oath to them and they were cross-examined also, probably by the complainant. After considering all the facts and circumstances of the case the Panchayati Adalat came to the conclusion that the applicants had committed no offence and acquitted them. The complainant applied in revision to the Sub-Divisional Magistrate. The Sub-Divisional Magistrate set aside the order of the Panchayati Adalat on the ground that the accused had been put under oath and cross-examined. It was held in *Pati* v. *Dubari*, 1952 ALL. L. J. 565 that if an accused is put under oath and cross-examined the procedure is illegal and the trial is vitiated. But that was a case in which the accused was convicted and had applied to this Court to have his conviction set aside on the ground that the procedure which resulted in his conviction was vitiated. Where, however, the accused is acquitted and, therefore, he does not object to the procedure adopted by the Panchayati Adalat, it is not open to the complainant to have the order of acquittal set aside on the ground that the accused was given oath and was cross-examined.

After all, the object of the rule that an accused should not be put under oath and should not be cross-examined is to protect the interests of the accused, not those of the complainant. The complainant himself cross-examined the accused and he cannot be heard to say that on account of his own act the trial was vitiated. In the circumstances, the ruling relied upon by the learned counsel for the opposite party has no application to the facts of the present case.

[3] I, therefore, set aside the order of the Sub-Divisional Magistrate and restore that of the Panchayati Adalat.

B/D.R.R. *Application allowed.*

A.I.R. 1953 Allahabad 365 *[Vol. 40, C. N. 166]*

MUSHTAQ AHMAD AND V. BHARGAVA JJ.

Bijey Singh and others — Plaintiffs—Appellants v. *Bhawani Singh and others—Defendants —Respondents.*

Second Appeals Nos. 1446 and 1447 of 1948, D/- 10-9-1951.

Contract Act (1872), Ss. 23, 65 — *A* advancing money to *B* for pre-empting property—*B* agreeing to convey pre-empted property to *A*—Suit for specific performance of agreement is not tenable — Refund of consideration must be made — U. P. Regulation of Agricultural Credit Act (14 of 1946), S. 12. [Para 11]

Anno. Contract Act, S. 23 N. 7, 12; S. 65 N. 1.

S. B. L. Gaur & P. L. Banerji — for Appellants; N. S. Singhal — for Respondents.

REFERENCES : Courtwise/Chronological Paras.

('27) 25 All. L. J. 1065 : (A. I. R. 1928 All. 112). 7

('47) 1947 All. W. R. (H. C.) 155 : 1947 All. L. J. 196 : (A. I. R. 1947 All. 431). 7

Mushtaq Ahmad J. — The appeal first mentioned was filed by the plaintiffs and the other appeal by the defendants, each in a different suit. The former arose out of suit NO. 2227 of 1946 of the Court of Munsif, Meerut, for specific performance of a contract of sale dated 4-4-1946, and in the alternative for recovery of RS. 3600 together with interest in circumstances to be hereinafter mentioned. The latter arose out of suit NO. 83 of 1947 of the same Court filed by Bhawani Singh, defendant 1, of the earlier suit against the plaintiffs, Bijai Singh and others, of that suit for an injunction restraining the latter from interfering with the possession of the former.

[2] On 4-8-1943, the property in dispute was sold by its owner Chatersen to one Harbal and others for RS. 7,200. The case of the plaintiffs in the earlier suit was that they and defendant 2, Run Singh, wanted the property for themselves, and therefore, had a suit filed for pre-emption ostensibly in the name of defendant 1, Bhawani Singh, they and defendant 2 being the real pre-emptors. That suit was decreed on 13-2-1946 on payment of the entire sale-consideration of RS. 7,200, one half of which was alleged to have been deposited in Court by the plaintiffs and the other half by defendant 2.

[3] These plaintiffs further alleged that in token of his undertaking to transfer the property to them and defendant 2, defendant 1 executed a deed of agreement on 4-4-1946 to the effect that, after mutation of his name as the owner of the property, he (defendant 1) would convey the same to the plaintiffs and defendant 2. Suit NO. 2227 of 1946 was for the specific performance of this very agreement. Along with this, a promissory note was also executed by defendant 1 in favour of the plaintiffs and defendant 2, acknowledging his liability to re-pay the amount of RS. 7200 to those persons. In the deed of agreement just mentioned and also in this promissory note the advance of this amount by the plaintiff and defendant 2 to defendant 1 was mentioned as a loan pure and simple, though made with the object of enabling defendant 1 to deposit the amount in Court as the pre-emption money under the decree dated 13-2-1946 aforesaid. It is said by the plaintiffs-appellants that, while defendant 1 did transfer a half share in the property to defendant 2, he refused to make a transfer of the remaining share to the plaintiffs and that, aggrieved by this refusal, the latter had to bring the suit out of which the first mentioned appeal has arisen. Neither the alleged sale-deed nor a certified copy of it was filed, so as to enable this Court to come to a definite finding that there was in fact a sale of half a share by defendant 1 in favour of defendant 2. The question whether such a sale ever took place was itself of some importance, because a particular argument was addressed to us by the learned counsel for the plaintiffs-appellants on the assumption that it had actually taken place.

[4] The defence of defendant 1 who virtually was the sole contesting defendant was that he had paid the pre-emption money out of his own pocket, that there had never been an understanding between him on the one side and the plaintiffs and defendant 2 on the other that he would transfer the property to those persons in case a decree for pre-emption was passed in his favour in respect of the sale-deed dated 4-8-1943 aforesaid. He also denied execution of the promissory note relied upon by the plaintiffs and that any amount had been advanced to him as a loan thereunder. There were other pleas also, namely that, as this defendant paid less than RS. 250 as land revenue, he could not be asked to make a sale of the property to the plaintiffs or defendant 2 in view of the bar of S. 12, U. P. Regulation of Agricultural Credit Act, 14 of 1946, that the agreement of 4-4-1946, was without consideration and illegal and that, in view of the promissory note mentioned by the plaintiffs, no suit for specific performance could lie.

[5] The suit out of which the other appeal NO. 1447 of 1948 arose was, as we have said, suit NO. 83 of 1947 of the same Court by defendant 1 of the earlier suit against the plaintiffs of that suit, for an injunction restraining the latter from inter-

fering with the possession of the former. It is obvious that, if the plaintiffs in the earlier suit failed so that the possession of defendant 1 was maintained and if it was found that that possession had been interfered with by the said plaintiffs, the later suit would be decreed. On the other hand, if the plaintiffs in the earlier suit are held entitled to a decree for possession by specific performance of a contract of sale, there would be no question of granting a decree for injunction to the plaintiff of the later suit. Of course, the defence taken by the defendants in the later suit was the same as was their case as plaintiffs in the earlier suit. Besides, they also pleaded that they had already obtained possession over the property in pursuance of the agreement dated 4-4-1946. This was of course an independent ground for defeating the claim for injunction.

[6] The trial Court, while decreeing the earlier, dismissed the later suit, finding that the promissory note and the agreement, each of 4-4-1946, had been proved as duly executed, that defendant 1 in the earlier suit could not have himself provided the money required for payment of the pre-emption money, that the pre-emption suit had been for the benefit of the plaintiffs and defendant 2 of the earlier suit, they being the persons who had paid the amount and that, therefore, there was no question of the execution of a sale-deed by defendant 1 being barred by S. 12, U. P. Act, 14 of 1946.

[7] The lower appellate Court reversed this decree. While affirming the findings of the trial Court on the first three questions, it held that defendant 1 could not be required to transfer the property in favour of the plaintiffs in the earlier suit because of the bar of S. 12 of the said Act. The learned Civil Judge gave a number of reasons for dismissing the plaintiffs' claim to a decree for specific performance of a contract, even though, as we have said, he had found that it was the plaintiffs who had provided the pre-emption money and that it was for their benefit and on their behalf that the pre-emption suit had been filed. He first of all held that, even though there had been an agreement between the plaintiffs and defendant 2 on the one side and defendant 1 on the other, to the effect that defendant 1, after obtaining a decree for pre-emption, would convey the property to the first two parties, the bar of S. 12, U. P. Regulation of Agricultural Credit Act, 14 of 1946, was absolute. The learned Judge relied on the case of *Sri Narain Dubey* v. *Jang Bahadur*, 1947 ALL. W. R. (H.C.) 155 also reported in 1947 ALL. L. J. 196. There, in a suit for specific performance of a contract of sale, a compromise decree was passed to the effect that different portions of the property would be transferred to particular parties. Neither by the time of the agreement of sale nor by the date this decree was passed had the Act mentioned above come into force. The compromise decree, in so far as it permitted certain parties to claim transfers of different portions of the property from the opposite party, was put into execution. Then it was objected that the property being protected land could not be transferred in view of the prohibition contained in S. 12 of the aforesaid Act. The objection prevailed. That is to say, in spite of the fact that by agreement and indeed by a decree one party was under an obligation to transfer the property to another, the transfer being forbidden by statute was disallowed by the Court. In another case *Gaya Prasad* v. *Durga Singh*, 25 ALL. L. J. 1065 arising under the Bundelkhand Encumbered Estates Act also there was an agreement to sell property contrary to the provisions of S. 10 of that Act. A suit for specific performance of the agreement was filed and decreed. Ultimately, on the suit of the sons of the transferee after the latter's death for recovery of the property, it was held that the agreement was *void ab initio* and could not be rectified by the subsequent cessation of disability.

[8] The second reason for refusing a decree to the plaintiff was that the agreement could either be enforced in its entirety or not at all and that the suit being for the enforcement only of one part of the agreement could not succeed. Learned counsel for the plaintiffs-appellants answered that defendant 2 having already transferred a half share in the property to defendant 1 and the suit being for the enforcement of the agreement only in respect of the remaining half, that being the only part left unperformed, the objection conceived by the learned Civil Judge should not be affirmed. This clearly assumed that there had in fact been a transfer of a half share by defendant 2 to defendant 1. As we have already remarked, there is nothing to show whether such a transfer has ever been made, the original sale-deed or even a copy of it not being on the record. We must in the circumstances give effect to the view taken by the lower appellate Court.

[9] The third and the last ground for dismissing the suit was that the plaintiffs and defendant 2 had committed fraud on the Court in the earlier suit by filing a claim for pre-emption not in their own names but in the name of defendant 1. The learned Judge remarked :

"The defendant Harbal and others failed in that case to prove it (the fact of defendant 1 not being able to provide the pre-emption money on account of his poverty, and his having been set up by Bijai Singh and others, plaintiffs in the earlier suit, to file that suit) and the pre emption suit was decreed. Thus clearly a fraud was practised both on the Court and on the vendees and a decree obtained."

The learned Judge, relying in this connection on a decision of the Chief Court, Lucknow, held that the agreement relied upon by the plaintiffs was in such circumstances against public policy and, therefore, illegal. We, therefore, agree with him and the plaintiffs in the earlier suit were not entitled to a decree for specific performance of contract.

[10] The last point dealt with by the learned Civil Judge was whether the plaintiffs were entitled to a decree for refund in respect of the sum of Rs. 3600 paid by them to defendant 1 under the promissory note of 4-6-1946. The learned Civil Judge answered the question in the negative because the suit had not been filed on the basis of a loan evidenced by the promissory note but only on the strength of an agreement to sell property. At the same time the plaintiffs' right to file another suit was left intact.

[11] We have given anxious consideration to this part of the case, and we have come to the conclusion that we should not lend our assent to this view of the learned Judge. On the findings arrived at by himself we are of opinion that he could well grant a decree to the plaintiffs in respect of this amount. He found as a fact that there had been an agreement between the plaintiffs and defendant 2 on the one side and defendant 1 on the other that, after defendant 1 had obtained mutation in his favour, he would convey the property to the plaintiffs and defendant 2 in equal shares. This agreement the learned Judge found to be illegal, being contrary to the provisions of S. 12, U. P. Act, 14 of 1946. Admittedly, along with the agreement there was an advance of Rs. 7200 made by the plaintiffs and defendant 2 in favour of defendant 1, for which a promissory note of a contemporaneous date was executed. The position, therefore, was that there was an agreement to sell property and in that connection there was also an advance of money made to the person who, after a certain event, had to sell it to the advancers. The agreement being found or rather discovered to be void within the meaning of S. 65, Contract Act, the question remains what is to happen to the amount advanced. The amount itself remained in the hands of the person to whom it had been advanced. It was even utilised by him as he deposited it in payment of the amount due under the pre-emption decree. The plaintiffs and defendant 2 who had made the advance on their part got no benefit under the same. They neither got any portion of the property nor till this day have received any advantage from the money paid by them. Section 65 reads :

"When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract, is bound to restore it or to make compensation for it to the person from whom he received it."

This section, we think, in terms applies. It applies even more effectively in view of the findings recorded by the lower appellate Court, from which naturally the conclusion at which we have arrived follows. It is in consequence of the finding that there was in fact an agreement of the description alleged by the plaintiff but that the same was invalid that it follows, as a matter of legal inference as also of natural justice, that the plaintiffs should get a decree for refund of the amount they paid.

[12] We, accordingly, allow this appeal in part modify the decree of the lower appellate Court by granting to the plaintiffs against defendant 1 a decree for recovery of Rs. 3600 without interest. In other respects the decree passed by that Court would stand. In view of the fact that the plaintiffs had not claimed this amount in the alternative as a loan evidenced by the promissory note set up by them and that our finding that they may be allowed a decree for this amount is entirely consequential on the findings recorded by the lower appellate Court, we are not inclined to grant the appellants their costs against the respondents who would be entitled to their own costs from the appellants in all the Courts.

[13] In consequence of this decision, the connected second appeal No. 1447 of 1948 stands dismissed with costs.

C/K.S. *Order accordingly.*

A.I.R. 1953 Allahabad 367 *[Vol. 40, C. N. 167]*

BIND BASNI PRASAD J.

Bhagwana and others—Accused-Applicants v. *State of U. P. through Ganga Ram, Complainant—Opposite Party.*

Criminal Revn. No. 1670 of 1950, D/- 11-9-1951.

U. P. Panchayat Raj Act (26 of 1947), Ss. 52, 55—Jurisdiction of Panchayat.

The jurisdiction of the Court does not depend upon the result of the case. It depends upon the allegations in the complaint. Of course such a complaint must be *bona fide* and the allegations in it must not be made with the deliberate intention of excluding the jurisdiction of the Panchayati Adalat. [Para 2]

Babu Ram Avasthi - for Applicants; Chaturbhuj Sahai —for Opposite Party.

Order.—This is a petition in revision by four persons who were convicted by a Bench of Magistrates of Muzaffarnagar under Ss. 323 and 427, Penal Code, and S. 24, Cattle Trespass Act. In appeal the learned Sessions Judge upheld the conviction under S. 323, Penal Code, and S. 24, Cattle Trespass Act, but set aside the conviction under S. 427, Penal Code.

[2] The only point argued on behalf of the applicants is that the case was cognizable by a Panchayati Adalat and the Bench of the learned Magistrates had no jurisdiction to take cognizance of the complaint. Sections 52 and 55, U. P. Panchayat Raj Act, 1947, have been relied upon. A perusal of S. 52 (1) (a) will show that while an offence under S. 426 is cognizable by a Panchayati Adalat that under S. 427 is not so cognizable. The difference between Ss. 426 and 427, Penal Code, is that the latter section applies where the damage caused by the mischief amounts to Rs. 50 or upwards. A conviction under S. 426 is made when the damage caused by mischief is less than Rs. 50. Now in the present case the complainant had alleged that the loss caused to his crop amounted to Rs. 100 or over. In fact a commission was issued to a lawyer who, after a visit of the locality, reported that the damage to the crop was to the

extent of Rs. 100. Learned counsel for the applicants agrees that if an offence under s. 427 was committed then the case would not be cognizable by a Panchayati Adalat. He contends, however, that as the applicants were acquitted of the charge under s. 427, Penal Code, it should be taken that they did not commit any offence under that section. Hence the case was cognizable by a Panchayati Adalat. The jurisdiction of the Court does not depend upon the result of the case. It depends upon the allegations in the complaint. Of course such a complaint must be *bona fide* and the allegations in it must not be made with the deliberate intention of excluding the jurisdiction of the Panchayati Adalat. That is not the position in the present case. The complainant's allegations were *bona fide*. It so happened that in the opinion of the learned Sessions Judge the charge under s. 427, Penal Code, was not made out. The view taken by the learned Sessions Judge that, the case was not cognizable by the Panchayati Adalat is correct. That being so, s. 55, Panchayat Raj Act, did not come into operation.

[3] The revision fails and it is hereby dismissed.

C/D.R.R. *Revision dismissed.*

A.I.R. 1953 Allahabad 368 *[Vol. 40, C.N. 168]*

RAGHUBAR DAYAL J.

Kaviraj Rai — Applicant v. *Sheo Darshan Dass and others — Opposite Party.*

Civil Revn. No. 887 of 1948, D/- 23-1-1952.

Civil P. C. (1908), O. 41, R. 17— Date of hearing not communicated to appellant or his counsel—No appearance on date of hearing — Dismissal of appeal is not under O. 41, R. 17—Art. 168 has no application to application for re-admission of appeal— (Limitation Act (1908), Art. 168). [Para 4]

Anno. Civil P. C., O. 41, R. 17 N. 2, 6 and 10; Limitation Act, Art. 168 N. 3.

S. C. Asthana—for Applicant; Harnandan Prasad and S. S. Srivastava—for Opposite Party.

Order. — This is an application in revision against an order of the Civil Judge Basti, re-admitting an appeal against the applicant.

[2] The appeal was dismissed in default on 16-2-1948. Application for re-admitting it was made on 21-3-1948.

[3] It was alleged in the application and was supported by an affidavit that the appellant opposite party waited till late in the day on 17-12-1947 to know the next date fixed for the hearing, that no date was fixed and he went away, leaving instructions with his counsel's clerk to inform the date to be fixed in the case, that he did not know that the appeal was fixed for hearing on the 16th February and that he learnt about the dismissal of the appeal on 27-3-1948. He further alleged in the application that he was told by the clerk that a post-card had been sent to him communicating the date of hearing, but that he did not receive it. The respondent applicant objected to the re-admission of the appeal, stating in the objection that the reasons mentioned in the application were baseless and that the application was filed beyond time.

[4] The learned Civil Judge considered the defendant's allegations about his not learning the next date fixed on the 17th December to be probable. Due to the local practice and the contents of the Hindi order-sheet for 17th December, he was also of opinion that the next date was not fixed in the presence of the appellant's counsel. I have looked up the order sheet, and it appears that the date 16th February was filled in the blank left after the entire order had been written. When the blank was filled cannot be said. I, therefore, agree with his finding that the 16th February was not fixed in the presence of the appellant or his counsel.

[4] There is nothing on the record to show that the counsel for the appellant opposite party knew that the appeal was fixed for the 16th February. The order-sheet of the 17th December does not bear his signature. The record of the appeal does not appear to contain any slip communicating the date to him. His counsel appears to have been called in Court on the 16th February. He then stated that he had no instructions. I am not prepared to conclude from this merely that the counsel must have known the date of hearing and that if he had not known it, he must have stated to that effect. It was stated in the application of the appellant opposite party that the counsel's clerk told him on the 29th March that a post-card had been sent to him intimating the date of hearing. How far that statement of the clerk is true cannot be said. The fact remains that the appellant opposite party stated on oath in the affidavit that he did not know from any communication from his counsel or his clerk that the appeal was fixed for hearing on the 16th February. The appellant opposite party cannot be held to have known that the appeal was fixed for the 16th February for hearing. It cannot be said, therefore, that the appellant did not appear when the appeal was called on for hearing on the date fixed or on the date to which the hearing had been adjourned. I am, therefore, of the opinion that the appeal was not dismissed under the provisions of O. 41, R. 17, sub-r. (1), Civil P. C., or for want of prosecution. It follows, therefore, that the thirty days' period of limitation prescribed under Art. 168, Limitation Act, would not apply to the application for the re-admission of this appeal by the appellant opposite party. The order under revision, therefore, cannot be said to be bad on the ground that it was passed on an application for re-admission filed beyond limitation.

[5] I, therefore, reject this application. In the circumstances of the case, I order the parties to bear their own costs.

C/R.G.D. *Application rejected.*

A.I.R. 1953 Allahabad 369 *[Vol. 40, C. N. 169.]*

AGARWALA AND HARI SHANKAR JJ.

State v. *Amulya Kumar, Respondent.*

Criminal Appeal No. 874 of 1951, D/- 8-12-1952.

(a) U. P. Town Improvement Act (8 of 1919), Ss. 21, and 94—Delegation of power to file complaint.

Where the resolution of the Board empowering the Chairman to exercise the powers vested in the Trust under S. 94 does not empower the Chairman to delegate his powers to the Secretary, he cannot do so under S. 21. Further, such a resolution cannot be treated as a rule framed under S. 73 if it has not received the previous sanction of the Government. [Para 6]

However, if there is a rule properly made under S. 73 empowering the Chairman to institute complaints for offences under the Act the Chairman can delegate his power to another officer of the Trust under S. 21. [Para 7]

(b) U. P. Town Improvement Act (8 of 1919), S. 95 —Scope.

Section 95 does not include the institution of complaints in connection with offences punishable under the Act, but deals with all other legal proceedings. Thus, it does not include criminal complaints mentioned in S. 94. [Para 7]

(c) U. P. Town Improvement Act (3 of 1919), Section 100 (e)—Irregularity.

The omission, defect or irregularity mentioned in cl. (e) of S. 100 has no reference to an illegality engendered by the institution of a complaint under S. 94 by a person who is not competent to do so. [Para 8]

(d) U. P. Town Improvement Act (8 of 1919) (as amended by Act 47 of 1948), S. 34A (1) — "For any area".

The extent of area is not limited in S. 34A. In the absence of any limit, there is nothing to prevent an Improvement Trust from including the whole of the area under its jurisdiction in any particular scheme. [Para 10]

J. Swarup and J. R. Bhatt, for the State; A. P. Pandey and Jai Gopal Chatterji, for Respondent.

Agarwala J. — This is a Government appeal against the acquittal of Amulya Kumar Banerji who was prosecuted under s. 79, U. P. Town Improvement Act, 1919, read with S. 34 (A) enacted by the U. P. Town Improvement (Adaptation) Act, 1948. The facts briefly stated are as follows :

[2] The respondent obtained permission from the Municipal Board of Banaras to construct a house on his land on Lajpat Rai Road, Banaras, sometime in september 1948. He started making constructions in accordance with the permission granted by the Municipal Board. While he was doing so, by the notification dated 19-1-1949, the Government brought into force the Town Improvement (Adaptation) Act, 1948 (U. P. Act 47 of 1948), in the whole of Banaras Municipality with immediate effect. On 5-4-1949 the Banaras Improvement Trust resolved that a master plan for the whole of the city of Banaras be prepared for the improvement of the city. The Trust then requested the Government to issue a notification under S. 34 (A). Accordingly, the Government issued a notification dated 4-6-1949 declaring that the Banaras Improvement Trust had decided to enforce an Improvement Scheme in the areas specified in the notification excluding the areas under the control and power of the Cantonment and Railway authorities. In this specification the area of the entire city of Banaras was shown.

[3] As the respondent continued making constructions which he had started in pursuance of the permission obtained by him from the Municipal Board, he was asked by the Secretary of the Trust not to do so. The respondent asserted that he had simply filled in the foundations and was not making any constructions worth the name. On 22-8-1949 the Trust passed a resolution that the Deferred Street Scheme in respect of certain streets be taken up in hand. Amongst the streets mentioned in the resolution was the street abutting which the house of the respondent was being constructed. The resolution provided that no one was to make constructions within 7½ft. of the alignment of the streets. On 5-10-1949 the Investigator of the Trust reported that the respondent was making constructions contrary to the resolution of the Trust. There was some correspondence between the Secretary of the Trust and the respondent, and the respondent again asserted that he had not contravened any resolution of the Trust.

[4] On 11-10-1949 the Secretary of the Trust filed a complaint in the Court of the City Magistrate, Banaras. In the complaint it was stated that it appeared from the report of the Investigator dated 23-6-1949 that the accused had continued the construction of his house without the fresh permission of the Trust, that the accused was served with a notice and was directed to stop the constructions at once but that he paid no heed to the notice and did not stop the constructions. It was, therefore, alleged that the respondent had been guilty under s. 79, Improvement Trust Act. The learned City Magistrate found the respondent guilty and sentenced him to a fine of RS. 100. The respondent appealed to the learned Sessions Judge who acquitted him holding that the complaint having been filed by the Secretary and not by the Chairman of the Improvement Trust could not be taken cognizance of by the Court and that the notification of the Government declaring the intention of the Trust to prepare an improvement scheme, being in respect of the whole of the city of Banaras and not in respect of any particular portion thereof, was invalid not being contemplated by law.

[5] In this appeal it has been strongly contended by learned counsel for the State that the learned Sessions Judge erred in the interpretation of law on both the points and further that the evidence on the record established that the respondent did in fact contravene the provisions of law and was guilty of the offence for which he was tried.

[6] As regards the question whether the complaint filed by the Secretary of the Improvement Trust can be taken cognizance of by the criminal

Court, one has to refer to s. 94, U. P. Town Improvement Act. This section lays down :

"Unless otherwise expressly provided, no Court shall take cognizance of any offence punishable under this Act, except on the complaint of, or upon information received from, the Trust or some person authorised by the Trust by general or special orders in this behalf"

It is conceded that there was no general or special order of the Trust authorising the Secretary to make the complaint. It was, however, pointed out that the Trust passed a resolution on 16-7-1949 empowering the Chairman to exercise the powers vested in the Trust under several sections of the Improvement Trust Act, including s. 94, and that the Chairman in his turn by an order dated 7-10-1949 authorised the Secretary to file complaints under s. 94. It was urged that under s. 21, the Chairman could delegate his powers to any officer of the Trust. This argument, however, is not tenable. The resolution of the Board empowering the Chairman to exercise the powers vested in the Trust under s. 94 did not empower the Chairman to delegate his powers to the Secretary. Under s. 21 the Chairman by general or special order in writing is empowered to delegate to any officer of the Trust any of his powers, duties or functions *under the Act or any rule made thereunder*, except those conferred or imposed upon or vested in him by ss. 31, 16, 22, 46 and 95. No doubt s. 94 is not one of the sections covered by the exception, but at the same time it by itself does not confer any powers on the Chairman. Therefore, it follows that the Chairman of a Trust may by general or special order in writing delegate to any officer of the Trust the performance of the powers, duties or functions of the Trust under s. 94, if he has been empowered by any rule made under the Act to exercise those powers. Rules under the Act are made under s. 73. These rules can be made only "with the previous sanction of the State Government.'. Even if we consider the resolution of the Trust dated 16-7-1949 to be a rule, there must be the sanction of the State Government for the same. No such previous sanction has been produced in the case. It follows, therefore, that the Chairman was not empowered to delegate his powers to the Secretary.

[7] We may here note an argument that was pressed upon by the learned counsel for the respondent. It was urged that in no circumstance could the Chairman delegate his powers to institute a criminal complaint to the Secretary, even if there were a rule to that effect, with the previous sanction of the Government. The reasoning was that s. 21, prohibits delegation of powers conferred on a Chairman under s. 95, which section it was contended relates to the institution of all kinds of legal proceedings civil or criminal, including those relating to offences committed under the Act. There is a fallacy in this argument. Section 95 deals with the powers of the Chairman. It is a general article empowering the Chairman, subject to the control of the Trust, to institute, defend or withdraw from legal proceedings under the Act, to compound any offence against the Act, to admit, compromise or withdraw any claim made under the Act, and to obtain such legal advice and assistance as he may from time to time think it necessary or expedient to obtain, etc. Section 94 specifically deals with offences under the Act and empowers only the Trust or a person authorised by it to institute complaints regarding them. If s. 95 were to include criminal complaints mentioned in s. 94, the Chairman and not the Trust would be the principal person to institute them. This would be contrary to the express language of s. 94. The proper interpretation of s. 95 is that it does not include the institution of complaints in connection with offences punishable under the Act, but deals with all other legal proceedings. Clause (b) of s. 95 speaks of *compounding* 'of any offence against this Act' and does not speak of institution of complaints therefor. This also supports the above view. Therefore, if there had been a rule properly made under s. 73 empowering the Chairman to institute complaints for offences under the Act the Chairman could have delegated his power to another officer of the Trust under s. 21. As, however, there was no such rule, the complaint filed in the present case was wholly unauthorised and conferred no jurisdiction on the criminal Court to take cognisance of it.

[8] On behalf of the State it was urged that this was merely an irregularity which could be cured under s. 100 (e), Improvement Trust Act. This section provides that

"no act done or proceeding taken under this Act shall be questioned on the ground merely of . . . . . .

(e) any omission, defect or irregularity not affecting the merits of the case."

It was urged that the fact that the Secretary instituted the complaint without proper authority was merely an irregularity which did not affect the merits of the case. The institution of a complaint or other legal proceeding by a competent person is the basis of the jurisdiction of the Court. No Court can take cognisance of a complaint or other legal proceeding unless it has been properly instituted or unless the defect has been cured in accordance with the provisions of law. If there was no jurisdiction to take cognisance of the complaint as provided in s. 94, the whole proceedings were ultra vires and void in the eye of law. The omission, defect or irregularity mentioned in cl. (e) of s. 100 has no reference to an illegality of this kind.

[9] In this view of the matter, it is not necessary to decide the other point raised in the case, namely, whether the notification of the State Government proclaiming that the Improvement Trust of Banaras had decided to enforce an Improvement Scheme in the whole of the city of Banaras was valid or not. It has, however, been urged before us by learned counsel for the State that the present appeal has been filed as a test

case requiring a determination of this question. As learned counsel on both sides have addressed us on the point at length we may briefly indicate our views upon it.

[10] The notification was issued under S. 34A, Improvement Trust Act, as amended by U. P. Act 47 of 1948. Section 34A reads :

"(1) Whenever the Trust decides to frame an improvement scheme for any area, the State Government may, at the request of the Trust, issue a notification specifying such area, and declaring that the Trust has decided to propose an improvement scheme for such area.

(2) A notification under sub-s. (1) shall remain in force for six months from the publication thereof and during this period no buildings shall be erected, re-erected, altered, or added to within the said area without the written sanction of the Trust.

Provided that the State Government may for sufficient reasons extend the said period by a further period not exceeding six months.

(3) If an improvement scheme is notified in accordance with S. 42 in respect of such area before the expiry of the notification the notification shall continue in force until the scheme is carried out or is abandoned."

It was urged by learned counsel for the respondent that the words "for any area" in cl. (1) of the section refer to a specified locality out of the jurisdiction of the Trust and that it did not refer to the entire area under its jurisdiction. Reference was made to ss. 24 to 32 in connection with this argument. Section 24 describes the various kinds of improvement schemes. Sections 25 to 32 deal in detail with the various improvement schemes mentioned in S. 24. All of them refer to 'area' leaving the impression on one's mind that normally the Trust would propose a scheme for a specific locality, within its jurisdiction. The extent of the area, however is not limited either in S. 34A or in any other provision of the Act. In the absence of any such limit, it seems to us that there is nothing to prevent an Improvement Trust from including the whole of the area under its jurisdiction in any particular scheme. No doubt normally the Trust would not go to the length of proposing a scheme for the whole of a city and bringing all constructions within the city to a standstill, yet we are unable to say that in law it has no such power if it thought it wise or prudent to take that course. The notification in question must, therefore, be held to be valid.

[11] The appeal, however, fails on the first point decided by us. The result is that we dismiss this appeal.

B/V.S.B. *Appeal dismissed.*

A.I.R. 1953 Allahabad 371 *[Vol. 40, C.N. 170.]*

BRIJ MOHAN LALL J.

Shib Singh—Applicant v. *Sridhar and others —Opposite Party.*

Criminal Ref. No. 286 of 1951, D/- 29-11-1951.

(a) Criminal P. C. (1898), Ss. 439, 145 (1)—Preliminary order under S. 145 (1) based on inadmissible evidence such as commissioner's report will be set aside in revision. [Paras 4, 5]

Anno. Criminal P. C., S. 439 N 15.

(b) Criminal P. C. (1898), S. 539B — Commissioner for local inspection.

Section 539B permits a Presiding Officer to make a local inspection but if a commissioner is deputed to go to the disputed place and to make an inspection he should appear in the witness-box to make the statement on oath and should subject himself to cross-examination. The report submitted by him is not *per se* evidence in the case. It is only when it is verified by the commissioner by a statement on oath that it becomes evidence. [Para 3]

Brij Lal Gupta — for Applicant ; A. G. A. — for Opposite Party.

Order. — This is a reference under S. 438, Criminal P. C., by the learned District Magistrate of Dehra Dun, recommending that an order passed under S. 145, Criminal P. C., by the Sub-Divisional Magistrate of Mussoorie, be vacated.

[2] An application under S. 145, Criminal P. C., was presented by one Shib Singh against one Sridhar. A preliminary order under S. 145 (1), Criminal P. C., was duly passed, and after recording evidence and considering the report of the Commissioner, the learned Magistrate came to the finding that Sridhar had all along been in possession. He passed an order forbidding Shib Singh to interfere with his possession.

[3] *Prima facie*, the finding recorded by the learned Magistrate is a finding of fact which is not ordinarily disturbed in revision, but the learned District Magistrate has rightly pointed out that the learned Magistrate has relied on inadmissible evidence. The Commissioner who was appointed to make a local inspection was not examined as a witness. In the circumstances, his report could not be treated as evidence in the case. There is a provision in the Code of Criminal Procedure for appointment of Commissioners for recording the statement of a witness, but no provision exists for appointing a Commissioner for making a local investigation or inspection. Section 539B permits a Presiding Officer to make a local inspection but if a commissioner is deputed to go to the disputed place and to make an inspection he should appear in the witness-box to make the statement on oath and should subject himself to cross-examination. Unless that is done, the statement made by him and embodied in his report cannot be taken in evidence. The report submitted by him is not *per se* evidence in the case. It is only when it is verified by the Commissioner by a statement on oath that it becomes evidence.

[4] Since the report of the Commissioner played a very important role in enabling the Magistrate in arriving at his finding and since this report was inadmissible in evidence, the learned Magistrate's finding cannot stand.

[5] In the circumstances the reference is accepted. The learned Magistrate's order is set aside. The case shall be sent back to the learned Magis.

trate. The commissioner shall be summoned and shall be examined and cross-examined in Court. Thereafter, the learned Magistrate shall record his finding on the disputed point and dispose of the case.

C/D.R.R. *Reference accepted.*

A.I.R. 1953 Allahabad 372 *[Vol. 40, C.N. 171]*

(LUCKNOW BENCH)

KIDWAI J.

Sidh Nath, Applicant v. *Triloki Nath, Complainant—Opposite Party.*

Criminal Revn. No. 111 of 1951, D/- 31-3-1952.

Penal Code (1860), S. 506—Tree belonging to complainant cut by accused—After some trouble about it, tree allowed to remain where it fell — Subsequently accused removing tree to his house — Complainant's servants, under his order, invading accused's house to remove the tree—While the tree was being removed, accused going to house of complainant with a gun and threatening him with serious results unless he called the invasion off — Complainant held could not by his own private action invade the house of the accused — Accused held could not be said to have committed an offence. [Para 7]

Anno. Penal Code, S. 506 N. 1.

B. N. Mullah, for Applicant; J. N. Tandon, for Opposite Party.

Order. — This revision application is filed by Lala Sidh Nath against his conviction of an offence under S. 506, Penal Code.

[2] The case of the prosecution was that a tamarind tree belonging to the opposite party, Lala Triloki Nath, was cut in August 1948 by the son of Lala Sidh Nath. There was some trouble about it and the tree was allowed to remain where it fell. On 16-9-1949, Lala Sidh Nath removed the tree to his house. On 18-9-1949, Lala Triloki Nath sent his men to the house of Lala Sidh Nath to get back the wood which Lala Sidh Nath had taken. Thereupon, Lala Sidh Nath who was sitting at the house of Raja Sri Ram went to his house, brought a gun and went towards the house of Lala Triloki Nath shouting abuses and inviting him to come out to meet the threat. Raja Sri Ram and Lala Prag Narain tried to stop him but in vain. Thereupon Lala Bhola Nath calmed Sidh Nath down and took away the gun from his possession.

[3] A written report of this incident was made at the police station on the next day and the case was started. For the prosecution 6 witnesses of this incident were produced, namely, Lala Triloki Nath (P. W. 1), Lala Prag Narain (P. W. 2), Raja Sri Ram (P. W. 3), Lala Kailash Kishore (P. W. 4), Bhagwandin (P. W. 5) and Daya Shankar (P. W. 6). The trial Court found the offences both under ss. 504 and 506, Penal Code, established and sentenced Lala Sidh Nath to a fine of Rs. 75 in respect of each of the offences.

[4] Lala Sidh Nath appealed and the learned Sessions Judge of Unnao set aside the conviction and sentence under S. 504 but maintained the conviction under S. 506.

[5] In this revision application the validity of the conviction under S. 506, Penal Code, is also challenged on several grounds.

(1) That the Court itself has found the matter to be a petty one and should, therefore, not have convicted the appellant by reason of S. 95, Penal Code, and

(2) That because in fact the applicant did not issue any threats to make the complainant desist from any legal act but whatever abuses of threat he issued were to make the complainant desist from unlawfully removing the wood from his house.

[6] With regard to the first contention S. 95, Penal Code, would not apply to the case because that section only applies in a case where the harm likely to be caused is so slight that no person of ordinary sense and temper would complain of such harm. In the present complaint the harm that may have been caused was with a gun and certainly that would not have been so slight as to induce an ordinary person to ignore it.

[7] The second point, however, has considerable force. According to the statement of Lala Prag Narain, Lala Sidh Nath was sitting at the house of Raja Sri Ram when his son came and informed him that a number of persons were entering his house and bringing out the wood to take it away. This statement is supported by the report made Ext. 2, which is also to the same effect. Even if it is conceded that Lala Sidh Nath had actually stolen the wood which was in fact the property of Lala Triloki Nath, Lala Triloki Nath could not by his own private action invade the house of Lala Sidh Nath to recover that wood without the necessary search warrant or without police aid. Lala Sidh Nath would be perfectly justified in resisting the invasion. In the present case an invasion of the house was going on and was by the servants of Lala Triloki Nath under his directions. If, therefore, instead of causing injuries or threatening the servants with dire consequences until they desisted from their criminal trespass, Lala Sidh Nath proceeded towards the house of Lala Triloki Nath, under whose orders the invasion was taking place, and threatened him with serious results unless he ordered the invasion off, he cannot be said to have committed an offence. According to the evidence to which I have referred, the wood was still being removed and it is agreed that it was being removed by the servants of Lala Triloki Nath under his orders. The responsibility of the removal was, therefore, on Lala Triloki Nath and it was not an offence on the part of Lala Sidh Nath even to threaten Lala Triloki Nath in order to prevent him from doing an act which was illegal.

[8] I may illustrate my meaning by saying that supposing a theft has been committed in a person's house, he is under the law entitled to defend his property and to cause injuries to the thief in preventing the theft. It would not become an

offence on the part of the person whose house is being broken into, if instead of starting off by hitting the thief, he gives notice to the thief to drop the articles stolen otherwise he would receive injuries. In the similar way if, instead of starting off by hitting at the servants of Lala Triloki Nath, Lala Sidh Nath went to the master to request or even threaten him to call off his servants from doing an illegal act, his action would not become an offence.

[9] I, therefore, allow this application, set aside the conviction of Lala Sidh Nath and the sentence passed upon him. The fine, if realised, shall be refunded.

C/G.M.J. *Revision application allowed.*

A.I.R. 1953 Allahabad 373 *[Vol. 40, C. N. 172]*

RAGHUBAR DAYAL AND AGARWALA JJ.

Dibia, Appellant v. *State.*

Criminal Appeal No. 883 of 1950, D/- 22-2-1952.

(a) Criminal P. C. (1898), S. 342—Material circumstances not put to accused.

Where the evidence against the accused consists of circumstantial evidence only, it causes prejudice. But in a case in which there is direct evidence of eye-witnesses concerning the commission of the offences by the accused and the conviction can be based upon their statements alone, if the direct evidence is put to the accused and the other circumstances are not put to him, it cannot be said that the accused has been prejudiced thereby : A. I. R. 1951 S. C. 441, *Ref.* [Para 10]

Anno. Cr. P. C., S. 342 N. 14, 15.

(b) Penal Code (1860), S. 300 — Serious injury on vital part with dangerous weapon must necessarily lead to the inference that the accused intended to kill the deceased. [Para 13]

Anno. Penal Code, S. 300 N. 4.

Jagdish Narain Agarwala, for Appellant; J. R. Bhatt Asst. Govt. Advocate, for the State.

REFERENCE Para

('51) 1951 All. L. J. 640 ; A. I. R. 1951 S. C. 441 : (52 Cri. L. J, 1491 S. C.) 11

Agarwala J.—This is an appeal by Dibia who has been convicted under S. 302, I. P. C., and sentenced to transportation for life.

[2] The appellant was prosecuted for having murdered one Puswa, his cousin, on 11-12-1949 at about noon in the house of one Bhikhari in village Todarpur in the district of Hamirpur. The prosecution case was that in Baisakh (April) of 1949 the appellant beat his wife whereupon she left his house and came to stay in the house of Puswa deceased and his brother Baddu, cousins of the appellant. She stayed there for the night and in the morning Baddu persuaded the woman to go back to her husband and calling the appellant made his wife to go with him. The accused took his wife out of the village and since then her whereabouts were not known. It was not known whether she was alive or dead. The appellant then began to give out in the village that Puswa had dishonoured his wife and that, therefore, he would kill him whenever he would get a chance.

On 11-12-1949 at about noon one Sheo Nath was having his hair cut by Babu Lal barber in the house of Bhikhari barber, Puswa deceased also went there for his hair cut and shortly thereafter Dibia appellant also went there. After Sheo Nath had his hair cut, the hair of Puswa deceased were also cut and while his nails were being trimmed, Dibia appellant suddenly took up an axe, which was lying there, and gave one severe blow on the head of Puswa and ran away. He was chased by Sheo Nath but could not be caught. Puswa fell down on the ground after getting the blow. His brother Baddu when informed of the incident came to Bhikhari's house and then took Puswa to the police station Korara, which is at a distance of seven miles from the village, by putting him in his cart. On the way to the police station Puswa died.

[3] The first information report was lodged the same day at 5 p. m. The police came to the village in the night and investigation was made. Some of the clothes which the deceased was wearing and were blood-stained were taken possession of. The axe which was also blood-stained was also taken into custody and two pairs of shoes, one belonging to the deceased and the other alleged to belong to the appellant, were also taken possession of. A recovery list was made and the articles were sealed in a bundle with the exception of the shoes belonging to the appellant.

[4] The post-mortem examination was held the next day at 11.30 a. m. Two injuries were found on the body of the deceased—(1) contused wound $1\frac{1}{2}$ ×1/3"×skin just above the outer half of the left eyebrow—(2) incised wound 3×$\frac{1}{2}$"1"× brain on the right side of the parietal region of the head 3" above the right ear. The brain matter was protruding through the wound and clotted blood was present. The skull had been cut through and a circular piece of bone was completely separated. The membrane and the brain underneath the injury No. 2 were cut through. In the opinion of the doctor, injury No. 1 could be caused by a fall or blunt weapon and injury No. 2 was the cause of death of the deceased.

[5] The appellant denied that he assaulted the deceased and said that the case was started against him due to enmity. He did not, however, suggest what enmity there was between him and the prosecution witnesses, nor was such enmity put to the witnesses when they were cross-examined.

[6] In support of the prosecution case three eye-witnesses were examined. Babu Lal barber who was cutting the hair of Sheo Nath and the deceased, Sheo Nath who had his hair cut by Babu Lal and was sitting at the time when the appellant struck the deceased with the axe, and Ram Bilas, a boy of 14 or 15 years of age who was standing in front of his house, which was opposite the house of Bhikhari, and who saw the appellant running away from the house of Bhikhari and being chased by Sheo Nath.

[7] Besides these eye-witnesses, three other witnesses were produced. Pirbhu Singh and Bans Gopal, zamindars of the village, deposed that Puswa deceased had illicit connection with the wife of the accused. Pyare Lal deposed to an extra-judicial confession by the accused of having murdered the deceased. From the statements of the eye-witnesses alone, apart from the evidence of other witnesses, we are perfectly satisfied that the prosecution story that the appellant struck the deceased with an axe on the head which resulted in the deceased's death is true.

[8] It was urged that the examination of the accused was wholly insufficient and consequently he was prejudiced and the trial was vitiated. There can be no doubt that the examination of the accused both by the Magistrate and by the Sessions Judge was faulty. The Magistrate put the following questions to the accused :

"Q. Did you on 11-12-49 at about noon, at mauza Todarpur, P. S. Kurari, inflict injuries on Puswa son of Mahadeo with an axe, with the intention of killing him, as a result of which he died ?

A. No sir. I did not assault him.

Q. Why was this case initiated against you ?

A. It has been initiated through enmity. I shall produce defence in the Sessions Court."

In the Sessions Court the following questions were put to the accused :

"Q. Did you make this statement (Ex. P/12) dated 11-5-50 before the committing Magistrate and whether it is correct ?

A. Yes. It is correctly recorded.

Q. Do you want to state anything more ?

A. Nothing.

Q. Is Ex. 3 shoe yours ?

A. No. It does not belong to me.

Q. Do you want to produce defence ?

A. No."

[9] Section 342, Criminal P. C., lays down that

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. . . . .

The answers given by the accused may be taken into consideration in such inquiry or trial. . . . ."

[10] It has been held that the Courts are bound to observe the provisions of this section and to put to the accused all such circumstances upon which reliance is to be placed by them against the accused. The object of the examination of the accused with reference to all the circumstances which appear against him is to afford the accused an opportunity of explaining those circumstances. The explanation so offered has to be taken into account in determining whether the circumstances are, in fact, against the accused and, ultimately whether the accused is guilty of the offence with which he is charged. If the material circumstances are not put to the accused and his explanation is not called for, there is a danger that injustice may be done. As to what circumstances should be put to the accused depends upon the facts of each particular case.

Where the evidence against the accused consists of circumstantial evidence only, it is of the utmost importance that the various circumstances which clinch the issue against him should be put to him and an explanation called for from him. But in a case in which there is direct evidence of eye-witnesses concerning the commission of the offences by the accused and the conviction can be based upon their statements alone, if the direct evidence is put to the accused and the other circumstances are not put to him, it cannot be said that the accused has been prejudiced thereby.

[11] Our attention has been drawn to a decision of the Supreme Court in *Tara Singh* v. *The State*, 1951 ALL. L. J. 640 : A. I. R. 1951 S. C. 441. We do not think that there is anything in that decision which is in conflict of what we have stated above.

[12] In the present case, the substance of the offence which is alleged against the appellant and which was deposed to by the eye-witnesses was put to him. The reason why the prosecution witnesses were deposing against the accused was also put to him in the second question put by the Magistrate, though the names of the witnesses were not specifically mentioned. In the Sessions Court the ownership of the shoes, Ex. 3, was also put to him.

The question regarding the motive of the offence, illicit connection of Puswa deceased with the appellant's wife, as alleged by the prosecution, and the facts that the appellant had beaten his wife six months before the incident, that she had gone to live with the deceased and Baddu P. W., that she was returned to the appellant the next morning by Baddu P. W., that the appellant had taken her out of the village and that her whereabouts were not known, were not put to him. The extra-judicial confession made to Pyare Lal was also not put to him.

[13] In our opinion, some of these questions should have been put to the appellant. But we are unable to say that because of the omission the appellant has been prejudiced in any way. We arrive at this conclusion for the reason that, in our opinion, the statements of the eye-witnesses are amply sufficient to justify the conviction of the appellant. The worse that can be said for the omission of the material circumstances to be put to the accused is that those circumstances may be omitted from consideration against the accused. If after omitting those circumstances the accused's conviction can be maintained, it can be said that he has not been prejudiced by the omission.

In our opinion, in the present case, even after omitting all the circumstances narrated above, which were not put to the accused, we are prepared to hold that the appellant did in fact inflict the injury on the head of the deceased with an

axe which resulted in his death and consequently the appellant was rightly convicted of having caused the death. Causing of a serious injury on a vital part of the body of the deceased with a dangerous weapon, like an axe, must necessarily lead to the inference that the appellant intended to kill the deceased. He was, therefore, clearly guilty of murder.

[14] We accordingly dismiss this appeal and confirm the conviction of and the sentence imposed upon the appellant by the Court below.

C/D.H. *Appeal dismissed.*

A.I.R. 1953 Allahabad 375 *[Vol. 40, C.N. 173]*

AGARWALA J.

Ram Charan — Applicant v. *State.*

Criminal Revn. No. 193 of 1951, D/- 28-9-1951.

(a) Criminal P. C. (1898), S. 106 — Proceedings under, are judicial and not administrative. [Para 5]

Anno. Criminal P. C., S. 106 N. 2.

(b) Criminal P. C. (1898), S. 106 — Duty of Magistrate — Superior Magistrate requesting Subordinate Court advisability of taking action under S. 106, in case pending before latter Court—Such request influencing Magistrate — Order passed without giving reason — Both order and conviction on main part of case held could not stand.

When the Magistrate is influenced with respect to one part of his order, it cannot be said that he is not equally influenced in convicting the accused on the main part of the case. [Paras 3 and 5]

Anno. Criminal P. C., S. 106 N. 15.

Gopal Behari — for Applicant; Asst. Govt. Advocate— for the State.

Order.—A complaint was made against Ram Charan applicant under S. 325/149, I. P. C., before a Magistrate of Bareilly. Several other cases seem to have been filed against the applicant in other Courts. One of them was under S. 107 in the Court of the City Magistrate of Bareilly. While the case was pending against the applicant in the Court of Sri S. M. Tyagi, Magistrate, Sri T. R. Barker, the City Magistrate, passed an order as follows:

"There are several cases pending in other Courts. These Courts will be requested to consider taking an action under S. 106. These proceedings will be taken up after those cases have been decided. Bonds under S. 117 (3) will continue."

This order was communicated to Sri Tyagi on 9-6-1950. Sri Tyagi recorded the evidence of the parties and convicted the applicant under S. 326, I. P. C., and sentenced him to one year's R. I. He also passed an order under S. 106, Cr. P. C., directing the applicant to execute a personal bond for Rs. 400, and furnish one surety in the like sum to keep the peace for a period of three years. No reasons were given for passing this order.

[2] In appeal the learned Sessions Judge confirmed the conviction of the applicant under S. 326, I. P. C., but reduced the sentence to six months' R. I. He also set aside the order under S. 106 on the ground that the Magistrate had given no reasons for taking action against the applicant under that section. He further observed that

"There is no material on the record in support of his order binding down the appellant to keep the peace for a period of three years. It appears that he passed this order on account of the two letters of the City Magistrate, Bareilly, requesting the Courts to consider the advisability of taking action under S. 106, Cr. P. C. Those two letters are on the record and they were sent by the City Magistrate in connection with a case pending before him under S. 107, Cr. P. C., against the appellant and others. Such a request by the City Magistrate was highly undesirable and contrary to all principles of justice. If there was a case pending in his Court under S. 107, Cr. P. C., against the appellant and others, that could be no ground to make a request to the Courts to consider the advisability of taking action under S. 106, Cr. P. C., against the appellant. His letters undoubtedly influenced the decision of the lower Court, inasmuch as without giving any reason and without any material on the record, the learned Magistrate bound down the appellant to keep the peace for a period of three years."

[3] In this revision application before me, it has been urged by Mr. Gopal Behari, learned counsel for the applicant, that the Magistrate passed an order under S. 106, Cr. P. C., without any rhyme or reason simply because the City Magistrate had written certain letters to him, that there is likelihood that the Magistrate might have been influenced in the decision of the case itself and that it is quite possible that if the letters were not there, he might have come to a different conclusion. I think the complaint of the applicant is not unfounded. The Magistrate apparently passed the order under S. 106 under the influence of the request made by the City Magistrate. The conclusion to which the learned Sessions Judge was led to is amply supported by the omission of the Magistrate to give reasons for his order under S. 106. If he was so influenced with respect to one part of his order, it cannot be said that he was not equally influenced in convicting the accused on the main part of the case. It has been said times without number that justice should not only be done but should seem to be done. In a case of this kind, where there is a reasonable suspicion that a Magistrate may have been influenced by an extra-judicial consideration, the order of the Magistrate cannot inspire confidence. In the interest of the purity of the administration of justice, such an order should not be allowed to stand. I have, therefore, no hesitation in accepting this application.

[4] I accordingly set aside the order of the Magistrate convicting the applicant and of the learned Sessions Judge confirming the applicant's conviction and order that the case shall be retried by a Magistrate, other than Sri Tyagi, competent to hear the complaint.

[5] I may add that the action of the City Magistrate, Sri T. R. Barker, in requesting the Magistrate to consider the advisability of passing an order under S. 106, Cr. P. C., was very improper. Proceedings under S. 106, Cr. P. C., are not administrative proceedings. They are no doubt proceedings for prevention of offences and not for punishment of persons committing offences. Nevertheless they are judicial proceedings. It is highly improper for any Magistrate to make to the Court

trying a case, any recommendation in connection with an order that may be passed by him in his capacity as a Court in that case. The City Magistrate in this case was an officer superior to the Magistrate who was trying the case. His request was likely to be interpreted as an order and to influence the judicial mind of the Magistrate concerned. If the City Magistrate, as an executive officer, wanted that proceedings under S. 106, Cr. P. C., should be taken against the applicant, he should have instructed the State counsel in the case to apply to the Magistrate concerned to consider the advisability of passing an order under that section. It is high time that the magistracy in the State should understand that they should not interfere with the judicial work of their subordinates except in a manner warranted by law.

C/R.G.D. *Retrial ordered.*

A.I.R. 1953 Allahabad 376 *[Vol. 40, C.N. 174.]*

MUSHTAQ AHMAD J.

Rajendra Misra and others—Plaintiffs—Appellants v. *Tirathraj Misra and others—Defendants—Respondents.*

Second Appeal No. 128 of 1945, D/- 17-3-1952.

Hindu Law — Partition — Joint family property—Occupancy holding standing in name of one member —Presumption is that it is joint family property — Evidence Act (1872), Ss. 101 to 103 : A. I. R. 1930 All. 822, *Rel. on.* [Para 7]

Anno. Evidence Act, Ss. 101 to 103, N. 47.

J. N. Takru and G. S. Pathak—for Appellants—K. L. Misra—for Respondents.

REFERENCE: Para.

('30) 1930 All. L. J. 974 : (A. I. R. 1930 All. 822) 7

Judgment.—This is a plaintiff's appeal against a decree modifying the final decree in a suit for partition.

[2] The preliminary decree was passed on 18 8-1941, in which the shares of the parties who represent two different branches of the same family were indicated in equal moieties. That decree became final on 21-9-1942. On 10-12-1942, the final decree was passed. This was modified on appeal on 19-7-1944 by the lower appellate court, and the present appeal is against this last decree.

[3] As usual, a commissioner had been appointed before the final decree was passed by the trial Court to divide the properties, and he made two lots of the same, *A* and *B*, the one for the plaintiffs and the other for the defendants. This allotment was accepted by the trial Court, and, on the basis of it, it passed the final decree on 10-12-1942 as already mentioned.

[4] The present appeal raises only three points, relating respectively.

(1) to a decree standing in the name of Sanman Datt, defendant 3, for RS. 733-12-6

(2) to an agricultural holding measuring five bighas of occupancy land recorded in the name of Tirath Raj Misra, defendant-respondent 1 and

(3) to mesne profits for the period of the defendants' possession after the institution of the suit.

I propose to deal with these items seriatim.

[5] The position with regard to the first item, that is, the decree for RS. 733-12-6 is that the trial Court by accepting the commissioner's report had awarded the same to the parties in equal shares. The lower appellate Court held that the plaintiffs-appellants were entitled only to a 1/4th share of the amount of the decree, although, when summarising its findings towards the end of the judgment, it said that they were entitled to a 1/4th only of RS. 366-14-3 which is one half of Rupees 733-12-6. The learned Judge was obviously wrong in recording this finding of a waivering nature. He misread the allegations in the plaint so far as they related to the decree in question. While the plaintiffs had roughly mentioned the amount of their share in the decree as RS. 400, they made it quite clear that they by themselves were entitled to a half share in the decree. The learned Civil Judge read this as meaning that in fact the entire family including the plaintiffs' branch was entitled to a half share in the decree and on that wrong basis he naturally held that the plaintiffs' share was 1/4th in the entire amount of the decree. How he remarked towards the end of the judgment that their share was 1/4th of RS. 366-14-3 is not at all clear, and the basis on which this remark was made was not explained by the learned counsel for the defendants-respondents. On a correct reading of the relevant portions of the plaint, there can be no doubt that the plaintiffs had claimed a half share in the decree in question, and the trial Court had rightly decreed the same. The modification introduced by the lower appellate Court was, therefore, wrong.

[6] As regards the second item relating to the five bighas of occupancy land, the lower appellate Court was of opinion that the plaintiffs had failed to prove the same as a part of the joint family property. The only observation to be found in its judgment on this point is that, where a certain property was acquired in the name of a member of a joint Hindu family, there was a presumption that it was his exclusive property and that this presumption having not been negatived by the plaintiffs in this case, they had failed to prove that the holding was a part of the joint family property. Learned counsel for the plaintiffs-appellants argued that, while undoubtedly there was an initial presumption of this nature, it was easily rebuttable by a number of circumstances being shown by the party who claimed the property as a part of the joint family estate. The fact of the family having possessed a nucleus with which the property could have been acquired was one of such circumstances. That the family in this case was actually possessed of joint family property is a matter of admission. That the holding in dispute could be acquired with the aid of such property is also not denied. It is also a fact that Tirath Raj

Misra in whose name the holding is recorded was the head of the family. This being the position, the initial burden that lay on the plaintiffs was not only discharged but it shifted to the defendants who ought to have proved that the holding was really the exclusive property of Tirath Raj defendant.

[7] Learned counsel for the respondents placed before me two decisions of the Board of Revenue to contend that, if a tenancy stood in the name of a particular individual and a right was claimed in the same by the other members of his family, it was for them to establish their claim as against the landlord. Those were cases in which the landlord was one of the parties. He could of course not be bound by anything which the tenant may have done without his (landlord's) consent or by any such consequences as may affect the nature of the tenancy in accordance with a particular rule of Hindu Law. On the other hand, in a suit for partition by some of the members of a joint Hindu family against the others, if a question arises whether the member in whose name a certain holding is recorded is the sole tenant of it or the other members of the family have also a common interest in the same, the matter would be decided in the light of the usual rules of Hindu Law relating to presumption and proof applicable to the case. The present case comes under the latter classification, and is, therefore, not affected by the rulings relied upon for the respondents.

Indeed, a Bench of this Court in *Acharji Ahir* v. *Harai Ahir*, 1930 ALL. L. J. 974, held that the ordinary rule of Hindu Law that properties acquired while the family was joint and with the help of the ancestral or joint family property should be regarded as joint family property, and that the burden of proof that it was self-acquired property of a single member should be on that member, should be applied also to a case where the property in question was a tenancy holding. There was thus no distinction between a case in which the property is a tenancy holding and one where the property is of any other kind so far as the point with which I am dealing is concerned. I am, therefore, of opinion that the lower appellate Court was wrong in disagreeing with the trial Court and eliminating the five bighas of occupancy holding from the joint family estate in this case.

[8] As regards the third item relating to mesne profits, Mr. Takru learned counsel for the appellants examined the position both with regard to the cultivated area and also the area negligently left by the defendants uncultivated. The plaintiffs claimed mesne profits in respect of both.

[9] With regard to the cultivated portion, the position was that the commissioner had held that the plaintiffs were entitled to Rs. 785-8-0, that is, one half of the profits for the two years, 1941 and 1942. The trial Court reduced the amount to Rs. 457-8-0 as there was an agreement between the parties before it that the rate per bigha might be taken as Rs. 15 per year for the entire area of 30 bighas, 11 biswas. The lower appellate Court reduced the amount further to Rs. 329-4-0, holding, as I have already noted, that five bighas of occupancy land should be taken out of the joint family tenancy from the 26 bighas, 15 biswas which, according to an agreement reached in that Court, represented the entire cultivatory area. It is obvious that the amount thus reduced on the basis of a particular area having been agreed upon cannot be challenged. At this rate they would be further entitled to mesne profits for the deflected area of five bighas occupancy land which I have already held to be part of the joint family property.

[10] With regard to the uncultivated area, the learned counsel for the appellants argued that the lower appellate Court had gone wrong in refusing mesne profits on the mere ground that the defendants had not intended to cause any loss to the plaintiffs by leaving a portion of the area uncultivated. Whatever the effect may have been of the absence of any such intention on the part of the defendants, the lower appellate Court also remarked that the defendants had not found sufficient time to look after the family cultivation in consequence of the present litigation. This was no doubt only an alternative remark, the learned Judge also noting that some plots might have been left *parti* with the object of causing loss to the plaintiffs. He did not definitely find as to whether the failure to cultivate this area was due to the one or to the other cause. All the same, if it was due to the cause first mentioned, I should be loath to disturb the decree by allowing mesne profits to the plaintiffs for the area that remained fallow.

[11] For these reasons I modify the decree of the lower appellate Court and restore that of the Court of first instance by allowing to the plaintiffs one half of the decree for Rs. 733-12-6, mentioned as item 1 in this judgment, by adding to the partible joint family property the five bighas of occupancy holding excluded by the lower appellate Court and allowing a further amount of mesne profits on one half of this area at the agreed rate of Rs. 15 per bigha per year for two years, namely Rs. 75.

[12] The appellants shall get one half of their costs in this Court and the lower appellate Court from the respondents who will bear their own. The order of the trial Court as to costs shall stand.

[13] Leave to appeal to a Division Bench is refused.

C/K.S. *Decree modified.*

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A.I.R. 1953 Allahabad 378 [Vol. 40, C. N. 175]
(LUCKNOW BENCH)

BEG J.

Sitla Bakhsh Singh—Defendant — Appellant v. *Kr. Surendra Bikram Singh, Plaintiff and others, Defendants—Respondents.*

Second Appeal No. 785 of 1947, D/- 4-1-1952.

(a) Oudh Estates Act (1 of 1869), S. 10—List under S. 8—Names in—Presumption as to ownership is conclusive.

Section 10 clearly bars the Court from any enquiry into the ownership or right of the person whose name is entered in the list to hold the taluqa or to possess the same. [Para 3]

(b) Evidence Act (1872), S. 43—(Judgment).

Party filing a judgment in its support cannot rely on the admission of certain fact contained therein. [Para 5]

Anno. Evidence Act, S. 43 N. 3.

N. Banerji — for Appellant; *Hyder Husain — for Respondents Nos. 1 and 3.*

REFERENCE : Para.

('42) 1942 Oudh W N 687 : (AIR 1943 Oudh 68) 6

Order. — This is an appeal by Raja Sitla Bakhsh Singh, defendant 1 in a suit for possession of a house situate in village Payer Khas, district Gonda. The suit was filed against him by the plaintiff-respondent Kunwar Surendra Vikram Singh. The plaintiff brought the suit for possession of the house on the allegation that one Rani Sarfaraz Kunwar was the owner of the property in dispute. She gifted the same to defendant 3 Rani Jairaj Kunwar by a gift deed dated 9-3-1899, and the said defendant 3 Rani Jairaj Kunwar gifted it to the plaintiff on 13-4-1945. Defendant 1, Sitla Bakhsh Singh and his wife defendant 2 were in unlawful possession of the said property and the plaintiff prayed for possession of the said house.

[2] The main contesting defendant in the case was Sitla Bakhsh Singh. He raised a number of defences. He denied the right of Rani Sarfaraz Kunwar to gift the property in question in favour of Rani Jairaj Kunwar. He further alleged that the property was held by Rani Jairaj Kunwar as a widow of Raja Udai Narain Singh along with Rani Jaswant Kuar, who was the co-widow of Raja Udai Narain Singh and a joint owner of the said property. The gift of Jairaj Kunwar without the consent of the co-widow was bad in law. The other defences raised by the defendant 1 are not relevant at this stage of the case.

[3] The suit of the plaintiff has been decreed by both the Courts and this second appeal has been filed by defendant 1 Sitla Bakhsh Singh. The main ground advanced by the learned counsel appearing for the appellant in this Court is that the house in dispute has not been proved to be the property of Rani Sarfaraz Kunwar. It cannot be doubted that Rani Sarfaraz Kunwar was the taluqdariya of Bhabhnipayar taluqa. Her name is entered in List 1 at No. 177 and in List II at No 75. These lists were prepard under S. 8, Oudh Estates Act (1 of 1869). In S. 10 of the said Act it is laid down that the Court shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are taluqdars or grantees. Learned counsel for the appellant has argued that in spite of the said provision of law contained in S. 10 it is open to the Court to enquire into the correctness of the said entry. In my opinion, the provision of law embodied in S. 10 clearly bars the Court from any enquiry into the ownership or right of the person whose name is entered in the list to hold the taluqa or to possess the same. Section 10 does not state that the inclusion of a person's name in the said list merely raises a presumption of ownership in his favour. On the other hand it states, that the existence of his name in the said list should be taken to be the conclusive evidence of the fact that he was a taluqdar or a grantee as contemplated by the Act. I cannot find any merit in this part of the argument of the appellant's learned counsel.

[4] The second argument of the learned counsel for the appellant is that in any case the house in dispute has not been proved to be part of the estate or taluqa. This is a new point that was not taken in any of the Courts below. It involves new questions of fact and law and it is too late at this stage to allow the plaintiff to open up new avenue of attack on this ground. In any case, so far as the question of the ownership of the house along with the adjoining land is concerned, there can be no doubt that Rani Sarfaraz Kunwar was the owner of the said property. Her name as owner is entered in EX. 15, khasra of the first settlement. The entries contained in the said document would be presumed to be correct under ss. 44 and 57, U. P. Land Revenue Act. No evidence has been adduced on behalf of the defendant-appellant to cast any doubt on the correctness of the entries made therein or to rebut the presumption of correctness that arises from such entries. Under these circumstances Rani Sarfaraz Kunwar must be held to be the owner of the property in dispute.

[5] Once Rani Sarfaraz Kunwar is found to be the absolute owner of the property in dispute, she would have power to gift it to any one she liked. The facts that she gifted the property in dispute to Rani Jairaj Kunwar on 9-3-1899, and that Rani Jairaj Kunwar gifted it to the plaintiff on 13-4-1945 have been found to have been proved by both the Courts below and the correctness of this finding has not been challenged in this Court. In view of the said finding the plaintiff must be held to be the rightful owner of the property claimed by him.

[6] In the end, the learned counsel for the defendant-appellant has relied on certain admissions made on behalf of the plaintiff-respondent 1 in a case in *Sitla Bakhsh Singh* v. *Surendra Bikram Singh*, 1942 oudh W. N. 687. He has invited my attention to the record of proceedings

in Court referred to in the judgment of that case which states that

"It was admitted in the proceedings dated 21-9-1937, that Raja Udai Narain Singh was the taluqdar of Babhnipayar under Act 1 of 1869 and that the name of Rani Sarfaraz Kunwar was entered in the list on his behalf."

This judgment was not filed by the defendant appellant in the case as a piece of evidence in his favour. I am of opinion that reliance on this judgment as a piece of evidence would be tantamount to admission of new evidence in the case. This is certainly not permissible at this stage of the case. Learned counsel appearing for the respondent has argued that the admission in question was made for the purpose of that particular case, as it suited both the plaintiff as well as the defendant of that case to proceed on the basis that Raja Udai Narain Singh was the taluqdar of Babhnipayar estate. If this document had been filed as evidence on behalf of the defendant, then it would have been the duty of the plaintiff to explain the admission made in that case. The document in question having not been filed by the defendant, it is not open to him to rely on any admission contained in the judgment of that case. The ruling of a case is an authority for the proposition of law contained therein. If it is sought to rely on any facts contained in the judgment of a case published in a Law Report then the party should file that as a piece of evidence in the case in order to enable the other side to file any documents in rebuttal of the same. Under the circumstances the document in question to which my attention has been drawn by the learned counsel for the appellant must be ignored by me as irrelevant and inadmissible for the purposes of this case.

[7] No other argument has been advanced on behalf of the appellant.

[8] Having considered the facts and circumstances of the case, I am of opinion that there is no force in this appeal which is dismissed with costs. The stay order dated 19-11-1948, is vacated.

C/D.R.R. *Appeal dismissed.*

A.I.R. 1953 Allahabad 379 *[Vol. 40, C.N. 176.]*

(LUCKNOW BENCH)

MALIK C. J. AND MISRA J.

Radhey Lal and another, Creditors-Appellants v. *Hausila Bux Singh and others, Claimants—Respondents.*

First Appeal No. 20 of 1947, D/- 6-2-1952.

U. P. Regulation of Sales Act (26 of 1934), Ss. 5 and 9, Proviso—Automatic transfer.

Section 5 only lays down that the Collector shall transfer to the decree-holder the agricultural land or the amount of the agricultural land determined in accordance with S. 3 (2) in full satisfaction of the decree. The transfer has to be effected in accordance with the provisions of law. The words 'a transfer of land under S. 5 has been completed' in the Proviso to S. 9 are also significant and go to show that something more than a mere order under S. 5 is necessary to complete the transfer : A. I. R. 1942 All. 224 and A. I. R. 1947 Oudh 4, *Ref.* [Para 4]

B. K. Dhaon, for Appellants; J. S. Trivedi, for Respondents 1 to 5.

REFERENCES : Courtwise/Chronological/ Paras.

('42) A.I.R. 1942 All. 224 : (I. L. R. (1942) All. 373). 3

('46) 1946 Oudh App. 193 : (A.I.R. 1947 Oudh 4). 3

Malik C. J. — This is an appeal by Radhey Lal and Ram Lakhan Lal against an order passed by the Special Judge, First Grade, Bahraich, rejecting an application under s. 11, Encumbered Estates Act, by the appellants claiming that they had become owners of the property in suit and the landlord-applicants were no longer owners of the same. There was a decree for money in favour of the appellants against the landlord-applicants and in execution of the decree the question arose of transfer of some land belonging to the landlord-applicants. On 30-1-1936, an order was passed under s. 5, Regulation of Sales Act (26 of 1934), the decree-holders having exercised the option of realising the decree by sale of the agricultural land. The Assistant Collector passed an order on 30-1-1936, in these terms :

"I have examined the sale statement. The judgment-debtor did not turn up in spite of sufficient service. The decree holders want to purchase 70.83 acres for Rupees 12,752-3-8 in full satisfaction of their decree. I accept the application of the decree-holders and I transfer 70.83 acres of land in full satisfaction of the decree under S. 5, Regulation of Sales Act. Inform the Tahsildar for necessary action."

After this order, on 6-2-1936, the judgment-debtors applied under s. 4, Encumbered Estates Act, and the order under s. 6 transferring the case to the Special Judge was passed on 16-3-1936. On 28-3-1936, a sale-deed pursuant to the order dated 30-1-1936, was executed and on 17-4-1936, it was registered.

[2] The question, therefore, is whether the order dated 30-1-1936, effected a transfer of title in the property from the judgment-debtors to the creditors; if so the subsequent order of 16-3-1936, under s. 6, Encumbered Estates Act, could not affect the same. In case, however, the order of 30-1-1936, did not effect a transfer of title in the property then the landlord-applicants were still the owners of the property on 16-3-1936, and all subsequent proceedings relating to the transfer and the execution of the decree should have remained stayed under s. 7 of the Act.

[3] Learned counsel for the appellants has urged that the order dated 30-1-1936, was intended to effect a transfer and did, as a matter of fact, transfer the interest in the property. The point is, however, covered by series of decisions of the Allahabad High Court and the Oudh Chief Court. The two cases mentioned in the judgment of the lower Court are: *Ram Chandra Rai* v. *Chandi Prasad*, A. I. R. 1942 ALL. 224 and *Noor Mohammad* v. *Ikram Husain*, 1946 oudh APP. 193. Both these cases clearly cover the point. There are a number of other cases which learned counsel have

cited. It is not necessary for us to give a reference to them. It is, however, admitted that the views of the High Court and that of the Chief Court were the same and both the Courts have consistently held that an order under s. 5 did not effect a transfer of interest in the property.

[4] The provisions of the Act when carefully examined lead to the same conclusion. Section 5, U. P. Regulation of Sales Act, does not provide that there shall be an automatic transfer of interest by an order under s. 5. It only lays down that the Collector shall transfer to the decree-holder the agricultural land or the amount of the agricultural land determined in accordance with s. 3 (2) in full satisfaction of the decree. The transfer has to be effected in accordance with the provisions of law. That this is the correct view is made abundantly clear by the proviso to s. 9, Regulation of Sales Act, the relevant portion of which is as follows :

"Provided that in all cases in which the Collector has given the option mentioned in S. 4 and the decree-holder has elected under cl. (b) of the section to have the sale postponed the provisions of Ss. 5 and 7 of the Act shall continue to have effect until the transfer of land under S. 5 has been completed. . . . . "

The words "a transfer of land under s. 5 has been completed" are significant and go to show that something more than a mere order under s. 5 is necessary to complete the transfer.

[5] The result, therefore, is that in spite of the order passed on 30-1-1936, the title in the property had not been transferred and the appellants had remained as creditors of the landlord applicants on the date the order under s. 6, Encumbered Estates Act, was passed.

[6] The order passed by the lower Court is correct. The appeal has no force and is dismissed with costs.

[7] The appeal having been dismissed the stay application is also dismissed and the order for the *ad interim* stay is discharged.

C/V.R.B. *Appeal dismissed.*

A.I.R. 1953 Allahabad 380 *[Vol. 40, C. N. 177]*

BRIJ MOHAN LALL J.

Sm. Shyama Devi—Accused — Applicant v. *Sadan Sewak — Opposite Party.*

Criminal Ref. No. 145 of 1951, D/- 12-11-1951.

Criminal P. C. (1898), Ss. 259 and 369—Dismissal of complaint for default—Restoration—Power of review—Exercise of.

Unlike the Code of Civil Procedure, the Code of Criminal Procedure contains no provision for restoration of complaints dismissed for non-appearance of the complainant. It is certainly open to a complainant to file a fresh complaint and in appropriate cases an application for restoration may be treated as a fresh complaint. But a fresh complaint can be filed only before a Magistrate empowered to take cognizance thereof under S. 190 (1), Criminal P. C. Where the Magistrate is not such a person he cannot entertain a fresh complaint or treat an application for restoration as a fresh complaint.

The order of restoration passed by such Magistrate cannot be justified by reference to the provision for review in S. 369, Criminal P. C. as it prohibits review except "to correct a clerical error." The Magistrate is certainly not correcting a clerical error by ordering the restoration of the complaint. [Paras 3, 4]

Anno. Cr. P. C., S. 259, N. 11; S. 369, N. 2.

Order. — This is a reference under s. 438, Criminal P. C., by the learned Additional District Magistrate of Kanpur recommending that an order passed by a learned Honorary Special Magistrate Second Class of Kanpur setting aside an order of dismissal of a complaint and restoring the said complaint be set aside.

[2] It appears that the learned Magistrate was hearing the complaint under s. 427, Penal Code. The case had been adjourned to 9-10-1950. On that day complainant was found absent and the learned Magistrate dismissed the complaint. Subsequently the complainant put in appearance and made an application on the same day for the complaint being restored. The learned Magistrate allowed this prayer and restored this complaint.

[3] It may be pointed out that unlike the Code of Civil Procedure, the Code of Criminal Procedure contains no provision for restoration of complaints dismissed for non-appearance of the complainant. It is certainly open to a complainant to file a fresh complaint and in appropriate cases an application for restoration may be treated as a fresh complaint. But a fresh complaint can be filed only before a Magistrate empowered to take cognizance thereof under s. 190 (1), Criminal P. C. In the present case, the learned Honorary Special Magistrate was not such a person. He could not entertain a fresh complaint. He could hear such cases only as were transferred to him by other Courts competent to take cognizance of a fresh complaint. In the circumstances, it was not open to the learned Honorary Special Magistrate to treat an application for restoration as a fresh complaint.

[4] In his explanation the learned Magistrate has attempted to justify his order by a reference to the provisions for review. He contends that he had, in fact reviewed his previous order. The power of review conferred by the Code of Criminal Procedure is contained in s. 369. It prohibits review except "to correct a clerical error." The learned Magistrate was certainly not correcting a clerical error by ordering the restoration of the complaint. In the circumstances, I am of the opinion that even if an order of restoration is treated as an order of review the learned Magistrate was not competent to pass that order.

[5] In the circumstances I accept the reference. The order passed by the learned Magistrate is set aside.

C/D.R.R. *Order set aside.*

A.I.R. 1953 Allahabad 381 *[Vol. 40, C. N. 178]*

WALI ULLAH J.

Prem Chand, Applicant v. *State.*

Criminal Revn. No. 579 of 1951, D/. 27-2-1952.

(a) Penal Code (1860), S. 415 — Loss or damage arising from act of cheating must be proximate and not vague or remote. [Para 6]

Anno. Penal Code, S. 415 N. 8.

(b) Penal Code (1860), S. 420—Sentence—(Criminal P. C. (1898), S. 32).

Where the accused was bound to lose his membership of the Board and to suffer in his reputation, the sentence was reduced from 6 months to one month R. I. [Para 7]

Anno. Penal Code, S. 420 N. 21; Criminal P. C., S. 32 N. 3.

C. S. Saran, for Applicant; C. B. Sahai, for Asst. Govt. Advocate, for the State.

Order.—The applicant, Prem Chand, has been tried and convicted of an offence under S. 420, Penal Code. The sentence passed upon him is one of six months' rigorous imprisonment and a fine of Rs. 100, in default one month's further rigorous imprisonment. Both the conviction and the sentence of the applicant have been confirmed by the appellate Court.

[2] It appears that the applicant, who is a member of the District Board of Etawah, sold by public auction, leaves of Khajur trees standing on the roadside between Debiapur and Phaphund. This was done by him on 11-9-1948, without any authority from the District Board. Ramadhin P. W. was the highest bidder. He purchased the leaves and paid Rs. 76 then and there. What he describes as a *Kachchi Rasid*, EX. P. 1, was given to Ramadhin. A proper receipt from the District Board, however, was promised to him after the amount had been deposited in the office of the District Board. Later it came to the knowledge of Ramadhin that the applicant had no authority to sell the leaves of the Khajur trees. After making some attempt to obtain a regular receipt from the District Board and failing to secure it, Ramadhin appears to have made a complaint to the District Magistrate on 15-2-1949. Apparently, on knowing of this, the applicant seems to have deposited the amount of Rs. 76 in the office of the District Board on 21-1-1949.

[3] Both the learned Magistrate as well as the learned Sessions Judge, who heard the appeal, have found that the applicant had acted dishonestly in inducing Ramadhin to believe that he (the applicant) had authority to sell and, thus under that deception, he induced Ramadhin to purchase and to part with Rs. 76.

[4] The defence taken by the applicant was that he had acted bona fide under the belief that he had been ordered to auction the leaves of Khajur trees. The learned Magistrate, however, rejected this plea and held that the applicant must be considered to have known clearly that he had no authority to auction the leaves. This finding of the learned Magistrate was in substance affirmed by the learned Judge. Further the learned Judge observed in his order:

"The auction of leaves appears to have been carried out after due publicity and receipt for price also appears to have been given with a view that no one may have any suspicion that anything was being done improperly."

[5] On the facts, it seems to me that there is nothing that can be said in favour of the applicant.

[6] Learned counsel for the applicant has strenuously contended that, on the facts found in this case, no offence of *cheating* was committed. His arguments have centred round the question whether or not there was any damage caused or was likely to be caused to Ramadhin on account of the unauthorised auction held by the applicant. Learned counsel has cited quite a number of rulings of different Courts including some cases decided by this Court. It seems to me, however, that the question whether loss or damage is likely to occur to the person deceived, in a particular case, has to be determined with reference to the facts and circumstances of that particular case. It is not a question which can be determined with reference to any particular view of the facts taken in a particular case. It is obvious that loss or damage spoken of in the latter part of S. 415 which defines "cheating" must be loss or damage which is the proximate result of the act. It must be a natural consequence of the act complained of. If it is a mere possibility and not a necessary consequence of the act, such loss or damage, even if it actually occurs, would not satisfy the element of damage which is one of the essentials of the offence of cheating as defined under S. 415, Penal Code. All the cases cited by learned counsel in this connection are cases which, if they are carefully analysed, would show that nothing more than this was laid down that damage or loss or harm, or risk of damage or loss, must be a proximate result of the act complained of. It should not be too remote or too vague to be directly attributable to the act complained of. If in a particular case, the element of damage is merely contingent i. e., not a necessary consequence obviously that element of the crime would be wanting. It seems to me quite clear that on the facts found by the two Courts below the applicant in the present case has been rightly convicted of the offence under S. 420, Penal Code.

[7] The question of sentence, however, in this case, deserves serious consideration. The applicant, as mentioned above, is a member of the District Board. Eventually the entire sum of Rs. 76 was deposited by the applicant in the District Board office on 21-2-1949, five months after the auction sale. It may be that the applicant made the deposit after he had come to know that a complaint with regard to this amount had been made to the District Magistrate by Ramadhin, but the net result obviously was that the District Board did not actually suffer in a pecuniary sense. The

applicant was sentenced to six months' rigorous imprisonment and a fine of Rs. 100 by the learned Magistrate. As said above, this was maintained by the learned Sessions Judge in appeal. The learned counsel for the applicant has stated that the applicant has done about one month in gaol. He was granted bail by a learned Judge of this Court on 16-4-1951, when the realisation of fine was also stayed. As the result of this conviction, the applicant is bound to suffer not only so far as his membership of the District Board is concerned, but also in his reputation generally. It seems to me that the sentence of six months imprisonment plus a hundred rupees fine is too severe in the circumstances of the case. I think the ends of justice will be met by reducing the sentence of imprisonment to the period already undergone and maintaining the sentence of Rs. 100 fine. In default of the payment of fine, he will undergo, as ordered by the Courts below, one month's rigorous imprisonment. The amount of fine must be deposited within a month of today.

C/K.S. *Sentence reduced.*

A.I.R. 1953 Allahabad 382 *[Vol. 40, C. N. 179]*

HARISH CHANDRA J.

Hardeo—Applicant v. *Ram Lal and others—Opposite Party.*

Criminal Ref. No. 302 of 1951, D/- 19-12-1952.

Criminal P. C. (1898), S. 145—Temple dispute.

Section 145 applies to a dispute which relates not only to the offerings but also to the possession of the temple. Hence a person, who as a *thekadar* on behalf of the managing committee of the temple is in possession, is entitled to succeed in the proceeding started under the section: A.I.R. 1941 Nag. 171, *Rel. on*; A. I. R. 1926 Cal. 437; A. I. R. 1920 Pat. 383 (1) and A. I. R. 1927 Nag. 333, *Disting.* [Paras 3, 4]

Anno. Criminal P. C., S. 145, N. 26, Pt. 8.

J. S. David — for Applicant; Shanti Bhushan — for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras.

('25) 52 Cal. 959 : (A. I. R. 1926 Cal. 437 : 27 Cri. L. J. 239). 2

('27) A. I. R. 1927 Nag. 333 : (28 Cri. L. J. 687). 2

('41) A. I. R. 1941 Nag. 171 : (42 Cri. L. J. 675). 2

('20) A. I. R. 1920 Pat. 383 (1) : (21 Cri. L. J. 572). 2

Order.—This is a reference by the Additional District Magistrate of Muzaffarnagar in a case decided by a Magistrate of the first class under s. 145, Criminal P. C. One Herdeva filed a complaint under s. 145, Criminal P. C., against Ram Lal and others alleging that the opposite party had forcibly taken possession of certain plots over which stood a temple of the deity Kali Singh and were taking the offerings by ousting the complainant, his brother Kanshiram and the manager, Baldeodatt. The opposite party in their written statement stated that the parties were entitled to receive offerings according to their respective shares. Evidence was recorded and the learned Sub-Divisional Magistrate dismissed the complaint erroneously holding that s. 145 only contemplated a dispute between two parties each of which asserted the right to hold exclusive possession of the property as against the other and not a dispute between a party claiming joint possession with another and a party contesting such right, the finding of the Court being that both the parties were entitled to a share in the offerings at the temple. The learned Additional District Magistrate rightly points out that the Magistrate did not approach the case correctly and that it was, therefore, necessary for him to find out which party was in actual possession of the property at the time of the passing of the preliminary order. He points out that there is strong documentary evidence on the record to show that the property is being managed by a managing committee in pursuance of decrees passed by competent Courts and that the committee had given the *theka* to the complainant Herdeva to receive offerings on behalf of all the co-sharers. He further points out that as the property was in possession of the *thekadar* on behalf of the managing committee at the time when the preliminary order was passed it should be released in his favour and that the order of the learned Sub-Divisional Magistrate should be set aside.

[2] On behalf of the opposite party it is contended that s. 145, Criminal P. C., will not apply to the present case inasmuch as the dispute relates to the performance of worship and not to the right of user of the temple or land belonging to the idol and reliance is placed upon the Calcutta case of *Surendra Nath* v. *Shashi Bhushan*, 52 Cal. 959. Section 145 applies when a dispute likely to cause a breach of the peace exists "concerning any land or water or the boundaries thereof". It is explained in that section that the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property. In the Calcutta case the dispute related to the performance of the *puja* of an idol and there was no dispute as regards the temple or any land belonging to the idol. The right alleged was a right to go into the temple and to perform the *puja* and to take a portion of the offerings made to the idol. It was held in that case that the right to perform the *puja* of an idol or to have a share of the offerings made to the idol cannot be said to be a right of user of any land as explained in s. 145.

A similar view was taken by the Patna High Court in the case of *Ghulam Sibtain* v. *Mt. Kaniz Khatoon*, A. I. R. 1920 Pat. 383 (1).

The Nagpur High Court in the case of *Sobhag Singh* v. *Bakhtawarsingh*, A. I. R. 1927 Nag. 333, took a similar view and held that the offerings made by pilgrims at a shrine do not come within the definition of "profits" as given in s. 145 and I am in full accord with the view held in this and the other cases referred to above.

The Nagpur High Court in the case of *Abdul Majid* v. *Mohammad Saheb Azizuddin*, A. I. R.

1941 Nag. 171, however, pointed out that where a dispute regarding the right to receive the offerings at a shrine centred round and depended upon the right to sit upon a particular spot the dispute related either to the possession of the land or to its use.

[3] I have carefully read the complaint in this case and there can be no doubt that the dispute was not only with respect to the right to receive offerings at the temple but also in regard to its management. The managing committee not only receives offerings but looks after the temple and its maintenance and Herdeva is a *thekadar* on behalf of the managing committee not only for the purpose of receiving offerings but also for its management. The learned Additional District Magistrate has discussed the evidence and I agree with his view that the present dispute relates not only to the offerings but also to the possession of the temple and that on the evidence the complainant was in possession of the property on the date on which the preliminary order was passed by the Sub-Divisional Magistrate.

[4] I accordingly set aside the order of the Sub-Divisional Magistrate dated 19-2-1951, and declare that the complainant Herdeva is entitled to possession of the property in dispute until evicted therefrom in due course of law and forbid all disturbance to such possession until such eviction. The property is under attachment and will accordingly be released in favour of the applicant.

B/V.S.B. *Reference accepted.*

A.I.R. 1953 Allahabad 383 *[Vol. 40, C. N. 180]*

WALI ULLAH J.

Masih Uddin — Applicant v. *The State and others — Opposite Party.*

Criminal Revn. No. 772 of 1951, D/- 28-2-1952.

(a) Criminal P. C. (1898), S. 145 — Effect of prior decree of Civil Court.

It is the duty of the Magistrate holding proceedings under S. 145 to maintain the rights of the parties when such rights have been declared by a competent Court within a time not remote from taking proceedings under the section. I. L. R. (1943) All. 150 and A. I. R. 1943 Oudh 410, *Rel. on.* [Paras 10, 15, 19]

Anno. Cr. P. C., S. 145 N. 44.

(b) Criminal P. C. (1898), S. 439—Findings of fact—Interference.

Ordinarily the High Court, sitting in revision, will not interfere with findings of fact recorded by Courts below. When, however, it appears to the High Court that the case has not been approached from the proper point of view by the Court or Courts below as the case may be and that consequently there is reason to think that there has been a failure of justice the High Court will undoubtedly interfere at the revisional stage. [Para 18]

Anno. Cr. P. C., S. 439 N. 15.

S. C. Khare — for Applicant; S. N. Misra — for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras.

('43) I. L. R. (1943) All. 150 : (1942 All. L. J. 629). 11, 12

('99) 26 Cal. 625 : (3 Cal. W. N. 461). 11

('43) A. I. R. 1943 Oudh 410 : (44 Cri. L. J. 789). 11, 13

('20) A. I. R. 1920 Pat. 210 : (21 Cri. L. J. 575). 11

Order.—The applicant has come up in revision against an order passed by the learned Magistrate on 19-7-1950, by which the crops attached were directed to be released in favour of the opposite party i. e., Bhura and others. This order of the learned Magistrate was affirmed by the learned Sessions Judge on 9-3-1951, when he dismissed the application in revision.

[2] It appears that the applicant, on 26-11-1949, made an application under s. 145, Cr. P. C., as the Mukhtar-i-am of the Mutwallis of a waqf. It was alleged by the applicant that the opposite party, namely Bhura and others, were interfering with the possession of the Mutwallis trustees over a large number of plots of land in village Kalolijar in the district of Namirpur. It was alleged that there was consequently an apprehension of a breach of the peace.

[3] Notice was issued to the opposite party and proceedings under s. 145, Cr. P. C., were carried on in the Court of the Magistrate. The applicant, in support of his case, filed the Dakhalnama which showed that, in pursuance of a decree for ejectment passed by the revenue Court in a case under s. 180, U. P. Tenancy Act, against Bhura along with some others, proceedings in execution had been carried out by a Vakil Commissioner appointed by the Court and possession delivered to the decree-holder. Along with this piece of documentary evidence some witnesses were also produced by the applicant to support his case.

[4] The opposite party denied that the trustees of the waqf had obtained actual possession by means of execution proceedings in the revenue Court. Some witnesses were also produced to support the case of the opposite party.

[5] The learned Magistrate, on a consideration of the materials before him, recorded the opinion that in spite of *the formal* ejectment of Bhura under the decree passed in the suit in 1948, he i. e. Bhura, continued in possession of the plots in dispute; in other words, it was held that the second party was not actually dispossessed from the land in dispute in spite of the delivery of possession which, according to the learned Magistrate, was only *formal*.

[6] There were four witnesses in support of the case of the applicant, namely Mathura, Raja Ram, Ahmad and Masihuddin while there were three witnesses in support of the case of the opposite party, namely Bhura, Bhaggi Singh and Jodha Singh. There was also an extract of Khasra for 1357 Fasli filed on behalf of the opposite party.

[7] The oral evidence given by the opposite party was apparently believed by the learned Magistrate, while that produced in support of the case of the applicant appears to have been rejected.

[8] In revision the learned Sessions Judge found that there was no legal defect in the judgment of the learned Magistrate and so the application in revision was rejected.

[9] Learned counsel for the applicant has raised two points in this Court: (1) that the learned Magistrate has not attached due weight to the decree for ejectment passed by the revenue Court in the suit under S. 180, U. P. Tenancy Act and (2) that the learned Magistrate had misread the evidence of some of the witnesses produced by the applicant. It was also urged that the evidence of Masihuddin applicant had been entirely ignored by the learned Magistrate.

[10] In support of point No. 1 taken by the learned counsel for the applicant, my attention has been invited to a number of rulings in which, in effect, it has been held that it is the duty of the Magistrate holding proceedings under S. 145, Cr. P. C., to maintain the rights of the parties when such rights have been declared by a competent Court within a time not remote from taking proceedings under the section.

[11] Learned counsel has relied on the cases of *Daulat Koer* v. *Rameshwari Koeri*, I. L. R. 26 Cal. 625, *Sukan Singh* v. *Prayag Singh*, A. I. R. 1920 Pat. 210; *Makhan Lal* v. *Mangal*, I. L. R. (1943) ALL. 150 and *Imtiaz Ali* v. *Badruddin*, A. I R. 1943 Oudh 410.

[12] In the case of *Makhan Lal* v. *Mangal*, (I. L. R. 1943 ALL. 150) decided by this Court, it was held by Yorke J.:

"Where the civil Court had decided in favour of a certain person that he was the owner entitled to the possession of a plot, it was held that in such a case S. 145, Criminal P. C. could not apply."

At p. 153, the learned Judge observed :

"It has been held in various cases that where there is a decree of a civil Court for possession in respect of the disputed land, the duty of a criminal Court proceeding under this section is to find which party held such civil Court decree and then to maintain that party in possession."

Further the learned Judge proceeded to observe:

"Again it has been said that it is the duty of the Magistrate to maintain any order which has been passed by the civil Court; and therefore to take proceedings which must necessarily have the effect of modifying or cancelling such order or of interfering with the rights of the parties determined by a civil Court is to assume a jurisdiction that the law does not contemplate. Similarly it has been held that when the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistrate to maintain the right of the successful party, and the defeated party will not be allowed to invoke the aid of the Magistrate and the police to neutralise the effect of the decree of the competent civil Court."

[13] In the case of *Imtiaz Ali* v. *Badruddin*, (A. I. R. 1943 Oudh 410) *(ubi supra)*, decided by the Chief Court, Bennett J. held :

"Where the civil Court which was seized already of the matter has disposed of it in favour of one of the parties to proceedings under S. 145, the proceedings under S. 145 should be set aside in revision. It will be open to the Magistrate, if he thinks necessary, to take proceedings against either or both parties under S. 107, Criminal P. C."

[14] In view of the case law mentioned above, it seems to me quite clear that the learned Magistrate in the present case did not attach that importance to the decree for ejectment and the execution proceedings consequent upon it, which it was his bounden duty to do. After all when proceedings under S. 145, Criminal P. C., are taken it is intended by the Legislature that the Court concerned would come to a finding as to which of the two parties is actually in possession. Such possession has to be protected. The party found to be in actual possession has to be maintained in that possession until such party is evicted therefrom in due course of law. Meanwhile all disturbance of possession is forbidden. If there has already been a decision by a competent Court, under which a right to possession has been declared in favour of one party or the other, that decision must be respected and maintained by the criminal Court.

[15] In the present case, the learned Magistrate has again and again treated the proceedings for delivery of possession in pursuance of the decree for ejectment to be purely a *formal* proceeding divorced altogether from the factum of actual possession. In this, it seems to me, the learned Magistrate was very much mistaken.

[16] Again, the learned Magistrate has put a good deal of reliance on the extract of khasra for 1357 Fasli in holding in favour of the opposite party. 1357 Fasli began on 8-9-1949. The application under S. 145 was filed in the Court of the Magistrate by the present applicant on 26-11-1949. It is, therefore, clear that at the time when the Khasra entries for the year 1357 Fasli were actually made, the dispute with regard to the possession of the fields in question had in all probability already commenced. Moreover, the Patwari of the circle who prepared the Khasra entries, was then in possession of this Khasra as the copy of the extract of the Khasra filed by the opposite party was obtained from him sometime in April 1950.

[17] It seems to me, therefore, that the learned Magistrate did not approach the evidence in this case from the proper point of view. This was particularly so in regard to the documentary evidence, namely *the Dakhalnama* filed on behalf of the applicants and *the Khasra* extract for 1357 Fasli filed on behalf of the opposite party. As I have said above, the learned Magistrate failed to appreciate the effect of the decree and consequently of the Dakhalnama executed in execution of the decree for ejectment.

[18] Mr. S. N. Misra, the learned counsel for the opposite party, Bhura and others, has contended that in revision this Court is bound to accept the finding of the learned Magistrate on the question of the factum of possession. He has cited some authorities of Courts other than this Court, to show that the finding on the factum of possession is binding on this Court. It seems to me, however, that the correct position is that ordinarily this Court, sitting in revision, will not interfere with findings of fact recorded by the Court or Courts, below. When, however, it appears to this

Court that the case has not been approached from the proper point of view by the Court, or Courts below as the case may be and that consequently there is reason to think that there has been a failure of justice, this Court will undoubtedly interfere at the revisional stage. This, to my mind, is the correct legal position and this has been affirmed again and again by decisions of this Court.

[19] It seems to me that, on the basis of the decree very recently obtained by the trustees of the *waqf*, whose Mukhtar-i-am was the applicant, prior to the institution of proceedings in the criminal Court under s. 145, Criminal P. C., the applicant must be held to be in possession. It may be noted here in passing that it is not the case of the opposite party that they obtained possession of the plots afresh after the termination of execution proceedings under which the decree-holder must be deemed to have obtained actual possession of the plots in dispute. I am unable to appreciate the significance of the word "*formal*" which has been repeatedly used by the learned Magistrate in connection with the execution proceedings in pursuance of the decree for ejectment.

[20] For the reasons given above, it must be held that the first party was in actual possession of the plots in dispute on the relevant date. I accordingly set aside the order of the learned Magistrate dated 19-7-1950. The possession of the applicant i. e. the first party, over the land in dispute shall be maintained and the second party is directed not to interfere with the possession of the first party until that party is ejected therefrom in due course of law.

[21] It appears that the crops attached during the pendency of these proceedings were sold and the money is in deposit in Court. This money, which is in deposit in Court, shall now be paid over to the first party.

[22] Mr. Misra, the learned counsel for the opposite party, has submitted that in pursuance of the order of the learned Magistrate passed on 19-7-1950, his clients i. e. the second party, have been in actual possession of the plots and been cultivating them, and that his clients the second party, should be allowed to reap the crops standing to-day as they must have been sown by them. This order will not stand in the way of the second party reaping the crops standing in the fields in dispute. In any case, therefore, the possession of the plots must be delivered to the first party after 15-5-1952.

C/D.H. *Order accordingly.*

A.I.R. 1953 Allahabad 385 *[Vol. 40, C. N. 181.]*

DESAI J. *on Difference between*
SANKAR SARAN, AND MUSHTAQ AHMAD JJ.

Satya Narain and others, Appellants v. *The State.*

Criminal Appeal No. 869 of 1950, D/- 17-4-1952.

1953 All./49 & 50

(a) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Desai and Sankar Saran JJ.* — The evidence of a witness against an accused is the direct statement made in Court that he was one of the offenders. His earlier identification of him is simply a corroboration of the evidence given by him in Court. The identification has by itself no independent value. [Paras 22 & 44]
Anno. Evidence Act, S. 9, N. 5.

(b) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Sankar Saran J.* — It cannot be said that on account of absence of identification proceedings, the entire sworn testimony of witnesses should be discarded. [Para 23]
Per *Desai J.* — The above observation should be taken as modified by the rule of caution or prudence that there must be corroboration. At the same time, it must not be thought that identification proceedings are required in order to supply material to the accused for challenging the evidence of the witnesses. [Para 44]
Anno. Evidence Act, S. 9 N. 5.

(c) **Evidence Act (1872), S. 9—Identifying parades —Accused confined into two jails at *P* and *J* — Witnesses identifying accused at *P* jail — Only some of them sent to *J* for identification — Evidence of witnesses who did not go to *J* held should not be discarded—Evidence of other witnesses who had gone to both places held could not be ruled out on ground that they stood in company of former — Identification at *J* held was quite irrelevant in judging results of identification at *P* — *Per Desai and Sankar Saran JJ.*; *Mushtaq Ahmad J., contra.)*** [Paras 11, 12, 24, 45 and 53]
Anno. Evidence Act, S. 9 N. 5.

(d) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Desai J.* — The whole object behind an identification proceeding is to find out whether the suspect is the real offender or not. [Para 47]
Anno. Evidence Act, S. 9 N. 5.

(e) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Desai J.* — Where several suspects are put up for identification the proper way to hold identification proceedings is to put up each suspect separately for identification mixed with as large a number of innocent men as possible, in any case not less than nine or ten. Care must be taken to see that the same innocent men are not mixed with each of the suspects. [Para 48]
Anno. Evidence Act, S. 9 N. 5.

(f) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Desai J.* — The weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify other suspects. It follows that it should not depend upon the mistakes committed by him i. e., upon the number of innocent men picked out by him as other offenders. [Para 50]
Anno. Evidence Act, S. 9 N. 5.

(g) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Desai J.* — An ideal identification proceeding is that which is held in the same conditions in which the offenders were seen by the witnesses. [Para 54]
Anno. Evidence Act, S. 9 N. 5.

(h) **Evidence Act (1872), S. 9—Identifying parades.**
Per *Desai J.* — If the identification appears to have been induced by any suggestion or other means, the Court should not hesitate to quash any conviction which follows, particularly when justice depended upon the identification of the accused. [Para 55]
Anno. Evidence Act, S. 9 N. 5.

(i) **Evidence Act (1872), S. 114, Illustration (a) — Stolen goods.**
Per *Desai J.*; *Mushtaq Ahmad, J., Contra.*—A person who is in possession of goods carried away by dacoits soon after the dacoity can be presumed to be either the dacoit or to have received them knowing them to be so carried away. [Paras 14 & 56]
Anno. Evidence Act, S. 114 N. 7.

S. N. Misra (for No. 1), Baqar Usmani, S. N. Mulla, and R. K. Shangloo, for Appellants; Deputy Govt. Advocate, for the State.

CASES CITED :

(A) ('30) A. I. R. 1930 All. 746 : 32 Cri. L. J. 152.
(B) ('21) A. I. R. 1921 All. 215 : 19 All. L. J. 947 : 27 Cri. L. J. 813.
(C) ('48) A. I. R. 1948 Mad. 113 : I. L. R. (1948) Mad. 667 : 49 Cri. L. J. 89.
(D) ('50) A. I. R. 1950 Cal. 413 : 51 Cri. L. J. 1520.
(E) (1914) A. C. 545.
(F) ('48) A. I. R. 1948 All. 241 : 49 Cri. L. J. 287.
(G) 57 C. L. R. 170.
(H) 49 C. L. R. 429.
(I) (1931) 75 Law. Ed. 1054 : 283 U. S. 308.
(J) (1927) 71 Law. Ed. 556 : 273 U. S. 95.
(K) ('42) A. I. R. 1942 All. 339 : 43 Cri. L. J. 867.
(L) (1910) 26 T. L. R. 640 : 5 Cr. App. Rep. 135.
(M) ('50) A I. R. 1950 All. 398 : 51 Cri. L. J. 1070.
(N) ('49) A. I. R. 1949 Nag. 277 : I. L R. 1949 Nag. 200 : 50 Cri. L. J. 713.
(O) ('50) A. I. R. 1950 Mad. 309 : 51 Cri. L. J. 497.
(P) ('50) A. I. R. 1950 Madh. B. 104.
(Q) (1896) 40 Law. Ed. 1090 : 162 U. S. 613.

Mushtaq Ahmad J.—Satya Narain, Shakur, Shyam Behari, Ram Abhilakh Sami Ullah, Ram Behari, Mohammad Raza, Sant Ram, and Mt. Naozadi (on bail) appeal against their conviction and sentences passed by the learned Sessions Judge of Jaunpur. The first eight of the appellants were convicted under s 396 and sentenced each to transportation for life, Ram Abhilakh, appellant 4, being also convicted under s. 19 (f), Arms Act, and sentenced to one year's rigorous imprisonment, and the last appellant, who is the mother of Ram Abhilakh, appellant 4, was convicted under s. 412, I. P. C., and sentenced to four years' rigorous imprisonment. There were ten other persons also charged under either or both of these sections, but they were all acquitted.

[2] The occurrence which became the subject of the charge had taken place on the night between 1st and 2nd of March 1949, at village Bhilampur, seven miles from the police station Sujanganj, district Jaunpur. As a result of what happened one Jageshar Pasi died, having received as many as ten injuries according to the post mortem report.

[3] A report of the incident was lodged by Dwarka Prasad, in whose house the alleged dacoity had been committed at 8-20 the next morning, in which only Sant Ram appellant was mentioned by name and 25 or 26 others without names as dacoits by the informant. It may be noted that Sant Ram's name is really stated in the report as Satya Narain, but that was only an alias for Sant Ram, it being necessary to mention this as appellant 1 in this appeal is also named Satya Narain. It may further be noted that this Sant Ram whose name is mentioned in the report is alleged to have been arrested on the spot and was not, therefore, put up for identification by the witnesses either at Jaunpur or at Partapgarh where different batches of the accused were identified by different batches of the witnesses.

[4] Mr. S. N. Mulla argued this appeal on behalf of Satya Narain and Sami Ullah, appellants 1 and 5 respectively, while the other appellants were represented before us by Mr. Baqar Usmani. Naturally, in the course of the arguments on behalf of Satya Narain and Sami Ullah those portions of the record were also brought to our notice which were germane only to the cases of the other appellants, there being no doubt, a number of common features between the case of the appellants 1 and 5 and that of the other appellants.

[5] The conviction in this case, as in every case of dacoity, was based either on identification evidence or on evidence of recovery of articles and in the case of some of the appellants on both. Dealing with the case first of Satya Narain and Sami Ullah represented by Mr. S. N. Mulla, the conviction of the one was based entirely on identification evidence and of the other both on such evidence and also on evidence of recovery of property alleged to have been taken away at the time of the dacoity. We have while examining the case of these two appellants to examine both these classes of evidence.

[6] It has not been contended before us that the identification evidence was so deficient in volume as not to form a satisfactory basis of conviction of the appellants, nor was the evidence of recovery of the articles alleged to have been stolen criticised in any great detail except with reference to one particular appellant, Samiullah. All the same a general criticism was advanced by learned counsel against the identification evidence on a ground which, according to the learned counsel was essentially fatal to the credibility of the same.

As already remarked above, there were identification proceedings both at Partabgarh and at Jaunpur. So far as the appellants are concerned, all of them except one, Mohammad Raza, were put up for identification at Partapgarh. Out of the whole lot of the accused only four of them, Mohd. Raza, appellant 7, Jahangir, Jamil and Ram Naresh, all acquitted, were lodged at the Jaunpur jail, whereas eleven accused were put in the jail at Partapgarh. Of the witnesses taken to identify the accused in jail, only seven were taken to the jail at Jaunpur and thirty-one to the jail at Partapgarh.

Of the seven taken to the Jaunpur jail only six were among the thirty-one taken to the Partapgarh jail. The position, therefore, was that whereas six out of the seven witnesses at the Jaunpur jail went to Partapgarh jail to identify the accused, the majority of the witnesses at the Partapgarh jail, that is twenty-five out of thirty-one, did not go to the Jaunpur jail to identify the accused there.

[7] On these facts learned counsel for the appellants 1 and 5 has strenuously contended that a serious prejudice was caused to them, and that it affected the quality of the trial.

[8] I would first indicate the precise position with regard to the identification of these appellants and then see how far the point raised by their counsel carries any force. There were in all ten witnesses who had identified these appellants in jail, either at the one or at the other place. Of these, three had no doubt been taken both to the Jaunpur and the Partapgarh jails to identify particular sets of the accused. They were Inder Bahadur Singh, Jagarnath Misir and Jagdamba Singh. The other seven had been taken only to the Partapgarh jail and not to the jail at Jaunpur. These were Ganga Prasad, Bansi Lal, Munnoo Ram, Bindeshwari Singh, Rudra Pratap Singh, Bishwanath and Bechu Singh, the last being examined only in the Court of the Committing Magistrate and his statement brought on the record at the trial under s. 33, Evidence Act.

Besides the three witnesses out of these ten, who had been taken to the Jaunpur jail to identify some of the accused, there were also Dwarka Prasad and Satya Narain at whose joint house the dacoity had been committed. Neither of these two men having identified either of the appellants 1 and 5, Satya Narain and Samiullah, their evidence calls for no consideration in the present connection. Of the three witnesses, Inder Bahadur, Jagarnath and Jagdamba, who had been taken both to the Jaunpur and Partapgarh Jails, Inder Bahadur had identified at Partapgarh six right persons and one wrong, Jagarnath four right and two wrong and Jagdamba five right and two wrong. Inder Bahadur at Jaunpur identified one right person and made no mistake, Jagarnath no right and two wrong persons and Jagdamba one right and one wrong person.

Taking the identifications by these men at both the places, the position was that Inder Bahadur had identified seven right persons and one wrong, Jagarnath four right persons and four wrong and Jagdamba six right persons and three wrong. The identification by Jagarnath, the second of these men taking into account the proceedings at both the Jails, therefore, stood in the ratio of fifty right and fifty wrong, although the identification by the other two men, Inder Bahadur and Jagdamba, on the same calculation heavily weighed on the side of correct identification as compared to the mistakes they made.

[9] On these facts learned counsel has strenuously argued that the identification of these appellants by seven out of the ten witnesses enumerated above at Partapgarh only, they having never been taken to Jaunpur for the purpose, carries no weight at all. He amplified his point by contending that the Court is now compelled to base its appreciation of the evidence of these men only on their behaviour at one of the identification centres, knowing nothing at all as to how they might have behaved if they had been taken to the other centre also for the same purpose.

He has illustrated his point by referring to the identification by Jagarnath witness who had identified four right persons and two wrong at Partapgarh and subsequently at Jaunpur no right and two wrong persons. Therefore, if one were to go by the identification made by the witness at Partapgarh alone, the identification might be taken as of a fairly good quality, but if one were to set off against the same the unsatisfactory identification made by the witness at Jaunpur, the scale was bound to turn in favour of the defence, inasmuch as in that event it would be a case of fifty right and fifty wrong.

Similarly, he argued that, if the other seven witnesses had been taken to the jail at Jaunpur to identify the accused who had been lodged there and if they had not behaved so well as at Partapgarh on an earlier date, the value of their identification at Partapgarh would have had to be judged in the light of the nature of their identification at Jaunpur and the Court would have then judged the quality of their evidence on the result of the identification made by them at both the places and not only at one of them to the exclusion of the other. In this contention, I think, the learned counsel was right.

[10] It was contended by the learned counsel for the State that, while it was a fact that these seven out of the ten witnesses against the appellants 1 and 5 had not been taken to the Jaunpur jail, no question was put to the Investigating Officer on behalf of the defence as to why this had not been done. This argument simply meant that, although there was an inherent deficiency in the identification proceedings relied upon by the prosecution, no one on behalf of the accused had cared to enquire how that deficiency had originated, that is to say, no one had asked anybody on the side of the prosecution to explain the cause of the deficiency.

To my mind, it only means that, because the accused had not tried to ascertain the cause of an obvious flaw in the identification proceedings, they were not entitled to take advantage of the same. I am unable to subscribe to such a reasoning. There are certain things more or less of an indifferent type which would not be allowed to operate against a particular party unless it has been given an opportunity of explaining it and has then failed to explain it. On the other hand, there are certain facts which from the nature of them are so patent that only an extraordinary cause might furnish some explanation about them, and, where such a cause is not disclosed, there seems to be no reason why the other party should be prevented from taking advantage of the situation.

It should have stared into the face of the prosecution agency in this case that the witnesses taken to the Partapgarh Jail alone for identification were open to be criticised and open even to be wholly rejected in the general evaluation of the

evidence of the prosecution against the accused if they had not been taken also to the jail at Jaunpur to identify the accused there. In the present case fortunately it does not seem necessary to exercise one's mind too much to realise the significance of this point. We have the identification made by Jagarnath witness in this case at both the places, Partapgarh and Jaunpur.

I have already shown that, whereas his identification at the former place taken by itself might fully satisfy the Court, his identification at Jaunpur, bearing value only in an inverse ratio, the total effect of the two identifications made by him brought the position virtually to a cipher, with the result that the Court would be perfectly justified in putting this witness out of account altogether. Why could not possibly the same may have happened in the case of the other seven witnesses also? I do not say that it must have so happened, but no one can say that it could not so happen. And if it could have so happened, surely the accused were deprived of an important test in the light of which they could have legitimately criticised the identification evidence against them as a whole.

[11] It may appear a little curious to say that for no fault intrinsically appearing in the evidence of a body of seven witnesses they should be put out of account only by reason of this particular flaw. The reason to my mind is clear. If the evidence of a single identifying witness can be reasonably criticised on the ground that he had been asked to identify only some of the accused at only one of the places of identification and not the others at the other place I see no reason why the same objection cannot lead to the same result where a number of witnesses come under such a category.

The position of every one of such witnesses would be open to the same objection, and the mere fact that he finds himself in company with many others would be no ground for believing him or the others of his class. I, therefore, think that, seven out of the ten witnesses examined against the appellants 1 and 5 not having gone to the jail at Jaunpur to identify the accused there, these appellants were deprived of a valuable material to scrutinise the evidence of those witnesses, a position clearly illustrated by the case of Jagarnath P. W.

In the case of *Abdul Jalil Khan* v. *Emperor*, A.I.R. 1930 ALL. 746(A), a certain witness had been taken to identify some of the accused at Bareilly and also to identify the remaining accused at Pilibhit. His failure to identify any of the suspected persons at Pilibhit was held to affect the quality of the identification at Bareilly. The same precisely is the position here. Not knowing how these seven witnesses, if they had been sent for the purpose to the Jaunpur Jail, would have behaved there, these appellants are wholly unable, and for this the prosecution alone is responsible, to attack their evidence on a ground which is now completely denied to them. The evidence of these seven witnesses, therefore, being open to a fatal objection, cannot, in my view, be accepted to make out the charge.

[12] There remains the question as to why the identification evidence of Inder Bahadur and Jagdamba, both of whom had been taken to Partapgarh and Jaunpur to identify the accused, should not be accepted. In the context of the facts of this case, I have come to the conclusion that it should not be. If it had stood by itself it might have formed a good basis of conviction of these appellants. These witnesses stand, however, in company with eight others whose evidence, as I have already pointed out, is open to a severe objection. One of the reasons suggested by the learned counsel for the appellants 1 and 5 was that the witnesses who had been taken to the Partapgarh jail were not taken to the Jaunpur jail because they had been shown only those of the accused who had been lodged at the former jail.

I cannot say whether this is a correct or a purely imaginary assumption. Nonetheless, the circumstance of the Partapgarh witnesses not having been taken to the Jaunpur jail is by itself so vital that it should have struck the prosecution that some explanation was necessary in that behalf, for otherwise it was open to the accused to take up the position they took in their arguments in this Court. No such explanation was made by the prosecution and in the absence of any explanation it would certainly be open to the accused to suggest what at least may not be taken as an irrational figment of the mind, namely that the accused in the Partapgarh jail had in fact been shown to the witnesses taken there to identify them.

If the seven witnesses had been taken to the Jaunpur jail also and had misbehaved there in the sense that the number of wrong identifications made by them outweighed the number of correct identifications, surely that circumstance would have affected the value and credibility of the evidence of the two witnesses Jagdamba and Inder Bahadur also. I think that this omission created a fundamental deficiency in the evidence of the prosecution as a whole, and it would be wholly unsafe to rely even on the evidence of these two particular witnesses. I am, therefore, inclined to hold that the charge against them under s. 396, I. P. C., was not at all brought out.

[13] There was some argument with regard to there being a presumption of the guilt of the accused even under this section in view of the provisions of illustration (a) of s. 114, Evidence Act. This illustration has the words :

"That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

[14] The learned counsel for the State, relying on this illustration, argued that, as at least five

articles proved to have belonged to Dwarka Prasad and his family were recovered from the house of Samiullah appellant only three days after the night of the dacoity, that is, on 4-3-1949, he could be assumed to have been among the dacoits himself and therefore to have committed the crime of dacoity. It is noticeable that the important words in this illustration are 'stolen goods', 'theft' and 'thief'. There is no reference to 'goods obtained by dacoity', 'dacoity' or 'dacoit'. Now S. 410, I. P. C. defines the expression 'stolen property' as "property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as 'stolen property'."

While the words 'theft', 'extortion' and 'robbery' occur in this section, there is no such word as dacoity, which means that property obtained by dacoity was not covered by the expression 'stolen property'. It cannot be denied that, while a dacoity is a robbery, the reverse is not true in every case. Robbery becomes a dacoity only where the number of persons concerned exceeds four. There seems to be no reason why, while referring to three distinct offences theft, extortion and robbery the Legislature should not have also mentioned the offence of dacoity, if property obtained by dacoity was also included in the words 'stolen property'.

One possible reason that suggests itself to my mind is that, while in the case of theft, extortion and robbery a presumption of liability for the substantive offence might be raised under cl. (a), S. 114, Evidence Act, the same should not be done in the case of a more serious offence, namely of dacoity. On a careful consideration of the matter I have come to the conclusion that no case under S. 396, I. P. C., was made out against the appellants 1 and 5, Satya Narain and Sami Ullah, and that they should be acquitted of the charge under that section.

(His Lordship considered the question whether Samiullah could be convicted of any other offence and after considering the evidence observed that he would hold him liable for an offence under S. 411, I. P. C. His Lordship then proceeded.)

[15-16] So far as the other appellants are concerned, the position of Shakur appellant 2, is precisely the same as that of Satya Narain, no property having been recovered from his house either. He should, therefore be dealt with similarly as Satya Narain.

[17] With regard to the other accused, there was the evidence not only of those who had identified them at Partapgarh Jail but also of some of those who had identified the accused at Jaunpur jail, and from the house of every one of them some or other property found to belong to Dwarka Prasad was recovered. Among them is also Ram Abhilakh appellant who was found by the learned Sessions Judge to have been armed with a pistol, it being further found that the injuries caused on Jogeshar Pasi could have been caused with that weapon. The appeal of these appellants, that is the appellants other than Satya Narain, Sami Ullah and Shakur, is, therefore, liable to be dismissed, except in regard to Mt. Naozadi who must have acted under the influence of her son Ram Abhilakh appellant the sentence passed appears to me as rather excessive.

[18] In the result I would allow the appeal of Satya Narain and Shakur and acquit them, and, further allow the appeal of Sami Ullah in respect of his conviction under S. 396, I. P. C. which I would set aside and instead convict him under S. 411, I. P. C. and sentence him to two years' rigorous imprisonment. I would also reduce the sentence in the case of Mt. Naozadi from four to two years' rigorous imprisonment.

[19] **Sankar Saran J.** — I am in agreement with my brother Mushtaq Ahmad in the order proposed by him against the appellants Shyam Behari, Ram Abhilakh. Ram Behari, Mohammad Raza, Sant Ram *alias* Satya Narain and the woman Nauzadi. I do not, however, find myself in agreement with him with regard to the three appellants Satya Narain son of Ram Newaz, Shakur and Samiullah for the reasons I shall presently indicate.

[20] This was a serious dacoity in which considerable amount of property was lost and one man, Jageshwar Pasi, was killed. A large number of men were prosecuted and 19 men stood their trial before the learned Additional Sessions Judge. They were charged, some of them under S. 396, Penal Code, alone, others under S. 412, Penal Code, only and the rest under both the sections. One man, Ram Abhilakh, was also charged under S. 19 (f) of the Arms Act. Of these men only nine were convicted. Of them eight were convicted under S. 396, Penal Code, and only Nauzadi was convicted under S. 412. Penal Code. They have all made an appeal to this Court.

[21] The evidence against the appellants in this case consists of identifications and recovery of property from the possession of some of them. The question which really needs to be considered is whether the evidence of the witnesses who identified the various appellants as having participated in the dacoity is to be rejected because of certain inherent defects in it. If there is no serious defect in their evidence, as I hold there is none, then upon their testimony the appellants' conviction should be maintained.

[22] It appears that after their arrest the appellants and certain suspected persons were confined into two District Jails, one at Pratapgarh and the other at Jaunpur, where identification parades were held. The identification parade at Pratapgarh was held on 27-3-1949, and at Jaunpur it was held nearly three months later on 22-6-1949. At Pratapgarh there were a large number of suspects

in the parade, but at Jaunpur there were only four. The majority of witnesses, numbering roughly over 30, were sent to Pratapgarh Jail for identifications and about half a dozen of them were sent to Jaunpur for the same purpose.

All those witnesses who were sent to Jaunpur for identification had also participated in the identification proceedings at Pratapgarh, but quite a number of those who took part in the identification proceedings at Pratapgarh were not sent to Jaunpur. Learned counsel for the appellants argued that this was a serious flaw in the prosecution case. According to them if all the Pratapgarh witnesses had been sent to Jaunpur Jail, they might have made mistakes and thus weakened the general effect of their evidence which did not happen because their identifications were confined to only one jail. I do not see force in this argument.

It has to be remembered that in convicting an accused person the Courts are guided by the sworn testimony that is given in Court. The reliance upon identification proceedings is only by way of corroboration or contradiction of the evidence in Court and no more. As was laid down in *Nagina* v. *Emperor*, A. I. R. 1921 ALL. 215 (B) identification proceedings held in jail

"amount to this, namely that certain persons are brought to the jail or other place and make statements, either express or implied, that certain individuals whom they point out are persons whom they recognise as having been concerned in a particular crime.

"These statements are of course not made on oath and again, they are made in the course of extra judicial proceedings. The law does not allow statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When these persons are called as witnesses then these previous statements become admissible, not as substantive evidence in the case, but merely as evidence to corroborate or contradict the statements made by these witnesses in Court (Ss. 155 and 157, Evidence Act). If when a witness to identify is called in the Sessions Court and states there that he can identify no one, there is obviously nothing to corroborate and so the evidence of the previous statement, express or implied, made in the course of the identification proceedings in the jail is not admissible."

[23] Thus if a witness was not produced at a particular identification parade, there is no material upon which to corroborate or contradict him. Suppose in a case of this nature no identification proceedings are held. It cannot be said that because of this defect the entire sworn testimony of prosecution witnesses should be discarded. Naturally enough the Courts would judge the identifications held before them in such circumstances with the greatest care and caution but would not altogether discard the testimony of witnesses because there were no previous identification parades held.

It must be noted that there is no provision in law that identification proceedings should be held in dacoity cases or for that matter in any type of cases. These parades are held in the nature of a precautionary measure that is taken so that the earliest impressions of the witnesses are kept on record.

[24] In this case we have the record of the identification proceedings that were conducted against all the appellants at least in the Pratapgarh Jail by some of the witnesses and by some of them in both the jails. Because all the witnesses were not sent to both the jails it cannot be said that the statements of those witnesses who went only to one jail for identification are falsified or lack corroboration. In the case of those who were able to identify accused persons in both the jails there may be stronger corroboration, but the fact that some of the witnesses attended only one identification parade does not mean that there is no corroboration of their evidence at all.

During the course of arguments learned counsel for the appellants were asked whether they objected at any stage of the proceedings either in jail or in Court to the fact that they had been prejudiced because all the witnesses were not sent for identification in both the jails, and their answer was in the negative. Nowhere in the course of the fairly lengthy cross-examination of witnesses has any suggestion been made that the absence at Jaunpur of all the witnesses who participated in the Pratapgarh identification parade was on account of any *mala fides* on the part of the prosecution.

[25] In these circumstances it would be throwing a very heavy burden on the prosecution to ask them not only to arrange for identification proceedings but to see to it that no witness who is sent up for identification in one jail is left out in another. It often happens that identification parades are held on different dates and different witnesses attend those parades and unless the defence make any definite allegations or suggestions no doubt is cast upon the absence of some of the witnesses from the identification parades. I am wholly satisfied that upon the evidence on the record nothing has been brought out to cast any doubt upon the genuineness of the identification parades and that no witness has been withheld for any ulterior reason. Thus there is absolutely no question of prejudice of any sort to the appellants in this case.

(His Lordship then dealt with individual cases and in each case observed that he would dismiss the appeal, but that he would reduce the sentence in the case of Nauzadi to two years.)

[26-39] **By the Court.**—The members of this Bench having differed in regard to Satya Narain (appellant 1), son of Ram Newaz, Shakur and Sami Ullah (appellants 2 and 5 respectively), the papers be laid before the Hon'ble the Chief Justice to obtain the opinion of a third Judge in the case of these appellants. The appeals of the other appellants are dismissed, except that in the case of the appellant Naozadi her sentence is reduced from four to two years' rigorous imprisonment.

She is on bail, and must surrender to serve out the rest of the sentence.

[40] **Desai J.**—The case of three appellants, Satya Narain, Shakur and Samiullah, has been laid before me for my opinion. They along with several others have been convicted under s. 396, Penal Code, etc. On appeal, the appeal of others has been dismissed by my brethren Sankar Saran and Mushtaq Ahmad, but they differed as regards these three appellants. While Sankar Saran J. was of the opinion that all the three appellants are guilty under s. 396, Penal Code, and their appeal should be dismissed, Mushtaq Ahmad J. was of the opinion that Satya Narain and Shakur should be acquitted and that Samiullah should be convicted under s. 411, Penal Code.

[41] There is no dispute about the facts relating to the dacoity. There is overwhelming evidence to prove, and both my learned brethren have been satisfied, that a dacoity resulting in the death of one man was committed in the night of 1 and 2 March 1949, in the house of Dwarka and his cousin Satya Narain in village Bhillampur, police station Sujanganj, Jaunpur district. It is also abundantly proved that some property carried away by the dacoits has been recovered from the house of Samiullah appellant; there is no difference of opinion between my learned brethren on this point.

Samiullah himself admitted the recovery of the property but claimed that it belongs to him and that claim, though supported by the evidence of his father, cannot be accepted. The property has been identified by the victims of the dacoity as belonging to them and no adequate reason exists for disbelieving their evidence. On the other hand, the appellant's father could very well have given false evidence in an attempt to shield him. The question, that caused difference of opinion, is whether he should be convicted under s. 397, Penal Code or under s. 411, Penal Code.

[42] Satya Narain belongs to village Bikra, Samiullah to village Mahasingh Sarai and Shakur to Mohammadpur, all of police station Baghra, district Partabgarh. Their villages are said to be near one another and about forty miles from village Bhillampur where the dacoity was committed. During the investigation of the dacoity the police carried out a raid in the villages where the appellants reside on 3-3-1949 and arrested several persons suspected to have committed the dacoity. They include Satya Narain and Samiullah appellants.

Shakur appellant was arrested on 4-3-1949. All were arrested at their houses in the morning and then taken, with their faces covered up, to police station Jaitwara and on the following day to Partabgarh jail. They along with eight other suspects were put up for identification before a First Class Magistrate in the jail on 27-3-1949. They were mixed with seventy other undertrials. Thirty-one witnesses were sent up by the police to identify the dacoits.

Seven of them did not pick out any of the suspects and the rest picked out one or more of them. All the suspects had alleged before the Magistrate holding the proceedings that they had been detained in police station Jaitwara for two days and shown to a large number of witnesses and that they were again shown to many of them at Partabgarh. After the identification proceedings, Satya Narain stated that there was none in the jail of his size and weight.

[43] Some other suspects who were arrested for their alleged participation in the same dacoity were placed before another Magistrate in Jaunpur jail for identification on 22-6-1949. There were four suspects arrested on 19th May or so and were mixed with twenty undertrials. Twelve witnesses were sent by the police to identify them. *I find that the details given by my brother Mushtaq Ahmad in his judgment about the identification proceedings are not correct.* Nine of these witnesses are those who had identified one or more of the appellants in Partabgarh. In all nineteen witnesses had identified one or more of the appellants in Partabgarh and out of these ten had not been sent to Jaunpur to identify the other suspects.

[44] Differences arose between Sankar Saran J. and Mushtaq Ahmad J., as regards the guilt of Satya Narain and Shakur appellants on one point alone. The evidence against these two appellants consisted wholly of direct evidence g ven by witnesses, corroborated by the fact of their having identified them in jail. There was no other evidence. Satya Narain was identified by a large number of witnesses, namely, Ganga Prasad, Inder Bahadur, Jagannath (P. W. 13), Jagdamba, Bansi Lal, Manu Ram, Bindeshwari, Rudra Pratap Singh, Bishwanath Singh, Becchu Singh, Amarpal Singh, Ram Bahadur Singh and another Jagannath (P. W. 7).

Shakur was identified by Jagdamba, Bansi Lal, Rudra Pratap Singh, Bishwanath Singh, Becchu Singh, Dwarka and Amarpal Singh, Manu Ram, Bindeshwari, Rudra Pratap Singh and Becchu Singh did not pick out any wrong man in the Partabgarh jail. Inder Bahadur, Bishwanath Singh and Bansi Lal identified eight, seven and seven suspects respectively and picked out one wrong man each. Jagannath P. W. 13 identified four suspects. Jagdamba six suspects and Ram Bahadur Singh four suspects and picked out one wrong man each. Dwarka identified four suspects and picked out three wrong men. Jagannath P. W. 7 identified three suspects and picked out four wrong men. Amarpal Singh identified seven suspects and picked out nine wrong men.

In the Jaunpur jail Inder Bahadur, Jagannath P. W. 13 and Bansi Lal identified one suspect and picked out no wrong man, Becchu Singh identified two suspects and picked out no wrong man, Jagdamba identified two suspects and picked

out one wrong man, Dwarka and Amarpal Singh identified one suspect each and picked out two and three wrong men respectively and Ram Bahadur Singh and Jagannath P. W. 7 identified no suspect and picked out two wrong men each. The contention that appealed to Mushtaq Ahmad, J. and has been repeated before me is, that the evidence of the witnesses who were not sent to Jaunpur for identification purposes should be disbelieved because it is not known how they would have fared there if they had been sent.

Mr. Mulla went to the length of pleading that the case of the appellants was prejudiced by all the witnesses who were sent to Partabgarh jail not being sent to Jaunpur jail also. An example was given by my learned brother and that is of Jagannath who is said to have identified four suspects and picked out two wrong men in the Partabgarh jail and identified no suspect and picked out two wrong men in the Jaunpur jail. If the credibility of Jagannath is to be assessed on the results of the identification at Partabgarh alone, he would be classed as a fair witness, but if the results of the identifications at both the jails are considered, he would be classed as a bad or unreliable witness.

Mushtaq Ahmad, J. was greatly impressed by these figures quoted before him by the appellants' counsel. But the figures are not correct and the counsel have confused between two Jagarnaths. It was Jagarnath P. W. 13 who identified four suspects and picked out two wrong men in the Partabgarh jail; but in the Jaunpur jail he identified one suspect and picked out no wrong man. Thus whether the results of the identification in Partabgarh only were considered or the results of identification at both the places, would make no difference to the credibility of the witness. It was the other Jagarnath who identified no suspect and picked out two wrong men in the Jaunpur jail. The counsel erroneously added the result of the identification in Partabgarh by one Jagarnath to the result at Jaunpur of the other Jagarnath.

Thus the example given before my learned brethren and which was made the basis of his judgment by Mushtaq Ahmad, J. was itself wrong. But taking it to be correct, Mushtaq Ahmad, J. accepted the principle that the credibility of the witnesses should depend upon the results of identifications at both the places and that the witnesses who were sent only to Partabgarh should be disbelieved for want of certainty as to how they would have behaved if sent to Jaunpur. No question was put to the investigating officer why all the witnesses were not sent to Jaunpur also, but Mushtaq Ahmad, J. was of the opinion that this made no difference because there was "an inherent deficiency" or "an obvious flaw" in the identification proceedings and that the deficiency or flaw was :

"So patent that only an extraordinary cause might furnish some explanation and that when no explanation was furnished, the appellants were entitled to take advantage of it."

He observed :

"It should have stared into the face of the prosecution agency that the witnesses taken to the Partabgarh jail alone were open to be criticised and open even to be wholly rejected in the general evaluation of the evidence of the prosecution against the accused if they had not been taken also to the jail at Jaunpur."

He considered that the appellants were deprived by the prosecution of :

"an important test in the light of which they could have legitimately criticised the identification evidence"

or "a valuable material to scrutinise the evidence of those witnesses".

He, therefore, rejected the evidence of Ganga Prasad, Manu Ram, Bindeshwari, Rudra Pratap Singh, Bishwanath Singh, Becchu Singh and Bansi Lal. Out of this the evidence of Becchu and Bansi Lal was wrongly rejected because they had gone to Jaunpur jail for identification. After rejecting their evidence, he rejected the evidence of the other witnesses who had gone to Jaunpur on the ground that they stood :

"In company with eight others whose evidence is open to a severe objection."

Sankar Saran, J., on the other hand, relied upon the evidence of the witnesses. He did not think that there was any fatal defect in the investigation or that the evidence of the witnesses who were not sent to Jaunpur suffered on account of that fact or that the police were bound to send all the witnesses to both the places. I am wholly unable to subscribe to the view taken by my brother Mushtaq Ahmad. It has been correctly pointed out by my brother Sankar Saran that the evidence against an accused is the direct statement made in Court that he was one of the offenders. His earlier identification of him is simply a corroboration of the evidence given by him in Court. See *In re Sangiah*, A. I. R. 1948 Mad. 113 (C) and *Kanhaiya Lal* v. *State*, A. I. R. 1950 Cal. 413 (D). The identification has by itself no independent value. As stated by Viscount Haldane L. C. in *Rex* v. *Christie* (1914) A. C. 545 (551) (E): "its relevancy is to shew that the witness "was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock. was an afterthought or a mistake."

Lord Moulton (with whom Viscount Haldane L. J. agreed) said at page 558 :

"Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained."

During the investigation of a crime committed by persons unknown to the witnesses, the persons arrested on suspicion of their complicity in the crime have got to be confronted by the investigating authority with the witnesses so that they can find out whether they are the persons who committed the crime or not. Before the investigating authorities send up a case to Court, they must be satisfied that the persons arrested by them are the persons accused of having committed the crime.

If they were known to the witnesses, the witnesses would have given their names and that would have established their identity, but when they were not known, their identity could be established only if the witnesses on seeing them say that they are the offenders. Since it would be very easy for a witness who has little regard for truth, to say that the person arrested on suspicion was the offender, he is confronted with the suspect mixed with innocent men. If he picks him out, that would add to the credibility of his statement that he was the offender. This is the primary object of identification proceedings.

When the proceedings are held, the statements made by the witnesses before the Magistrate conducting them, that the persons pointed out by him had committed the crime, are admissible as previous statements to corroborate their evidence in Court against those men. But simply because these statements are admissible in evidence (as corroborative evidence), it cannot be said that if such evidence is lacking the evidence given in Court is no evidence. The Evidence Act does not require any particular number of witnesses to prove any fact; nor does it require that the evidence of any witness should be corroborated. As far as the statutory law is concerned it is legal for a Court to believe the evidence of a witness without any corroboration.

"It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid"; per Lord Atkinson in (1914) A. C. 545 at p. 555 (E).

Similarly, in a case of dacoity, the Court does not act illegally by relying upon the evidence of a witness even though he has not named or identified the accused during the investigation The question at all times is of believing or not believing the witness; *Dhaja Rai* v. *Emperor*, A. I. R. 1948 ALL. 241 (F). But in practice, it is not safe to accept the statement of a witness about the complicity of an accused in the crime if he did not describe him by name or other particulars during the investigation and still was not made to identify him out of a group. In (1914) A. C. 545 (E), Lord Reading said on p. 564:

"There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law."

Phipson writes in his Law of Evidence, Edn. 8, p. 392:

"In criminal cases it is improper to identify the accused only when in the dock; the police should place him, beforehand, with others, and ask the witness to pick him out."

The English Court of Criminal Appeal has set aside convictions if the proof of identity depended on the belief of a few witnesses whose recognition of the accused had taken place when he had been shown to them singly as a suspect. It treats it "as indisputable that a witness, if shown to the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection:" *Davis* v. *The King*, 57 C. L. R. 170 at p. 181 (G).

The evidence of a witness that he recognises the accused, whom he had not seen before the occurrence, as the offender is inherently weak. Lord Guthrie, presiding at the *Slater Trial* charged the jury thus:

"It would not be safe to convict the prisoner merely on the evidence of personal impression of his identity with the man seen flying from the house, on the part of strangers to him, without reference to any marked personality or personal peculiarities, and without corroboration derived from other kinds of evidence. My proposition involves a distinction between the identification, by personal impression, of a strange person, and the identification, by personal impression, of a familiar person.

Suppose that a father told you that his son, who was resident in his house, had been seen by him in Princes Street yesterday. That would be admirable evidence. But if a person who had only seen the son once in his life told you that he had seen him in Princes Street yesterday, that would be evidence of slender value, unless the son had a marked personality, or unless he had some peculiarity about him, such as a very peculiar walk, or unless there were corroboration, such as that the man, when spoken to, answered to the name of the particular individual."

Quoted by Evatt and Mctiernan JJ. in *Craig* v. *The King*, 49 C. L. R. 429 at p. 450 H). In *Davis* v. *The King*, 57 C. L R. 170 at p. 182 (G) the High Court of Australia adopted the English view that: "if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone as a suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence direct or circumstantial."

Therefore the observation of my brother Sankar Saran that it cannot be said that on account of absence of identification proceedings the entire sworn testimony of witnesses should be discarded should be taken as modified by the rule of caution or prudence that there must be corroboration. At the same time I must utter a warning against thinking that identification proceedings are required in order to supply material to the accused for challenging the evidence of the witnesses. In A.I.R. 1948 Mad. 113 (C), Rajamannar J. (now C. J.) said:

"Identification parades are held not for the purpose of giving defence advocates material to work on but in order to satisfy investigating officers of the *bona fides* of the prosecution witnesses."

[45] The view of my brother Mushtaq Ahmad that the evidence of the witnesses who did not go to Jaunpur should be discarded on that ground alone cannot be supported. The only effect of their not going to Jaunpur is that there is no corroboration of evidence, if any, given by them against any of the persons lined up for identification at Jaunpur. It is quite erroneous to say that the witnesses who identified the appellants should have been sent to Jaunpur also so that the defence might have some material for challenging their evidence against the appellants.

To say that had they been sent to Jaunpur, they might have committed mistakes and that consequently their evidence against the appellants might have been seriously impaired and that no reliable evidence would be left for maintaining their conviction, would be to ignore the fundamental principle that cases should be decided on the basis of evidence and not on surmises and speculations. McReynolds J. in *Aldridge* v. *United States*, ((1931) 75 LAW. ED. 1054 at p. 1060 =283 U. S. 308 (1)), said :

"Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material; to promote order, and not to hinder it by excessive theorising of or by magnifying, what in practice is not really important."

"A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule";

Stone J. at p. 558, in *McGuire* v. *United States*, (1927) 71 LAW. ED. 556, 558 : 273 U. S. 95 (3). There can be no justification for treating the witnesses who were not sent to Jaunpur as if they had been sent there and had committed numerous mistakes in identifying the other suspects. And there cannot possibly be any justification for ruling out the evidence of the other witnesses who had gone to both the places on the ground that they stand in their company. Finally, as I would show presently, the results of identification at Jaunpur would be quite irrelevant in judging the results of identification at Partabgarh.

[46] Though so many dacoities are committed and though the evidence against the alleged dacoits is in most cases the evidence of identification, it is to be regretted that enough attention has not been paid by anybody to the question of proper identification proceedings. Controversies have raged about the method of valuing the identification results, but how the identification proceedings should be carried out has not been discussed in any authority. Nor has adequate attention been paid to the factors to be considered in judging the evidence of witnesses of identification.

[47] The whole object behind an identification proceeding is to find out whether the suspect is the real offender or not. One may confront the witness with the suspect and find out whether he was the offender. But there would be no guarantee of the truth of the witness's saying that he was the offender. In order to have some guarantee of the truth, the witness is confronted with the offender not standing alone but mixed with a number of men of similar sizes and features. If a suspect is mixed with nine innocent men and the witness picks him out as the offender, one would be inclined to believe that he was the real offender. If a blind man were to go round the ten men arranged in a circle, his chance of picking out the suspect would be 1/10th or 1 to 9.

Similarly if ten blind men were to go round, according to the law of chance, one of them would point out the suspect. Thus there would be a chance of 1 to 9 of anyone being picked out as the offender. If a suspect is picked out by only one witness in identification proceedings, one cannot be certain that he did not pick him out by accident. If a suspect is mixed with 99 innocent men, then the chance of his being picked out by accident by any witness is 1 to 99; this is a much remoter chance than 1 to 9 as in the case when he was mixed with nine innocent men, and one would be ready to believe that he was identified really because he was the offender and not on account of chance.

Ordinarily, it is not practicable to have 99 innocent men to be mixed with a suspect. In practice one may not expect more than 10 or 20 men to be mixed. Taking the case of a suspect mixed with nine innocent men, the chance of his being picked out by two blind men is 1/100, which is again a very remote chance. While one may not be quite certain that an accused identified by only one witness was the real offender, when he is identified by two witnesses the certainty becomes strong and one can believe that he was the real offender.

There is also the clear possibility of a *bona fide* mistake when only one witness identifies an accused. If he is identified by two, both making a *bona fide* mistake is a remote possibility and such a possibility may not be made a ground for acquittal. This is why Courts hesitate to accept the identification of one witness only. They are not prepared to act upon a solitary witness's bare testimony based on identification and do not consider only his identification of the accused as sufficient corroboration. If three witnesses identify the suspect, nobody can have any doubt about his complicity in the crime.

[48] I have assumed so far that only one suspect is lined up for identification. Even though in a dacoity case there are two or more accused, the question as regards each individual accused is whether he committed the dacoity and it is obvious that the answer should not depend upon whether the other accused committed the dacoity or not. A correct answer to the question can be given only when he alone is put up for identification out of a group of say ten or twenty men.

The proper way to hold identification proceedings is to put up each suspect separately for identification mixed with as large a number of innocent men as possible, in any case not less than nine or ten. As each witness comes up for identification, it will be seen whether he identifies the suspect or not. He will either identify him, in which case there will arise no question of mistake (because there will be no mistake), or he will not identify him in which case even if he makes a mistake in picking out an innocent man it will be immaterial, because he will not have identified the suspect and even if he gave evidence against him in Court, it would not be believed.

When several suspects are put up for identification in connection with the same dacoity, care must be taken to see that the same innocent men are not mixed with each of them, otherwise the benefit of holding separate identification proceedings would go away. In this way, the proceedings will be as simple as possible without any complications arising out of innocent men being picked out. The problem how the identification of suspects is affected by some innocent men also being picked out, will be eliminated completely. If a suspect is identified by only one witness, he will be acquitted. If he is identified by three or more, he will be convicted ; the only condition being that the proceedings are genuine and not a farce or sham, i. e. the identifications are based only on impressions formed during the commission of the crime.

[49] What actually happens in most dacoity cases, however, is that several suspects are lined up for identification together. This practice is fundamentally wrong and is the root of all the trouble that arises in the matter of judging the identification results. In a line-up in which only one suspect is put up for identification there will arise no question of mistakes as explained above. But in a line-up in which two or more suspects are put up, a witness may identify one suspect and pick out an innocent man and there will arise the problem of judging how the identification of the suspect is affected, if at all, by the picking out of the innocent man. Though Courts have laid down certain rules such as that if a witness identifies three suspects and picks out one innocent man, he is not a satisfactory witness and that if he identifies four suspects he is a satisfactory witness even if he picks out one innocent man (see *Emperor* v. *Debi Charan*, A.I.R. 1942 ALL. 339 (k),) or that if a witness identifies one or more suspects and does not pick out any innocent man he is a good witness; but these rules are not based on reason or any principle of mathematics.

It is evident that how a witness's failure to identify the other suspects or mistake in picking out some innocent man affects the value of his identifying one or more suspects depends upon the reason for the witness's failure or mistake. Several causes contribute to a witness's failure to identify the other suspects or picking out innocent men. No clear-cut rule can be laid down for judging how the identification is affected by a witness's failure or mistake. As in almost every case the causes which brought about a witness' failure or mistake would not be known to the Court, it would be practically impossible for it to apply any particular rule.

[50] The weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify other suspects. He might not have had the same opportunity of noting and retaining in mind the features of all the offenders committing the crime. He might not have even seen all the offenders. He might not have been attracted to the same extent by the features of all the offenders, even if he saw them. Features of some might have made a stronger impression upon his mind than those of others.

Further if a suspect, who has not been identified by him, has not been proved to be guilty of the crime, it cannot be said that he was one of the offenders and ought to have been identified by the witness. After all he has been arrested only on suspicion and merely because he is a suspect he does not become one of the offenders. He might not have been involved in the crime at all and the witness would act rightly in not identifying him.

On the other hand, I do not see any reason why a witness's identifying or picking out only suspects should always be taken to be a case of "no mistake." If all the suspects identified by him are proved to be guilty, it would certainly be a case of "no mistake", but if some of them have not been proved to be guilty there is no reason for saying that his identifying them is not a mistake. Thus, neither a witness's failure to identify other suspects nor his identifying them is an infallible test for judging his reliability.

If the weight to be attached to the identification of a suspect should not depend upon the failure of the witness to identify the other suspects, it follows that it should not depend upon the mistakes committed by him i.e., upon the number of innocent men picked out by him as other offenders. In logic there is no difference between his failing to pick out other suspects as other offenders and his picking out some of the innocent men as other offenders. There is no reason to think that a witness who identifies a suspect and also picks out an innocent man is necessarily worse or less reliable than another witness who identifies the suspect and picks out no innocent men.

When he picks out an innocent man, he picks him out as another offender : his act amounts to saying that the suspect and the innocent man were two of the offenders. There is no such connection between his saying that the suspect was one of the offenders and his saying that the innocent man was another of the offenders which would make the former statement unreliable simply because the latter statement turns out to be wrong.

If a witness deliberately tells a lie in one respect something may be said for his being disbelieved in other respects, but it cannot be said that a witness tells a deliberate lie when he picks out an innocent man as one of the offenders. He might have honestly thought that he had seen the innocent man while committing the crime. His face may resemble that of one of the dacoits. So long as his picking out a suspect and an innocent man does not amount to his saying that either one or the other only took part in the crime, it cannot be said that his identifying the suspect should be disregarded

just because he erroneously thought that along with him the innocent man also had taken part in the crime.

While thus the picking out of an innocent man should have no effect at all on his identifying a suspect, the law of chance comes in again and it becomes impossible to disregard the mistake. If five suspects are put up for identification mixed with twenty innocent men and if a witness identifies one suspect and picks out four innocent men, it can be argued that the identification of the suspect could be as much due to chance as to design. Any blind man picking out five men at random would pick out one of the suspect because that is the law of chance. If the witness identifies two or more suspects and four innocent men, it can still be argued that anyone of them might have been identified by chance, and that since it cannot be ascertained which, both or all are as good as identified by chance.

This anomalous position arises on account of the inherent defect in the identification proceedings, viz., that of including more than one suspect. I have already hinted at another anomaly. When some of the suspects identified by a witness are not proved to be guilty, there exist no means to ascertain whether his identifying them was a mistake or not. Just as there is no reason for treating it as a mistake, there is no reason for not treating it as a mistake also. When it is not known whether the witness made a mistake or not obviously the weight to be attached to the identification of other suspects cannot be assessed.

[51] In this country most of the witnesses who go for identification are illiterate and cannot be expected either to understand the question, or to state what the percentage of their certainty about the complicity in the crime of every person picked out by them is. When a witness picks out two or more men as having taken part in the crime he does not necessarily mean that he has got the same certainty about their complicity. He may be cent per cent. certain about the complicity of one and may be only 50 per cent certain about the complicity of the others. He has to pick out a man or not pick him out. If he picks him out, he becomes a cent. per cent. offender as far as he is concerned though if his certainty were to be taken into consideration it might be anything even less than 50 per cent.

If a person of whose complicity he is only 40 per cent. or 50 per cent. certain is picked out and he happens to be an innocent man, it would be illogical to ignore his identification of a suspect on the ground of his having picked out the innocent man. The Court would be in a better position to assess the weight of his identifying the suspect if while identifying the two men he said that he was cent. per cent. sure of the complicity of one man (the suspect) and only 40 or 50 per cent. sure of the complicity of the other (the innocent man). But as I said, it is impossible to expect witnesses in this country to state intelligently what the percentage of their certainty is.

[52] When a number of suspects are lined up for identification, there is possibility of a witness, identifying two men on the basis of one impression. He may identify one man because of his resemblance to a certain impression in his memory, later he may identify the other man because of his resemblance to the same impression. He may do this without realising that he is identifying two men to answer for one offender, or he may identify both as alternatives. If one of them is a suspect, it is evident that little weight should be given to his identification.

There are no means of knowing how his mind was working when he identified the two men, and in this state of uncertainty it becomes unsafe to act upon any identification. If he identifies in addition two suspects in respect of whom he is absolutely certain i. e., he identifies three suspects and one innocent man, in the absence of information as to about which two suspects, he is certain, and which suspect he identifies as an alternative to the innocent man the Court cannot act upon any identification.

[53] In the instant case all the three appellants were put up for identification only at Partabgarh and how the witnesses who identified them fared subsequently in Jaunpur jail while trying to identify other dacoits is absolutely irrelevant. To mix up the results of the two identifications proceedings has no support either from the law or from reason or logic. And the necessary corollary is that a witness who is sent to identify one suspect is not required to be sent to identify another suspect in another proceeding.

Normally all witnesses who claim to be in a position to identify the offenders would be sent to identify all of them. The investigating authorities would themselves do this. But if for certain reasons they do not do this, they contravene no law at all, and are under no obligation to offer any explanation for their conduct and no Court can refuse to accept the testimony of a witness on the ground of his not having been sent to identify all the suspects.

[54] Another serious flaw in the identification proceedings, as they are conducted everywhere, is that they are conducted in circumstances which are quite different from those in which the offenders are said to have been seen committing the crime by the witnesses. Take the usual case of a professional dacoity which is generally committed at night and in which the dacoits are seen by the witnesses in the light of torches or lanterns and from distances of 20 40 or 80 paces. An ideal identification proceeding is that which is held in the same conditions in which the offenders were seen by the witnesses.

If a witness claims to identify an offender on account of a certain impression formed and retained in his mind on the basis of seeing him or his

face in a certain artificial light from a certain distance, he must be able to identify him from that distance and in that light. There is no reason why he should claim better light and shorter distance to identify him. As a matter of fact, the impression formed of the face when seen in the light and shade of artificial light and from a distance of say forty paces must naturally be quite different from an impression formed by seeing him in broad daylight and from a distance of 3 4 paces.

I think it may even be said that if a witness who saw a dacoit only in the light of a lantern and from a distance of 40 paces identifies a suspect in broad daylight from a distance of 3 paces, he does so not on account of the impression formed in his mind while witnessing the dacoity but on account of having seen him elsewhere in broad daylight and from close quarters. It may not be always possible to have identification proceedings held in the same circumstances in which the crime was committed, but that is no reason for never making an attempt to hold them in like circumstances.

In order to inspire confidence not only in the Court but also in the public, I consider it necessary that every attempt should be made to hold them in circumstances similar to those in which the crime was committed. If the dacoits were seen in torch light, the identification proceedings should be held with the help of torches : If a witness claimed to have seen the dacoits from a distance of 30 paces, he should be asked to identify them from only that distance.

If he saw the dacoits only while running away, he must be able to identify the suspect while he is running. There can be no justification for his demanding better facilities for identifying the dacoits than he had of seeing their features, if he claims to identify them only on the basis of the impression of the features formed in his mind at the time of the dacoity and retained since then. Evatt and Mctiernan JJ. said in *Craig* v. *The King*, at p. 446 (H) :

"An honest witness who says 'The prisoner is the man who drove the car,' whilst appearing to affirm a simple, clear and impressive proposition, is really asserting : (1) that he observed the driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity.

It therefore became necessary, in the present case, to pay attention to the following circumstances: (1) Whether the witness was a stranger to the driver of the car, (2) whether the driver had any special peculiarities which, at the time, impressed themselves upon the witness, (3) the length of time which elapsed between 14th December and (a) the time when the witness first described the driver or (b) the time when the witness saw the accused person, (4) the description of the driver given by the witness before seeing the prisoner, and (5) the circumstances under which the prisoner was first seen and identified by the witness as the driver."

Many judges are justly sceptical of the genuineness of many identification results. Having regard to the general level of intelligence among villagers they find it difficult to believe that dacoits seen only in the light of a torch or a lantern from a distance of several yards should be recognised by the witnesses after some months. It is high time that the identification proceedings were conducted genuinely and properly.

[55] The identification proceedings in the present case were not conducted properly. They were not conducted separately for each suspect. Nor was any attempt made to reproduce the circumstances in which the dacoits were seen by the witnesses. None of the inmates of the house in which the dacoity was committed identified any of the three appellants. Dwarka did identify two of them, but his evidence has been ignored by everybody because he picked out many innocent men and there was no reasonable certainty that he picked out the appellants on account of his having seen them and not by accident.

All the witnesses who have identified them had seen them from the house of Ganesh which is at a distance of 25 yards according to one witness, 1 bigha according to another and 30-35 paces according to a third, from the house of Satya Narain and Dwarka, or from the house of Din Dayal which is 15-20 paces or from the house of Ram Prasad, which is at a distance of 50-60 paces, or from the house of Ram Kishan 2-3 biswas off or from the house of Sitaram the distance of which is not known. The night was dark and the dacoits' faces were seen by these witnesses only in the light of torches and lanterns.

Torches were with the dacoits and some of the witnesses. Lanterns were burning inside and outside the house of Satya Narain. Dwarka and some of the witnesses also carried lanterns. The dacoits were armed and were firing in all directions to keep off the people. They had also wounded some persons. They kept on going inside the house and coming out. When after committing the dacoity the dacoits left, they were pursued by a large number of witnesses. During the pursuit there was an encounter with *lathis* between the pursuers and some 4-5 dacoits who were left behind.

The encounter resulted in one dacoit being knocked down and captured. Inder Bahadur and Bindeshwari are two of the three witnesses who had fought with *lathis* with the dacoits. But none of the appellants was seen by any of the witnesses in the *lathi* fight. As a matter of fact, no witness has assigned any specific part to any of the appellants; only Bechu and Ram Bahadur Singh stated that Samiullah appellant was armed with a gun. None of the appellants is said to possess any marked personal peculiarities.

It is true that the identification of the appellants took place in the Partabgarh Jail on the 26th day. Still I am unable to say that I am satisfied that the appellants were identified by the

witnesses merely on the basis of their having seen them committing the dacoity. There may be some truth in their statements that they were shown to the witnesses at Jaitwara and Partabgarh. Some of them might have taken part in the police raid. Had the identification proceedings been held in circumstances similar to those in which the dacoity was committed and had the witnesses still identified the appellants, I would have relied upon their identification.

If the identification appears to have been induced by any suggestion or other means, the Court should not hesitate to quash any conviction which follows, particularly when justice depended upon the identification of the accused. I would refer to *R.* v. *Dickman*, (1910) 26 T. L. R. 640 (L) in which Lord Alverstone, C. J. deprecated in the strongest manner any attempt to point out beforehand to a person, coming for the purpose of seeing if he could identify another, the person to be identified. He observed at page 642 :

"The Police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it was so".

[56] Samiullah's case is different. Not only has he been identified by the witnesses as one of the dacoits, but also property proved to have been carried away by the dacoits was recovered from his house on the very third day of the dacoity. There is no truth in Samiullah's evidence that the property belongs to him. He has offered no explanation for his being in possession of the property carried away by the dacoits from the house of Satya Narain Dwarka.

As the property was recovered so soon after the dacoity, it can be presumed that he was one of the dacoits. Illustration (a) to s 114, Evidence Act, is simply an illustration as it purports to be; it does not lay down the entire law on the subject and it is needless to emphasise that it uses the words, "stolen goods", "theft" and "thief". There is no force in the argument that because the words "dacoity" and "dacoit" are not used in it, a person who is in possession of goods carried away by dacoits soon after the dacoity cannot be presumed to be either the dacoit or to have received them knowing them to be so carried away.

"Theft" is a general term and dacoity is theft committed in certain circumstances. The principle involved in the illustration is clearly applicable to all thefts, including those amounting to dacoity. Mushtaq Ahmad J., was of opinion that property obtained by dacoity is not stolen property as defined in s. 410, Penal Code. With great respect to the learned Judge I do not agree. Section 412, Penal Code, refers to property carried away by dacoits as stolen property. Even otherwise the words used in the illustration are not "stolen property", but "stolen goods". "Stolen property" may have a particular meaning as given in s. 410, Penal Code., but there is nothing to suggest that the words "stolen goods" should be given the same meaning.

In *Sumer* v. *Rex*, A. I. R. 1950 ALL. 398 (M), this Court definitely laid down that the illustration does not limit the scope of s. 114 and that a person found in possession of property carried away by dacoits can be presumed either to have been present and concerned in the dacoity or to have received it knowing it to be dacoity property. The general presumption is that a person found to be in recent possession of the fruits of a crime is the criminal unless he can account for his possession. Recent possession of property proved to have been in the possession of a murdered person at the time of the murder leads to the presumption that the possessor was the murderer; *see*: *Ram Parshad* v. *Crown*, A. I. R. 1949 Nag. 277 (N), *In re Venkataswami* A. I. R. 1950 Mad. 309 (O) and *Sadashiva Daulat* v. *State*, A. I. R. 1950 Madh. B. 104 (P). In *Wilson* v. *United States*, (1896) 40 Law Ed. 1090 (Q).

Fuller C. J., laid down that if property that was in the house at the time of its being burnt down is in possession of the accused after the arson, it raises the presumption that he was present and concerned in the arson. It is legitimate to presume that Samiullah was present and concerned in the dacoity. Though the direct evidence is not such as would have sustained his conviction standing alone, his conviction under s. 396, Penal Code, must be maintained.

[57] In my opinion the appeal of Satya Narain and Shakur should be allowed, their conviction be set aside and they be acquitted and the appeal of Samiullah be dismissed and his conviction and sentence be maintained.

[58] **By the Court.**—The opinion of the third Judge having been received, in accordance with it the appeal of Satya Narain and Shakur appellants is allowed and that of Sami Ullah appellant dismissed. Satya Narain and Shakur shall be released forthwith unless they are wanted in any other connection.

A/V.R.B. *Order accordingly.*

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(LUCKNOW BENCH)

CHANDIRAMANI J.

Tikai Chamar, Defendant-Appellant v. *Mohammad Ibrahim Khan, Plaintiff-Respondent.*

Second Appeal No. 22 of 1947, D/- 22-8-1951.

U. P. Land Revenue Act (3 of 1901), Ss. 33 and 42 —Correction of papers proceedings—Question whether defendant grove-holder—Decision on, does not operate as res judicata — (Civil P. C. (1908), S. 11) — 15 R. D. 720, *Disting.* [Para 3]

Sri Ram, for Appellant; Mohd. Ayub, for Respondent.

REFERENCE Para

('31) 15 R. D. 720 3

Judgment. — This is a defendant's appeal against the appellate decree of Sri Khadim Ali, Additional Civil Judge, Faizabad, dated 12-11-1946.

[2] The plaintiff Mohammad Ibrahim Khan alleged that he was a grove-holder of the grove in

plot NO. 1808 situated in village Sheotara and that he had been dispossessed from the same in 1945 as a result of certain proceedings for correction of papers in the Revenue Court. He accordingly sought to recover possession of the grove. The defence was that the defendant Tikai Chamar was the grove-holder and the matter had been decided in his favour in the Revenue Court and this finding was final and could not be questioned. The question of jurisdiction was also raised and it was apparently decided in the trial Court against the defendant. The issue as to whether the plaintiff was a grove-holder or not was sent to the Revenue Court, and the Revenue Court held that the plaintiff is a grove-holder. In these circumstances the plaintiff's suit was decreed. On appeal the question of jurisdiction was not pressed. The question whether the plaintiff was a grove-holder was urged once again and decided against the defendant-appellant.

[3] In this second appeal the only point pressed before me is that the decision of the Revenue Court in the correction of papers case operates as res judicata and reliance was placed on *Raghubar Dayal* v. *Bhagwan Din*, 15 R. D. 720. According to that authority where an application for correction of papers under S. 33, U. P. Land Revenue Act, 3 of 1901, is contested it becomes a suit under S. 42, Land Revenue Act, relating to disputes respecting the class or tenure of any tenant, and a finding arrived at under S. 42 proceedings that a person is a sub-tenant and not a co-tenant operates as res judicata in any subsequent litigation. There the plaintiff claimed to be a co-tenant and not a sub-tenant as alleged by his landholder. There was no denial as to tenancy, but it was the class or tenure which was disputed. In the present case the very tenancy is disputed, assuming that the grove-holder is a tenant for purposes of S. 42. The proceedings for correction, therefore, in the Revenue Court did not fall under S. 42 in the present case, and there is no question of those proceedings operating as res judicata for the present suit. As the contention on the point raised by the appellant fails there is no force in this appeal. It is accordingly dismissed with costs.

C/G.M.J. *Appeal dismissed.*

A.I.R. 1953 Allahabad 399 *[Vol. 40, C. N. 183]*

MALIK C. J. AND V. BHARGAVA J.

Raghunandan Prasad—Applicant v. *Income-tax Commissioner, U. P. Lucknow and another —Opposite Party.*

Civil Misc. Writ No. 7845 of 1951, D/- 9-1-1953.

Constitution of India, Art. 226—Issue of writ.

The power to issue writ vested in the High Court under Art. 226 shall not be exercised in cases where a party has adequate or specific remedy available to it.

[Para 6]

S. N. Dvivedi, for Applicant; and S. C. Dass, for Opposite Party.

CASES CITED:

(A) ('52) A. I. R. 1952 All. 99.

(B) ('51) A. I. R. 1951 All. 746 : 1951 All. L. J. 576 (FB).

Malik C. J. — The petitioner Raghunandan Prasad held a substantive post of Inspector in the Income-tax Department. On 8-11-1941, he was given a chance to officiate as an Income-tax Officer. He continued to officiate as such for several years, but on 12-10-1946, the Commissioner of Income-tax reverted him to his substantive post. This order was communicated to Raghunandan Prasad on 15-10-1946. Against the order of 12-10-1946, Raghunandan Prasad made a representation to the Central Board of Revenue. The Central Board of Revenue passed an order on the recommendation of the Federal Public Service Commission that Raghunandan Prasad should be given a chance to show cause against the order of reversion and after he has shown cause then only he should be reverted. This order is dated 30-9-1948. The grounds were then set out why Raghunandan Prasad was not deemed fit enough to continue as an Income-tax Officer or confirmed in that post and these grounds were communicated to Raghunandan Prasad who sent his representation to the Public Service Commission. The Public Service Commission on 26-10-1949, after considering the representation and the personal file of Raghunandan Prasad, recommended that he was rightly reverted, and on 31-10-1949, the Governor-General passed an order dismissing the representation dated 4-2-1947 and holding that Raghunandan Prasad was not fit for appointment as Income-tax Officer and he had been rightly reverted to his substantive post. On 15-11-1949 Raghunandan Prasad filed a suit in the Court of the Civil Judge of Agra for various reliefs and claimed that his reversion was bad. This suit was decreed in part on 4-4-1951, the learned Civil Judge having ordered as follows:

"The plaintiff's suit for a declaration that the order dated 12-10-1946 is illegal and is void and ineffectual, is decreed. It is further declared that the plaintiff continued to hold the post of an officiating Income-tax Officer till the date of the suit. Any orders of the Government affirming or upholding the validity of the order dated 12-10-1946 shall stand vacated as far as they affect the declaration given above. The plaintiff's suit for other reliefs mentioned in the plaint is dismissed. Parties shall bear their own costs of the suit."

[2] The ground on which the learned Civil Judge held that the order of reversion dated 12-10-1946 was void was that that order was passed without giving notice to Raghunandan Prasad to show cause why he should not be reverted. Against the decree passed by the learned Civil Judge, Raghunandan Prasad has come up to this Court in first appeal which has been registered and numbered here as First Appeal NO. 236 of 1951 and is still pending. On 16-11-1949, the Commissioner of Income-tax communicated to the applicant the decision of the Governor-General dated 31-10-1949, rejecting Raghunandan Prasad's appeal against the order of reversion. On 10-3-1950, the Central Board of Revenue passed a fresh order which purports to be a new order of reversion with effect from 16-11-1949. The writ application

in this Court was filed on 4-9-1951, and the main ground taken is that the learned Civil Judge having held that the reversion order dated 12-10-1946, was bad, the applicant should have been reinstated as officiating Income-tax Officer, not only up to the date of the suit but till his retirement. It is further urged that if the order of 10-3-1950, is deemed to be a fresh order of reversion, then the original order dated 12-10-1946, being null and void, there should have been de novo proceedings started by formulating the charges afresh and by giving a fresh notice to the applicant.

[3] On behalf of the Commissioner of Income-tax, three objections have been taken, firstly, that in accordance with the High Court Rules, chap. 22, R. 6, the applicant having an adequate remedy by way of a suit this application should not be accepted. The second objection is that the Union of India has not been impleaded, and lastly, that Art. 311 of the Constitution, which deals with the question of reduction in rank, does not apply to a person reverted to his substantive post.

[4] It is not necessary for us to express any opinion on the last point as that matter would arise probably in the First Appeal pending in this Court. Moreover, learned counsel for the Commissioner of Income-tax has stated that the point has already been decided in his favour by a Bench of this Court, though the judgment has not been placed before us.

[5] As regards the second point, we find that the Secretary, Ministry of Finance (Revenue Division), Government of India, has been impleaded as opposite party 2, and if we were disposed to entertain this application, we might have allowed the applicant to make the necessary correction.

[6] On the first ground, however, we are not satisfied that it is a fit case in which we should exercise our discretionary jurisdiction under Art. 226 of the Constitution. Learned counsel for the applicant has brought to our notice a decision of this Court, *Pratab Narain Singh* v. *State of Uttar Pradesh*, A. I. R. 1952 ALL. 99 (A), to which one of us was a party and in which it was observed that :

"A Full Bench of this Court in *Asiatic Engineering Co.* v. *Achhru Ram*, (A.I.R. 1951 All. 746 (FB) (B)) has held that the question of existence of a specific and adequate alternative remedy is material only when the question of issue of a writ of mandamus is under consideration and not in the case of a writ in the nature of certiorari or a prohibition."

The writ application was allowed mainly on the ground that the petitioner in that case had no adequate remedy, and the observations quoted above merely set out an alternative ground. The decision in the *Asiatic Engineering Co., Ltd.*, *case* (B) was not cited before that Bench and the observations were merely based on impressions of what was supposed to have been decided in that case. Moreover, the alternative remedy suggested was an approach to the local Government by a petition under S. 13, U. P. Court of Wards Act. That was considered not to be an adequate alternative remedy and the remarks were made in that connection. Reference to the decision of the Full Bench in A. I. R. 1951 ALL. 746 at p. 769 (F.B.) (B) shows that the Full Bench pointed out the difference in the legal systems in India and in England and held that in India there are various special provisions of correcting errors made by lower Courts and Art. 226 of the Constitution having provided that the High Court shall have power in certain circumstances to pass certain orders in the nature of writs, it was clearly a discretion, no doubt a judicial discretion given to the High Courts In several Full Bench cases, this Court has pointed out that this power shall not be exercised in cases where a party has adequate or specific remedy available to it. This is particularly so when a party can ultimately come up to this Court in appeal or revision from a decision arrived at by a subordinate Tribunal. It is, therefore, not necessary to consider the history behind these writs in England for the purpose of determining whether a writ should or should not issue.

[7] It is not denied that the applicant, in the case before us, if he has a grievance, can file a suit against the order of 10-3-1950, if that be treated as an order of reversion, as he had done against the order dated 12-10-1946. The only ground suggested is that such a suit would take some time for final decision, but in a suit it would be open to the parties to lead evidence and the matter will be much more satisfactorily dealt with than in a summary proceeding under Art. 226 of the Constitution.

[8] We are, however, not satisfied that the order dated 10-3-1950, can be deemed to be a fresh order of reversion. It appears to have been issued as a matter of extra precaution to prevent any technical objection being raised on the ground that the order of 12-10-1946, having been passed without an opportunity being given, mere dismissal of the appeal against that order was not enough and a fresh order of reversion should have been passed. On 16-11-1949, the petitioner had already been informed that the Governor General had decided that he would not interfere against the reversion of the applicant to his substantive post as an Inspector in the Income-tax Department and it was, therefore, that in the order of 10-3-1950, 16-11-1949 was chosen as the date of revision. In any case, this would be a point which would probably arise both in the First Appeal as well as in the civil suit, if any filed, and it is not necessary for us to express any final opinion on it.

[9] We are not satisfied that it is a fit case in which in the exercise of our jurisdiction under Art. 226 of the Constitution we should interfere. We, therefore, reject this application with costs.

A/V.S.B. *Application rejected.*

***A.I.R. 1953 Allahabad 401** *[Vol. 40, C. N. 184]*

MALIK C. J. AND V. BHARGAVA J.

Chhotelal Gobardhan Das — Applicant v. *Commr. of Income-tax, U. P. and V. P. Lucknow—Respondent.*

Misc. Case No. 540 of 1944, D/- 5-1-1953.

* Income-tax Act (1922), Ss. 23 (4), 27 and 33 (1) and (4)—"Pass such orders thereon as it thinks fit".

In an appeal under S. 33 (1) against an order passed under S. 23 (4), the validity of the assessment made under S. 23 (4) cannot be challenged when no second appeal against the order of the Appellate Assistant Commissioner confirming the order of the Income-tax Officer passed under S. 27 refusing to cancel the assessment so made was filed. [Paras 1 and 9]

Anno. Income-tax Act, S. 23, N. 4; S. 27 N. 1; S. 33, N. 1.

B L. Gupta—for Applicant; S. C. Dass—for Respondent.

CASE CITED :

(A) ('44) A. I. R. 1945 Cal. 104 : 1944-12 I. T. R. 327.

Malik C. J.— The question referred to us under S. 66 (2), Income-tax Act, is as follows :

"Whether in an appeal under S. 33 (1), Income-tax Act, against an order passed under S. 23 (4), the validity of the assessment made under S. 23 (4), can be challenged when no second appeal against the order of the Appellate Assistant Commissioner confirming the order of the Income-tax Officer passed under S. 27 refusing to cancel the assessment so made was filed ?"

[2] On 16-10-1942 the Income-tax Officer made an assessment under S. 23 (4), Income-tax Act, on an estimated income of Rs. 10,000. The assessee had made a return and had claimed that he had suffered a loss of Rs. 13,320-5-3. The Income-tax Officer thereafter issued notice to the assessee to produce his *Sauda Bahi* so that the Income-tax Officer may be able to ascertain whether the assessee's contention that he had suffered loss to the extent mentioned by him was correct. The assessee, however, did not produce the *Sauda Bahi* and the Income-tax Officer made the assessment as stated above.

[3] The assessee then made an application under S. 27, Income-tax Act, stating that he was not able to produce the *Sauda Bahi* as he did not maintain it and praying that the Income-tax Officer might cancel the assessment order, dated 16-10-1942, and make a fresh assessment in accordance with the provisions of S. 23. This application was dismissed by the Income-tax Officer on 27-1-1943.

[4] The assessee then filed two appeals before the appellate Assistant Commissioner of Income-tax one against the assessment order, dated 16-10-1942, and the other against the order, dated 27-1-1943, refusing to set aside the order of 16-10-1942, and make a fresh assessment. These two appeals were heard separately by the Appellate Assistant Commissioner of Income-tax on different dates. On 5-8-1943, the Appellate Assistant Commissioner of Income-tax dismissed the appeal against the order, dated 27-1-1943 and on 7-8-1943, he partly allowed the appeal against the order dated 16-10-1942, and modified that order.

Against the order, dated 7-8-1943, an appeal was filed before the Income-tax Appellate Tribunal. At the time of the hearing of the appeal, however, it was argued that the assessment made under S. 23 (4) of the Act was wrong and that the application under S. 27 should, therefore, have been granted and a fresh assessment made in accordance with the provisions of that section. The Tribunal said as follows :

"But no appeal against the Appellate Assistant Commissioner's order under S. 31 confirming the Income-tax Officer's order under S. 27, having been brought up to the Tribunal and the present appeal being one relating to the merits of the assessment, we cannot go into the question about the propriety of the assessment having been made under S. 23 (4)."

The assessee thereafter made an application praying that the point of law may be referred to this Court and the question mentioned above has been referred to us for opinion.

[5] Learned counsel admitted that there is no direct authority on the point. We have, however, examined the provisions of the Income-tax Act and are satisfied that the Tribunal was right in its views that no appeal having been filed against the order refusing to make a fresh assessment, it was not open to it to go into that question. The Income-tax Officer has a right under S. 23 (4) of the Act to make a best judgment assessment under the circumstances mentioned in that sub-section which are to the following effect :

"If any person fails to make the return required by any notice given under sub-s. (2) of S. 22 and has not made a return or a revised return under sub-s. (3) of the same section or fails to comply with all the terms of a notice issued under sub-s. (4) of the same section or, having made a return fails to comply with all the terms of a notice issued under sub-s. (4) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment . . . . ."

[6] Against a best judgment assessment under S. 23 (4) of the Act, previous to the amendment made in 1939, there was no appeal. The assessee, however, had no right to make an application under S. 27, explaining the reasons for his default and in case the Income-tax Officer was satisfied that the assessee was prevented by sufficient cause, he was entitled to set aside his previous order, cancel the assessment and proceed to make a fresh assessment, but in case he was not satisfied and refused the application under S. 27 of the Act, an appeal to the Appellate Assistant Commissioner of Income-tax was provided under S. 30 (1), Income tax Act.

By the Amending Act of 1939, however, an appeal was provided against a best judgment assessment also with the result that, after the said amendment, S. 30 of the Act provided for the appeals—one against an assessment order passed under S. 23 (4) and the other against an order passed under S. 27, Income-tax Act, refusing to make a fresh assessment. An assessee may under S. 30 (1) appeal against an order of refusal to make a fresh assessment under S. 27 but where the

Income-tax Officer has made an assessment under S. 23 (4) of the Act, or, has made a fresh assessment under S. 27, the assessee can appeal under S. 30 (1) and object to the amount of income assessed or the amount of loss computed or, to the amount of tax determined.

The scope of the two appeals is, therefore, entirely separate and while, in the case of one, the question for consideration is whether sufficient cause had or had not been made out for a fresh assessment in the other it is accepted that the Income-tax Officer was entitled to make the assessment under S. 23 (4) and the dispute merely relates to the merits of the case, i. e., whether the amount assessed was in excess, or, whether the right amount of income-tax had been imposed on the assessee. In the case of *Naba Kumar Singh* v. *Income-tax Commr.*, A. I. R. 1945 Cal. 104 at p. 105 (A), it was observed that

"On repealing the proviso in the old section the Legislature has expressly limited the manner in which appeals may be allowed against decisions under S. 23 or S. 27, and by inserting the words applicable to S. 23 or S. 27 with the word 'amount' they have definitely intended that the assessee's right of appeal under S. 30 should be limited as regards those sections to the quantum of the assessment or tax."

[7] In the appeal against the order, dated 27-1-1943 the Appellate Assistant Commissioner of Income-tax was concerned with the determination of the question whether the assessee was justified in refusing to comply with the notice requiring him to produce the *sauda Bahi*. In the appeal against the order, dated 16-10-1942, the Appellate Assistant Commissioner of Income-tax was concerned with the question whether the amount assessed was correct in view of the facts and circumstances of the case. Both these appeals were separately disposed of by separate orders.

[8] Section 33 (1), Income-tax Act, provides for an appeal by an assessee "objecting to an order passed by an Appellate Assistant Commissioner." The Appellate Assistant Commissioner of Income-tax had, in this case, passed two orders under S. 31. The assessee had filed an appeal against the order, dated 7-8-1943, which dealt only with the question of quantum of the tax payable. He had filed no appeal against the order, dated 25-8-1943, which dealt only with the question whether the assessee had made out a sufficient case for a fresh assessment after setting aside the previous assessment order.

The Income-tax Appellate Tribunal, therefore, had before it only an appeal against the order dealing with the quantum of the tax payable and it was, no doubt, entitled to "pass such orders thereon as it thought fit" (see S. 33 (4) of the Act). The words 'such orders thereon as it thought fit' are no doubt, very wide but they must relate to the matters that arise in the appeal before the Income-tax Appellate Tribunal. The appeal in this case, as we have already said, related to the quantum of the tax payable and in that appeal, the question whether there was sufficient cause for not complying with the previous notice did not arise, no appeal having been filed against the order under S. 27 though an appeal was provided for by the Income-tax Act.

[9] In the circumstances of this case, the view taken by the Income-tax Appellate Tribunal appears to us to be correct and the answer to the question referred to us is, therefore, in the negative.

[10] The assessee must pay the costs to the Department which we assess at Rs. 300.

A/V.R.B. *Answer accordingly.*

A.I.R. 1953 Allahabad 402 *[Vol. 40 C. N. 185.]*

RAGHUBAR DAYAL J.

Bhagwan Sahai, Applicant v. *Moti Lal, Opposite Party.*

Criminal Revn. No. 1706 of 1951, D/- 19-11-1951.

Criminal P. C. (1898), S. 259 – Revival.

Revival of a complaint which has been dismissed under S. 259, Criminal P. C., or the setting aside of the order of discharge by the trial Court is not provided for : A. I. R. 1929 Mad. 260 and A. I. R. 1935 All. 59, *Rel. on.* [Para 3]

Anno. Cr. P. C., S. 259, N. 11.

Gopal Behari and B. S. Darbari, for Applicant; M. N. Raina, for Opposite Party.

REFERENCES : Courtwise/Chronological	Paras
('35) A. I. R. 1935 All. 59 : (36 Cri. L. J. 128)	3
('50) A. I. R. 1950 Bom. 10 : (51 Cri. L. J. 213)	1, 2
('29) A. I. R. 1929 Mad. 260 : (30 Cri. L. J. 403)	3

Order.—Moti Lal filed a complaint for various offences against Bhagwan Sahai. The complaint was dismissed for default of the complainant in appearing before the Court, presumably on 22nd May, and the accused were discharged. On the same day the complainant filed a second complaint. The learned Magistrate proceeded against the accused on that complaint. All the accused put in appearance on 29-8-1950. The learned Magistrate ordered for the recording of evidence. That day an application was filed on behalf of the complainant praying that the complainant had put in an application for the restoration of the case on the same day on which the previous case had been disposed of and that there was good cause for the delay, that according to law as enunciated in *In re Wasudeo Narayan*, A. I. R. 1950 Bom. 10, there was no necessity for any fresh trial and that the case be taken up after the stage when the order of dismissal was passed. The learned Magistrate accepted this application on 6th september and ordered as prayed. It is against this order that the accused has come up in revision his contention being that there was no provision in criminal law for reviving a complaint which had been dismissed for default in appearance.

[2] I agree with the contention for the applicant that a complaint dismissed in default under S. 259, Criminal P. C., on account of the non-appearance of the complainant cannot be revived in the sense that the order of dismissal and discharge of the accused be set aside and that the accused be pro-

ceeded against in the same proceedings. The order of discharge is to be set aside in the manner provided by the Code of Criminal Procedure. Sections 436 and 437, Criminal P. C., deal with cases in which the accused had been discharged. It may be mentioned, however, that in the present case there was really no application for restoration. What was filed on the date on which the case was discharged was a second complaint. This misstatement of fact appears to have been made in the application with a view to take advantage of the Bombay ruling, in *In re Wasudeo Narayan*, A. I. R. 1950 Bom. 10, and to save the inconvenience of going through the same proceedings which had been transacted in the previous case. This was not fair.

[3] Section 5, Criminal P. C., provides that:

"All offences under the Indian Penal Code shall be investigated into, tried and otherwise dealt with according to the provisions hereinafter contained."

There is no provision in the Code of Criminal Procedure for the revival of a complaint which had been dismissed under S. 259, Criminal P. C., or for the setting aside of the order of discharge by the trial Court. It should follow, therefore, that neither such an order of reviving the complaint can be passed nor an order of discharge can be set aside. Similar was the view expressed in *O. S. Venkatasubba Ayyar* v. *T. M. Soundararaja Ayyangar*, A. I. R. 1929 Mad. 260, and in *Phonisia* v. *Emperor*, A. I. R. 1935 ALL. 59, in which case the order of discharge was passed on merits.

[4] I, therefore, allow this application, set aside the order of the learned Magistrate dated 6-9-1950 and order that the case started on the complaint filed on 22-5-1950 be proceeded with according to law.

C/D.R.R. *Application allowed.*

A.I.R. 1953 Allahabad 403 *[Vol. 40, C. N. 186]*

MALIK C. J. AND V. BHARGAVA J.

Hidayatullah and another, Defendants-Appellants v. *Nabi Bux, Plaintiff—Respondent.*

Second Appeal No. 990 of 1951, D/- 10-12-1952.

States Merger (United Provinces) Order (1949), Cl. 4 — Appeals transferred to High Court from Ijlas-e-Humayun in Rampur — Reopening of concurrent finding of fact—(Practice)—(States Merger (Governor's Provinces) Order (1949), Cl. 12 (e).)

In the absence of any laws or directions to the contrary, the rule laid down by the Judicial Committee of the Privy Council for appeals to it govern the appeals before the Ijlas-e-Humayun of Rampur which have been transferred to the Allahabad High Court on the merger of that State. The appellant in such appeal cannot, therefore, claim a right that the evidence on the record should be re-examined by the High Court though there is a concurrent finding of fact against him by three competent Courts in that State, on the ground that the Nawab had, in some cases, allowed the concurrent findings of fact to be re-opened, in his prerogative rights of a Sovereign. [Para 4]

Gyandra Kumar, for Appellants.

Judgment. — This case has had a chequered history. The plaintiff-respondent brought a suit in the Court of the Additional Civil Judge of Rampur State for a declaration that he was the owner of 23½ yards of land in a lane adjacent to his house. The suit was decreed by the Additional Civil Judge and an appeal against his judgment was filed before Sita Ram Agrawala J., of the Rampur High Court. He dismissed the appeal on 20-2-1949, and against the judgment of the learned Single Judge an appeal was filed before a Division Bench. The appeal was dismissed by the Division Bench on 8-11-1949. In the meantime, the State had merged in the Centre and in the exercise of the powers conferred by ss. 3 and 4 of the Extra-Provincial Jurisdiction Act, 1947 (Act No. 47 of 1947) the Central Government passed an order dated 1-7-1949, by which a Chief Commissioner was appointed and the powers of the Nawab of Rampur were transferred to the Chief Commissioner.

[2] Against a judgment of the High Court, Rampur, an appeal lay to the *Ijlas-e-Humayun* under the *Nizamnama Adalat High Court Va Adalat hai Reyasat Rampur of 1944*. The Nawab was exercising the powers of the *Ijlas-e-Humayun* and these powers of the Nawab were transferred to the Chief Commissioner under the order mentioned above. On 19-11-1949, the defendants filed an appeal before the Chief Commissioner and prayed that the judgment passed by the Courts in Rampur be set aside and the plaintiff's suit be dismissed. Before the Chief Commissioner could, however, deal with the appeal the State merged in U. P. on 1-12-1949, and the cases pending in the High Court, Rampur, or in the *Ijalis-e-Humayun* stood transferred to this Court under a Notification published in the Gazette of India (Extraordinary), dated 30-11-1949, and called the States' Merger (United Provinces) Order, 1949. It is thus that the appeal that had been filed in the Court of the Chief Commissioner has come before us for disposal.

[3] We have heard learned counsel and we see no reason to admit this appeal. The appeal is concluded by findings of fact recorded by the High Court of Rampur. It was established to the satisfaction of the Courts which had heard the case that the plaintiff had proved his title to the land in suit. Some legal objections were taken to the validity of the sale deed dated 12-4-1882, which was in plaintiff's favour and those objections had no substance. The other points of law were correctly decided and learned counsel has not been able to point out any error. Learned counsel has, however, urged that the practice followed in the appeals to the Privy Council do not apply to appeals before the Ijlas-e-Humayun which never considered itself bound by concurrent findings of fact. It is pointed out that under the *Nizamnama* of 1944, mentioned above, jurisdiction of the Nawab was unlimited and it was open to him to go into questions both of fact and law and pass such order as he pleased and this Court, therefore,

in hearing this appeal must reconsider the evidence on the record and decide whether the decision of the learned Judges of the Rampur High Court was right or wrong.

[4] It must, however, be remembered that the Nawab was exercising the prerogative rights of a Sovereign and, though it may have been open to him to pass such orders as he pleased, the appellant could not claim a right that questions of fact should be re-opened and the evidence considered afresh. The case had already come before three Courts of law of competent jurisdiction which had been constituted for determining the rights of the parties. It might be that in the exercise of the prerogative right of the Sovereign and in the absence of any well-established practice, the Nawab might have in some cases allowed concurrent findings of fact to be reopened—a fact about which we have no knowledge except the assertion of counsel but these must have been exceptional cases where some rule of natural justice had been violated or some such obvious error made on the face of the record as would induce the Sovereign to interfere. The appellant, however, cannot claim a right that the evidence on the record should be re-examined by us, though it had already been examined by three Courts, which had held against him. In our view, the rule laid down by the Judicial Committee of the Privy Council for appeals to that august body should, in the absence of any laws or directions to the contrary, govern such appeals.

[5] Having read the judgment and having heard learned counsel, we see no reason to admit this appeal. The appeal is, therefore, dismissed.

B/D.R.R. *Appeal dismissed.*

A.I.R. 1953 Allahabad 404 *[Vol. 40, C.N. 187.]*

BIND BASNI PRASAD J.

Trilok Chand and others, Accused-Applicants v. *State.*

Criminal Revn. Nos. 1175, 1176 and 1177 of 1950, D/-2-12-1952.

Municipalities—U.P. Municipalities Act (2 of 1916), Ss. 293 and 298 By-laws 1 to 9—(U. P. Town Areas Act (2 of 1914), S. 38).

Although the word "Tehhazari" had been used in the bye-laws it was in essence intended to levy an octroi or an import duty for which the Town Area had no authority. The impost had not the character of Tebhazari for the use of public land or roads. It was leviable irrespective of the fact whether a person is a consumer or a dealer, whether he uses or not public land or road. Hence the bye-laws were illegal. [Para 11]

D. Sanyal, for Applicants; S. N. Misra, for the State.

Order.—These three criminal revisions came up for hearing before me on 30-5-1952, when I found it necessary to refer two questions of fact to the lower Court for determination. The findings on those two points have now been received from the learned Magistrate and learned counsel for the parties have been heard at length.

[2] In the town of Faridnagar in the district of Meerut there is a Town Area Committee. It has framed bye-laws purporting to act under ss 293 and 298 (2) of the U. P. Municipalities Act, 1916, as applied to town areas under s. 38 of the U. P. Town Areas Act 1914. Clause (1) of these bye-laws provides that there shall be imposed Tehbazari at the rate of one anna per seer upon Kotogem and Vanaspati. Clause (2) provides that the fee aforesaid shall be paid to an officer appointed for this purpose by the Committee or to a thekadar to whom the theka for the collection of these dues might be given by the Committee. Clause (3) provides that the aforesaid fee shall be paid on the import of the Vanaspati or Kotogem within the limits of the Town area. Clause (4) requires that the vendors of Vanaspati and Kotogem shall take a licence from the Committee. Clause (5) provides that no one who has not taken out a licence shall be entitled to sell Kotogem or Vanaspati. Clause (6) provides for a certain procedure for the grant of the licence. Clause (7) provides that the vendors of Vanaspati and Kotogem shall put up a sign-board at their shops and shall keep their shops in a sanitary condition. Clause (8) provides that if a consumer or a vendor brings or imports Vanaspati or Kotogem within the limits of the Town Area then he shall have to pay the aforesaid dues but if anyone purchases Vanaspati or Kotogem from a vendor within the limits of the Town Area then no tax shall be payable. Clause (9) provides that the contravention of these bye-laws shall be punishable with fine which may extend to Rs. 200.

[3] In Criminal Revision No. 1175 of 1950 the applicants are Trilok Chand and Mool Chand. The charge against them was "under s. 298 (2) 1B/293 (1) of the Municipalities Act and Bye-law No. 9, dated 24-4-1945 of the Town Area." The finding of the learned Magistrate is that the accused did not pay the tax nor did they maintain the accounts properly. They were, therefore, sentenced to a fine of Rs. 50 each or in default to undergo three days' rigorous imprisonment. They went in revision and contended that the Town Area had no authority to frame the bye-laws under which the tax was levied. Learned Sessions Judge dismissed this contention with the remark that it was not shown to him as to how the imposition of the tax was *ultra vires* and the point was not raised in the lower Court. In this Court the contention is repeated that the bye-laws are *ultra vires*.

[4] In Criminal Revision No. 1176 of 1950 the applicants are Manohar Lal and Kanti Saran. They were charged with offences "under s. 298 (2) 1B/293 (1) of the Municipalities Act and cl. (9) of the Town Area Bye-laws." In this case the learned Magistrate held that the accused were not guilty of not maintaining proper account but they were guilty of not paying the tax on Kotogem. In the result they were sentenced to a fine of Rs. 50 each

or in default to undergo fifteen days' rigorous imprisonment. The same contentions were raised by these applicants also before the learned Sessions Judge and in this Court as by Trilok Chand and Mool Chand.

[5] In Criminal Revision NO. 1177 of 1950 the applicants are Bisheshar Dayal and Madan Lal. They were charged "under S. 298 (2) 1B/293 (1) of the Municipalities Act and Bye-law NO. 7." The finding of the learned Magistrate was that the stock register of the firm Bisheshar Dayal Madan Lal was incomplete from 26th to 30th May 1949. They were not paying the tax on Kotogem and were not maintaining the cash memos. In the result, they were sentenced to a fine of Rs. 150 each or in default to undergo fifteen days' rigorous imprisonment each.

[6] It is not disputed that the applicants in all the three cases are vendors of Vanaspati or Kotogem and carry on business in the same. The trials were summary

[7] The question which was considered at the last date of hearing was whether or not the applicants were carrying on the business of the sale of Kotogem and Vanaspati on the land belonging to the Town Area. I referred the following two issues for a finding :

"1. Whether the land upon which the Bazar in Faridnagar is situated and in respect of which the Town Area Committee of Faridnagar made the bye-laws in dispute vests in that Committee or is entrusted to the management of that Committee ?

2. In particular whether the land upon which the shops of Trilok Chand, Kr. Manohar Lal, Kanti Sharan, Bisheshwar Dayal and Madan Lal are situated belongs to them or is vested in or entrusted to the management of the Town Area Committee ?"

[8] The learned Magistrate has submitted the following finding. The land upon which the bazar in Faridnagar is situated and in respect of which the Town Area Committee made the bye-laws in dispute either vests in that Committee or has been entrusted to the management of that Committee. The Town Area looks after the sanitation and lighting of the bazar. The land on which the building of the shops of the applicants are situated belongs to the applicants themselves, but the land in front of them belongs to the Town Area. The applicants use also the land in front of their shop buildings as they have their Chabutras etc. on the land of the Town Area and use the same.

[9] So far as the levy of Tahbazari by the Town Area is concerned there can be no doubt that it can do so. Section 293, U. P. Municipalities Act, as extended to the town areas provides :

"The Town-Area-Committee may charge fees to be fixed by bye law or by public auction or by agreement, for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of, the Town Area, including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise."

On the findings received from the learned Magistrate it is clear that not only do the applicants in these three cases use the buildings of their shops but also the land in front of them which belongs to the Town Area Committee. Their liability to pay Tehbazari is, therefore, beyond doubt. I may also here refer to S. 14 (2) (b), Town Areas Acts, which authorises a Town Area Committee to impose taxes and fees in the nature of Tehbazari "for the use of public land or public roads."

[10] But while the Committee has the power to realise Tehbazari in respect of the use of public land or public roads the manner in which it has tried to enforce this right makes the bye-laws illegal. The whole tenor of the bye laws is to levy a tax on the import of Vanaspati or Kotogem within the limits of the Town Area. Clause (8) of the bye laws provides that a consumer or a vendor both will be liable to pay the Tehbazari tax on importing Vanaspati or the Kotogem within the limits of the Town Area and that no such tax will be leviable on the purchase of Kotogem within the limits of the Town Area. It is clear that though the name of Tehbazari has been given to this levy it is really a kind of octroi.

[11] Sri S. N. Misra, learned counsel for the Town Area Committee, admits that Town Area Committee has no power to impose octroi or any import duty, nor does he dispute the proposition that the bye law so far as it goes to levy a tax on consumers is beyond the powers of the Town Area Committee. Section 298, U P. Municipalities Act, which contains a provision as to the making of the bye laws has been modified to a great extent in its application to the Town Area Committees. This will be evident from a perusal of page 64 of the Town Area Manual, Uttar Pradesh, corrected upto 1-12-1951. I asked Sri S. N. Misra learned counsel for the Town Area Committee. to indicate as to under which provision of S. 298, U. P. Municipalities Act, as applied to Town Areas this bye-law fell. He was unable to point out to me any provision in S. 298 as applicable to Town Areas under which this bye-law could be framed.

The action of the Faridnagar Town Area Committee in framing these bye-laws by virtue of powers vested in it under S. 298 (2), U. P. Municipalities Act, is evidently wrong. It is not the form, but the pith and the substance of the by-laws which must be seen. Although the word "Tehbazari" has been used in the bye-laws it is in essence intended to levy an octroi or an import duty for which the Town Area had no authority. The impost has not the character of Tehbazari for the use of public land or roads. It is leviable irrespective of the fact whether a person is a consumer or a dealer, whether he uses or not public land or road. In declaring these bye-laws illegal I want to make it clear that the right of the Town Area Committee to realise Tehbazari in a suitable manner is not intended to be taken away. It is open to the Committee to levy the Tehbazari by framing fresh and suitable bye-laws and realising it in a legal manner. The bye laws as they stand

cannot be given effect to as they are beyond the purview of the Town Area Committee. That being so, the contravention of any provision of these bye-laws by the applicants can constitute no offence.

[12] For the reasons given above, the aforesaid three revisions are allowed. The convictions and the sentences are set aside and the fine, if paid, shall be refunded.

[13] A copy of this judgment shall be sent to the Government of Uttar Pradesh in the Local Self Department for information and necessary action.

B/K.S. *Revisions allowed.*

A.I.R. 1953 Allahabad 406 *[Vol. 40, C. N. 188]*

AGARWALA AND CHATURVEDI JJ.

Pheku Chamar and others — Defendants—Appellants v. *Harish Chandra and others—Plaintiffs—Respondents.*

Second Appeal No. 103 of 1949, D/- 9-1-1953.

(a) Tenancy Laws—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 9 — 'Held' and 'belong to'—(Words and Phrases).

The Legislature has deliberately used the word "held" and this word connotes the existence of a right or title in the holder. The other words used are "belonging to" and that expression certainly refers to owner. The word "held" follows the words "belonging to" and also denotes that the person in possession is there because of some right or title to the land. [Para 9]

Section 9 does not confer a right on persons having no title to the land. It is confined in its application to the case where the building is lawfully held by the person in possession. [Para 9]

(b) Interpretation of Statutes — Marginal note — Wording of section should be preferred to anything contained in marginal note. [Para 9]

Anno. C. P. C., Pre. N. 7.

(c) Interpretation of Statutes — Avoidance of inconsistency.

Different provisions of a statute should be given an interpretation which would make them consistent, rather than one which makes one provision inconsistent with the other. [Para 10]

Anno. C. P. C., Pre. N. 7.

(d) Tenancy Laws—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 18, 9 — 'Subject to the provisions of this Act.'

The expression 'subject to the provisions of this Act' in S. 18 refers to the rights and liabilities of the Bhumidars which are detailed in a subsequent chapter of the Act, and not to the provisions of S. 9. [Para 10]

(e) Tenancy Laws—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 9 — Construction by trespasser on *sir* land.

In enacting S. 9 the Legislature never meant to deprive the citizens of their lawful rights over the land simply because a trespasser has succeeded in making some constructions over it. Section 9 does not mean that if any person has made any construction whatsoever over any land lying within the limits of an estate, however wrongful or recent the possession might be, his construction will stand and the site of the building will be deemed to have been settled with him by the State Government. [Para 10]

(f) Hindu Law — Alienation—Licence in respect of joint family property—(Easements Act (1882), S. 53)—(Transfer of Property Act (1882), S. 38).

Section 53, Easements Act, makes it quite clear that a licence can be granted only under the circumstances and to the extent to which the transferor could execute a transfer of the property. Where, therefore, the practical effect of a licence is the same as the effect of a sale or of a perpetual lease, it would be governed by the same rules of Hindu Law which prohibit the transfers by the members of a joint Hindu family without legal necessity.

Held that an irrevocable licence to make constructions over the *sir* land belonging to a Hindu joint family granted without consideration or legal necessity by a member thereof is not valid. [Paras 12, 13]

Anno. Ease. Act, S. 53 N. 1; T. P. Act, S. 38 N. 5.

(g) Limitation Act (1908), Arts. 144, 120 — Suit for possession of land on demolishing construction thereon.

Where the main prayer in the plaint is for the possession of the land in suit, and possession can only be granted by the demolition of the constructions because the constructions belong to the defendants, the prayer for demolition is only an ancillary relief which necessarily follows the delivery of possession. Such a suit is governed by the 12 years' rule of limitation in Art. 144 and not by six years rule in Art. 120. [Para 14]

Anno. Lim. Act, Art. 120 N. 2; Art. 144 N. 2.

(h) U. P. Village Abadi Act (3 of 1948), S. 2—Scope.

The Village Abadi Act is not concerned with the cessation of *sir* rights of zamindars in the land. It only provides for the raising of a presumption of the consent of the owner in case a building was found to exist on the land in August 1947. [Para 15]

(i) Transfer of Property Act (1882), S. 51—Improvement.

The making of constructions over *sir* land cannot be said to be an improvement of the land as *sir* land, the constructions being of no use to the proprietor of the land who would presumably use it for the purpose of cultivation. [Para 16]

Anno. T. P. Act, S. 51 N. 7.

(j) Transfer of Property Act (1882), S. 51—Licensees making constructions over *sir* land—No belief in good faith that they are absolutely entitled to the property —Not entitled to compensation. [Para 16]

Anno. T. P. Act, S. 51 N. 9, 10,

S. Sadiq Ali — for Appellants; S. N. Sahai—for Respondents.

Chaturvedi J. — This is a defendants' appeal arising out of a suit for possession of a piece of land situate in village Mirpur, district Jaunpur.

[2] The plaintiffs and defendants 53 to 57 form a joint Hindu family and the plaintiffs are the descendants of the defendants mentioned above. These defendants 53 to 57 gave a licence in the year 1937 to defendants 1 to 52 permitting them to make constructions on the land in suit, and defendants 1 to 52 accordingly have made certain constructions. The main defendants are these defendants 1 to 52 and they will be hereinafter referred to as the defendants. The other defendants, namely, defendants 53 to 57, the grantors of the licence, will be referred to as pro forma defendants.

[3] The plaintiffs' case was that they constitute a joint Hindu family with the pro forma defendants and the property in suit is the joint ancestral property of the plaintiffs. It was alleged that the pro forma defendants had no right to grant a licence of the land in suit to the other defendants and that the said licence was void and

ineffective inasmuch as the licence was not given for consideration and was not justified by legal necessity. The prayer of the plaintiffs, therefore, was that they should be put into possession of the property in suit and the constructions made by the defendants on the land be ordered to be removed.

[4] The main defences to the suit were that the plaintiffs had nothing to do with the land in suit, that the pro forma defendants were the zamindars of the land and that they had every right to grant the licence. It was also pleaded that the suit was barred by limitation and by the principles of estoppel and acquiescence. A plea under s. 11, C. P. C., was also raised.

[5] The learned Munsif found that the property in suit was the ancestral property of the joint family consisting of the plaintiffs and the pro forma defendants and that it bore the character of *sir* land. He further held that the licence was without consideration and there was no legal necessity for it. The learned Munsif then considered the issues on bar by s. 11, Civil P. C., and on estoppel and on acquiescence and decided those issues against the defendants. The suit was obviously not barred by time inasmuch as it was brought within 12 years of the date of the alleged licence. In the result, he decreed the suit for possession as prayed and allowed the defendants three months' time to remove their building material. In default, the building material was to be removed through the agency of the Court and the defendants were liable for payment of expenses incurred therein.

[6] The defendants then went up in appeal from this decree and the learned Civil Judge upheld the findings of the learned Munsif on all the points mentioned above and dismissed the appeal. The defendants then filed a second appeal in this Court which came up for hearing before a learned single Judge on 14-11-1952. The learned single Judge was of the opinion that the findings arrived at by the Courts below were findings of fact which could not be challenged in second appeal, but because a new point was raised before him by the learned counsel for the appellants, he referred the case to a Division Bench. The new point that was raised before the learned single Judge was to the effect that the suit should fail because of the provisions of s. 9 of the U. P. Zamindari Abolition and Land Reforms Act, Act No. 1 of 1951. On this point the learned single Judge remarked that he stood committed to the view that the word "held" used in the section meant "lawfully held". But he referred the case because his previous decision was a single Judge decision. We may note here that in referring the case, the learned single Judge has made it clear that he is referring the whole case and not any particular point arising in the case. We are, therefore, seized of the whole case.

[7] The learned counsel for the appellants has argued the point raised before the learned single Judge, and has also raised a number of other points which will be considered in due course.

[8] The first point urged by the learned counsel for the appellants was that in view of the provisions of s. 9 of the U. P. Zamindari Abolition and Land Reforms Act, the suit should be dismissed because the land underneath the buildings should be deemed to have been settled with the appellants by the State Government, and the buildings admittedly belonged to the appellants. Section 9 of the said Act reads as follows :

"All private wells in holdings, grove or abadi, trees in abadi, and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

[9] The argument of the learned counsel is that by virtue of the provisions mentioned above the defendants shall continue to hold the buildings constructed by them and the site of the buildings shall be taken to have been settled with the defendants. As we shall subsequently discuss while considering the rights of the defendants in this land, our view is that the defendants are in the position of persons in possession having no right to the land. The question, therefore, that arises for consideration is whether s. 9 of the Act confers a right on persons having no title to the land, or it is confined in its application to the case where the building is lawfully held by the person in possession. We find it difficult to understand why the Legislature should have given a preference to trespassers over the rights of persons having a title in the land. The Legislature has deliberately used the word "held" and this word connotes the existence of a right or title in the holder. The other words used are "belonging to" and that certainly refers to owner and the word "held" follows the words "belonging to" and, in our opinion, it has also been used in a sense so as to denote that the person in possession is there because of some right or title to the land. The learned counsel for the appellants has referred to the marginal note where the word "occupier" has been used. But so far as the body of the section goes, the Legislature has not used the word "occupier" anywhere, and we think that it is the wording of the section itself which should have preference over anything that has been said in the marginal note.

[10] The interpretation put by the learned counsel for the appellants would also militate against the provisions of s. 18 of the Act. Under this section Bhumidari rights have been granted to an intermediary in a *sir*, *khudkasht* and grove. So that according to the provisions of s. 18, the plaintiffs have acquired Bhumidari

rights in the very land which, according to the contention of the defendants-appellants, should be taken to have been settled with the defendants under the provisions of S. 9 of the Act. The well-known rule of interpretation of a statute is that different provisions of a statute should be given an interpretation which would make them consistent, rather than one which makes one provision inconsistent with the other. On this point the argument of the learned counsel for the appellants is that in S. 18, we find an expression "subject to the provisions of this Act" and this expression should be taken to mean that the provisions of S. 18 are subject to the provisions contained in S. 9. In our view, the expression mentioned above refers to the rights and liabilities of the Bhumidars which are detailed in a subsequent chapter of this Act, and not to the provisions of S. 9. If the Legislature had meant that every occupier of a building, whether a trespasser or otherwise, would be entitled to the land under the provisions of S. 9, then the expression that would have been used would have been one which would make an exception with regard to cases covered by S. 9 and the general expression "subject to the provisions of this Act" would not be an appropriate expression. The argument of the learned counsel would lead to the result that if any person has made any construction whatsoever over any land lying within the limits of an estate, however wrongful or recent the possession might be, his construction will stand and the site of the building will be deemed to have been settled with him by the State Government. It is well-known that the main object of the passing of the U. P. Zamindari Abolition and Land Reforms Act was the abolition of the rights of the zamindars and it was not meant to interfere with the rights even of tenants or groveholders. The interpretation suggested by the learned counsel would make it impossible even for a tenant to eject a trespasser, in case the trespasser has made some sort of construction over the land before the suit has been brought. It may be that the land over which no rights at all exist, excepting those of the State Government, the State Government may not have thought it desirable to take actual possession of the land and to let the land remain in the possession of a person who has made some constructions over it. But it is impossible to imagine that the Legislature ever meant to deprive the other citizens of their lawful rights over the land simply because a trespasser has succeeded in making some constructions over it. We, therefore, find ourselves unable to accept the contention of the learned counsel for the appellants and, in our opinion, S. 9 does not help the appellants. The point is decided against them.

[11] The next point argued by the learned counsel was that this was a case of a mere licence and not of a transfer by the senior members of the joint family and, therefore, the rules of Hindu law, which prohibit the transfers without legal necessity, do not apply to a case like this. In our opinion, this argument has no force. The effect of a transfer like this is to deprive the joint family of the possession of the property for an indefinite period. If the licence were valid, the defendants would be entitled to maintain possession of the land as long as the buildings stand and, in the ordinary course of nature, it is expected that the buildings may be there for an indefinitely long period. The practical effect, therefore, of the licence is the same as the effect of a sale or of a perpetual lease, and we think that the same principles should be applied to the case of a licence like this as apply to the case of transfers by the members of a joint Hindu family.

[12] We may further refer to the provisions of S. 53 of the Easements Act. That section says:

"A licence may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the licence."

The provisions of this section make it quite clear that a licence can be granted only under the circumstances and to the extent to which the transferor could execute a transfer of the property. On the findings arrived at by the Courts below, it is quite obvious that if the pro forma respondents had executed any transfer, it would have been void against the plaintiffs.

[13] We further find that the land in suit was actually *sir* land of the members of the plaintiffs' family. *Sir* right has always been recognised to be a very valuable right in this State, and the different Tenancy Acts, that have been passed from time to time, have conferred special rights in the zamindar's *sir* land. Even in the U. P. Zamindari Abolition and Land Reforms Act, the zamindars have been granted Bhumidari rights in the *sir* land. If a valuable property like this is transferred without consideration or legal necessity. it is obvious that such a transfer cannot stand and, we have already mentioned above, that the case of an irrevocable licence really stands on the same footing.

[14] The third point argued by the learned counsel was that the suit was barred by time. His argument is tha there was a prayer for the demolition of the constructions, that the period of limitation provided for the grant of this relief is six years, that the present suit was brought more than six years after the accrual of the cause of action and that, therefore, the suit was barred by time. We find ourselves unable to agree with this argument because the main prayer in the plaint is for the possession of the land in suit, and possession can only be granted by the demolition of the constructions because the constructions belong to the defendants. To a suit for possession of land, 12 years' rule of limitation applies and the present suit has been brought within 12 years. In our opinion, therefore, the suit for possession is not barred by time and the prayer for demoli-

tion is only an ancillary relief which necessarily follows the delivery of possession.

[15] The only other point that was argued was that the land had ceased to be *sir* and had become *abadi* land and that under the provisions of the U. P. Village Abadi Act, the present suit was liable to be dismissed. We find from the judgment of the learned Munsif that the land in suit was recorded as sir land even as early as the year 1882, and the land will be taken to continue as sir land unless under some provision of law it can be held that it has ceased to be *sir*. The only provision of law that has been brought to our notice is the one contained in the definition of "*abadi*" given in S. 2 of the Village Abadi Act. The way in which *sir* rights are created are mentioned in the U. P. Tenancy Act and the same Act also mentions as to how these rights come to an end. The Village Abadi Act was not concerned with the cessation of *sir* rights of zamindars in the land, and it only provides for the raising of a presumption of the consent of the owner in case a building was found to exist on the land in August 1947. In the present case, there is no question that these constructions were made without the permission of the plaintiffs, and, even if any presumption can be raised under the provisions of the Village Abadi Act, the same has been clearly negatived on the admitted facts of the case and the findings arrived at by the Courts below.

[16] It does appear to be hard on the defendants that their constructions should now be removed and the learned counsel has drawn our attention to s. 51, T. P. Act. His contention is that the defendants are entitled to be compensated for the loss that they would suffer by the demolition of their buildings. Section 51 of the Act provides for a compensation being granted in case the transferee of immoveable property has made any improvement on the property believing in good faith that he is absolutely entitled thereto. In our opinion, the making of these constructions over *sir* land cannot be said to be an improvement of the land as *sir* land, the constructions being of no use to the proprietor of the land who will presumably use it for the purpose of cultivation. There is the further difficulty that it is impossible to say that the defendants believed in good faith that they were absolutely entitled to the property. On the admitted facts of the case they only could think that they were licensees, and under the provisions of the section no compensation can be granted to the defendants. Nor does s. 64 of the Easements Act help the appellants.

[17] We therefore find no force in this appeal and dismiss it. But, in the circumstances of the case, we make no order as to costs

[18] The appellants are granted three months' time to remove the constructions and on their failure to do so, the constructions will be removed by the executing Court, and the costs incurred therein will be recoverable from the appellants.

B/D.R.R. *Appeal dismissed.*

A.I.R. 1953 Allahabad 409 *[Vol. 40, C. N. 189.]*

(LUCKNOW BENCH)

P. L. BHARGAVA J.

Baboo Lal — Applicant v *State through Mahesh Prasad—Opposite Party.*

Criminal Revn. No. 326 of 1951, D/- 8-12-1952.

(a) Penal Code (1860), S. 425 Expl. 2—Destruction of one's own property.

The dispute between the accused and the complainant about the ownership of the Pardha wall would not entitle the accused to demolish the wall, when it is found that the wall was the common property of both. [Para 7]

Anno. Penal Code, S. 425 N. 7.

(b) Criminal P. C. (1898), S. 350A — Constitution of Bench.

Where the trial of the accused had commenced before three Magistrates constituting a Bench and for some time continued before them but on a subsequent date of hearing one of the Magistrates had absented himself and then the trial had proceeded and concluded before the remaining two Magistrates there is no illegality in the trial. *Case law discussed.* [Para 14]

Anno. Criminal P. C. S. 350A N. 2, 3, 4.

Krishna Bahadur Sinha, Ram Asrey and Kamla Krishna—for Applicant; B. N. Roy—for the State.

CASES CITED :

(A) ('34) A.I.R. 1934 All. 144 : 36 Cri. L. J. 38

(B) ('32) A.I.R. 1932 All. 127 : 1932 All. L. J. 42 : 33 Cri. L. J. 200.

(C) ('32) A.I.R. 1932 All. 191 : 54 All. 413 : 33 Cri. L. J. 885.

(D) ('33) A.I.R. 1933 All. 355 : 34 Cri. L. J. 701.

Order. — There is a house in mohalla Newazganj, police station Saadatganj, in the city of Lucknow. The house belonged to one Brij Lal, who died leaving six sons. One of his sons is Babu Lal, who has filed this revision. Mahesh Prasad, who filed the complaint, which has given rise to this revision, is the grandson of Brij Lal. Kailash Nath and Nand Kishore, who were named among the accused persons in the complaint filed by Mahesh Prasad, are also the grandsons of Brij Lal. Brij Lal's sons and grandsons now own and occupy the house, which has not yet been partitioned. In the house there is a room occupied by Babu Lal applicant and adjacent to that room on the other side is the dalan occupied by Mahesh Prasad complainant. There is a common wall between Babu Ram's room and Mahesh Prasad's dalan. On the upper storey over the common wall, there is a parda wall. The partial demolition of the parda wall has led to the present dispute.

[2] On 17-6-1950, at 10.30 a. m., Mahesh Prasad lodged a report at police station Saadatganj against Babu Lal, applicant, Kailash Nath and Nand Kishore. In this report Mahesh Prasad had alleged that there was an old enmity between him and the accused persons on account of the disputes about property and that on 17-6-1950, at about 8 a. m. while he was away from his house the accused Babu Lal had gone on the roof of his

house and with the help of Kailash Nath and Nand Kishore had demolished the parda wall in order to cause loss and damage to him.

[3] A couple of days later, on 19-6-1950, Mahesh Prasad filed a complaint against Babu Lal, applicant, Kailash Nath and Nand Kishore in the Court of the Judicial Magistrate II of Lucknow. In this complaint it was alleged that the accused persons bore a grudge against the complainant "on account of assumed disputes regarding property," and that on 17-6 1950, at about 8 a m. while the complainant had gone to Chaupattia, Babu Lala, applicant, with the help of Kailash Nath and Nand Kishore had gone to the roof of the house and demolished the parda wall, which was his exclusive property, over which he was in exclusive possession and that the accused persons had done so with intent to cause wrongful loss to the complainant.

[4] The case was transferred by the Judicial Magistrate to the Lucknow City Bench. The complainant produced evidence in support of the complaint in the Court of the Bench Magistrate, who, on a consideration of the evidence produced before them, discharged Kailash Nath and Nand Kishore and framed a charge under S. 426, Penal Code against the applicant, Babu Lal.

[4a] In his statement before the Court, Mahesh Prasad stated that his house adjoined the house of the accused persons, that formerly his relations with the accused were quite cordial but subsequently they had deteriorated, that he had constructed a parda wall on the roof of his house and it was demolished by the accused persons and that he had protested but without any result.

[5] The Bench Magistrates held that the parda wall in question did not belong exclusively to Mahesh Prasad or to Babu Lal, that the said parda wall was the common property of both Mahesh Prasad and Babu Lal and that the demolition of the parda wall had caused damage to the extent of Rs. 30. Accordingly, they found Babu Lal, applicant, guilty of an offence punishable under S. 426, Penal Code, and convicted him. They sentenced him to pay a fine of Rs. 30 or in default of payment of fine to undergo simple imprisonment for fifteen days.

[6] Against his conviction and sentence, the applicant preferred an appeal, which came up for hearing before the Assistant Sessions Judge of Lucknow. The learned Assistant Sessions Judge upheld the findings of fact recorded by the Bench Magistrates and also the conviction and the sentence imposed upon the applicant. In the result, he dismisseed the appeal. The applicant has now come up to this Court in revision.

[7] The learned counsel for the applicant has, in the first place, argued that there was a bona fide dispute about the ownership of the parda wall; consequently the applicant's act of demolition of the wall did not amount to any offence, much less an offence of mischief as defined in S. 425, Penal Code. There can be little doubt that both the parties claimed to be the exclusive owner of the common wall which the complainant alleged had been constructed by him at his own costs. Evidently, this dispute had continued for sometime and it was there even on the date of the incident, which led to the initiation of these proceedings. According to the findings recorded by the Courts below, however, the wall was the common property of Mahesh Prasad and Babu Lal, applicant. The dispute about the ownership of the parda wall would not have entitled the applicant to demolish the wall or justify his action in actually demolishing the same or any portion thereof. Obviously, the applicant, instead of having recourse to legal action in a Court of law to establish the right which he claimed in the wall, started demolishing the same. No doubt, the demolition of the wall meant a loss to the applicant also but he obviously intended to cause loss to the rival claimant, Mahesh Prasad, complainant. On the facts found by the Courts below, I have no doubt in my mind that the applicant had demolished the parda wall with intent to cause loss or damage to Mahesh Prasad complainant. Explanation 2 appended to S. 425, Penal Code, provides that

"Mischief may be committed by an act affecting property belonging to the person who commits the act or to that person and others jointly."

In my opinion, therefore, the Courts below were perfectly justified in recording a finding that the act of demolition in this case amounted to mischief as defined in S. 425, Penal Code.

[8] In the next place, it has been argued by the learned counsel for the applicant that the trial in the Court of the Bench Magistrates was vitiated on account of all the Bench Magistrates not taking part in the proceedings throughout and delivering judgment. When the trial of the case against the applicant began in the Court of the Bench Magistrates on 25-8-1950, Sarv Sri Lakshmi Chand, Lalta Prasad Vaish and Mehdi Hasan Khan, Magistrates, were present. All the three Magistrates were also present on some of the subsequent dates of hearing but thereafter Mehdi Hasan Khan dropped out and further evidence was recorded by Sarv Sri Lakshmi Chand and Lalta Prasad Vaish who also examined the applicant and framed a charge against him. The trial then proceeded and concluded before these two Bench Magistrates, who delivered judgment in the case.

[9] The contention put forward on behalf of the applicant is that as the three Bench Magistrates who took cognizance of the offence, were not present throughout the trial, the trial was illegal and vitiated on account of that illegality. It was, therefore, contended that the judgment delivered by two of the Bench Magistrates, who had taken cognizance of the offence, was also invalid. In support of his contention learned counsel for the applicant has relied upon a Divi-

sion Bench ruling of this Court in *Dasrath Rai* v. *Emperor*, A. I. R. 1934 ALL. 144 (A). The facts of the case relied upon by the learned counsel were, however, different. In that case three Honorary Magistrates constituted a Bench, which had power to try the case. On most of the hearings all the three Honorary Magistrates were present but on one of the dates of hearing, one of them was absent. The case was not taken up on that day and was adjourned. On the next date of hearing one of the Honorary Magistrates happened to be absent. He rejoined on the next day and then continued to be present all along and ultimately took part in delivering and signing the judgment. On the day on which one of the Honorary Magistrates was absent, some witnesses were examined and cross-examined. All the three Honorary Magistrates unanimously came to the conclusion that the accused were guilty and convicted them. Their appeal was dismissed by a Magistrate of the first class.

On revision a point was raised that inasmuch as one of the Honorary Magistrates was absent on one day, the whole trial was vitiated and the conviction could not stand. With reference to the above mentioned facts the learned Judges observed at page 147 :

> But where an Honorary Magistrate who had not heard the whole evidence and has not been present throughout the proceedings takes part in the deliberations and joins with the others in arriving at the final decision, there is every likelihood of his influencing his colleagues. By virtue of his absence on some of the material dates, he became incompetent to form a true opinion on the merits of the case and if he joins in the deliberations, there is a likelihood of a failure of justice."

In the case before us, the Magistrate who had dropped out never joined the Bench again nor did he take part in the delivery of the judgment.

[10] In the Division Bench case relied upon by the learned counsel for the applicant, the Division Bench had discussed three earlier decisions of this Court. While dealing with the case of *Chiteshwar Dube* v. *Emperor*, A.I.R. 1932 ALL. 127 (B), the learned Judges observed :

> "We are not sure whether the learned Judge intended to lay down that if a member of Honorary Magistrates constitute a Bench and if only a few of them sufficient to form a quorum are present and try the case, the trial is altogether illegal. Apparently his intention was not drawn to the notification fixing a quorum which would obviate the necessity of the presence of all the Honorary Magistrates at the trial. If the learned Judge meant to lay down that all the Honorary Magistrates irrespective of the quorum must be present at all the hearings then we would certainly not agree with that view. Furthermore if it was intended to lay down that a newly appointed member can replace an outgoing member on the Bench trying the case without necessitating a fresh trial even where his presence is necessary for the purpose of a quorum, we would not agree with that view" (p. 146).

[11] Another decision considered by the Division Bench was the case of *Ram Khelawan* v. *Sheo Nandan*, A. I. R. 1932 ALL. 191 (C). In that case one of the three Magistrates was not present on some of the days of the hearing and the two Magistrates who had been present throughout actually differed in their conclusions. The third Magistrate who had been present on some days joined them and agreed with the Magistrate who was in favour of the acquittal. It was on account of his opinion that the accused were acquitted. It was held in revision at the instance of the complainant that the order of acquittal was invalid under S. 358, Criminal P. C., as the Magistrates constituting the Bench had not been present throughout the proceedings. On a reference made to the High Court, the acquittal was set aside and a retrial ordered. The order of acquittal was set aside as in that case the opinion of the Magistrate who had not been present throughout the proceedings actually turned the scales and it was on account of his opinion that the accused were acquitted.

[12] The last case dealt with by the Division Bench was of *Mathura* v. *Emperor*, A. I. R. 1933 ALL. 355 (D). The facts of that case were very much similar to the facts of the present case. There when the case was started there were three Magistrates and throughout the conduct of the case, there was a quorum of two and the judgment was delivered by those two who were present throughout. It was held that the trial was not irregular as the presence of the third Magistrate was not necessary for the case and as he was not a party to the judgment, the Magistrates were not influenced by his opinion.

[13] In the case relied upon by the applicant's learned counsel, it was further held that the failure of all the Magistrates to be present at the trial was a mere irregularity curable under S. 537, Criminal P. C., if the irregularity had not occasioned any failure of justice. The relevant observations on this occur at p. 147 of the report. They are as follows :

> "But inasmuch as S. 350A in terms is a saving clause and does not directly prohibit or declare invalid the trial of a case where one of the Honorary Magistrates has not been present throughout the proceedings but only indirectly or by implication assumes that the trial would be irregular if all the Magistrates constituting the Bench have not been present throughout the proceedings, it seems difficult to hold that such a defect is illegal and vitiates the whole trial. When there is no specific provision in the Act requiring that all the Honorary Magistrates constituting the trial Bench must be present at all the hearings and if they are not present the trial shall be illegal, we can only infer that such defect would be irregular. The defect is not such as involves a direct infringement of any specific provisions of the Act, but is contrary to the spirit and the principle underlying S. 350A. We think that we cannot regard it as anything more than an irregularity in the judgment or proceeding within the meaning of S. 537 of the Act."

It would thus appear that the authority cited by the applicant's learned counsel does not support his contention. On the other hand, the case in A. I. R. 1933 ALL. 355 (D) which was cited with approval in that case supports the validity of the trial and the judgment delivered by the trial Court in this case.

[14] It is true that the trial of the applicant had commenced before three Magistrates consti-

tuting a Bench and for some time it had continued before them and that on a subsequent date of hearing one of the Magistrates had absented himself and the trial had proceeded and concluded before the remaining two Magistrates. But the absence of one of the Magistrates could not and did not invalidate the constitution of the Bench. There is no provision of law which requires the presence of all the Magistrates constituting a Bench and before whom the trial of a particular case begins, to be present on all the hearings. The trial of the case can proceed before the Bench, if the Magistrates present constitute the prescribed quorum. All that para. 814 of the Manual of Government Orders, which lays down the rules for the conduct of business by Benches of Honorary Magistrates, requires is that the Bench shall not consist of more than three members and two of those shall form a quorum. Therefore, so long as the prescribed quorum is there, the Bench will be duly constituted and will be able to exercise its jurisdiction. In this case it is admitted that the quorum was always there; consequently during the trial of the applicant the Bench was always duly constituted. I can therefore, find no illegality in the trial of the applicant.

[15] The Magistrate who had absented himself after some hearings did not appear again and took no part in the rest of the trial or the delivery of judgment. Therefore, there was no illegality even in the delivery of the judgment in this case, and the judgment does not suffer from any defect or illegality.

[16] In any case the failure of all the three Magistrates to take part in the trial throughout was at the most an irregularity but the applicant was not thereby prejudiced in any manner. I am, therefore, not prepared to accept the contention put forward on behalf of the applicant that the trial in the present case or the judgment delivered by the Bench Magistrates was vitiated on any ground.

[17] I, therefore, see no force in any of the contentions put forward on behalf of the applicant in this revision and I, accordingly, reject it.

B/D.H. *Revision dismissed.*

A.I.R. 1953 Allahabad 412 *[Vol. 40, C. N. 190]*

HARISH CHANDRA J.

Rashid, Accused, Appellant v. *The State.*

Criminal Appeal No. 621 of 195', D/- 8-12-1952.

Penal Code (1860), Ss. 361 and 362 Applicability.

Where a married girl under the age of 18 left her parents' house of her own free will and went to the accused's house and asked him to take her away to some other place as she wanted to avoid going to her father-in-law's house and the accused accordingly took her to another town it was held that the offence committed was not of abduction but one of kidnapping from lawful guardianship as it could not be said that the girl had abandoned her guardian with the intention of not returning to him but simply with a particular purpose: A.I.R. 1949 All. 710, *Not foll; Case law referred.* [Para 3]

Anno. Penal Code, S. 361 N. 2, 4, 9, 12; S. 362 N. 4.

Majid Uddin — for Appellant.

CASES CITED :—

(A) ('14) A. I. R. 1914 All. 376 (1) : 15 Cri. L. J. 265.
(B) ('15) A. I. R. 1915 All. 390 : 16 Cri. L. J. 663.
(C) ('08) 7 Cri. L. J. 210 : 14 Bur. L. R. 262.
(D) ('28) A. I. R. 1928 Mad. 585 : 29 Cri. L. J. 635.
(E) ('49) A. I. R. 1949 All. 710 : 51 Cri. L. J. 29.

Judgment. — The appellant Rashid has been convicted under S. 366, Penal Code, and sentenced to rigorous imprisonment for three years and a fine of Rs. 100. In default of payment of fine he has been ordered to undergo rigorous imprisonment for a further period of six months. The victim was one Sm. Anwari, the daughter of one Sharif who was employed in the Loco Shed at Mau railway station in the district of Azamgarh as a sweeper. He lived in one of the railway quarters at the station. One Khalil, who was employed as a painter in the Loco Shed, occupied another quarter in the same neighbourhood. The appellant is the brother-in-law of Khalil and at the time of the occurrence which took place in the night of August 10-11-1949, was staying temporarily with Khalil. During that night Anwari disappeared from her father's house. A search was made and ultimately a report was lodged at the police station on the following evening at 7.10 O'clock.

In the meanwhile the girl had been taken away by the appellant to Ghazipur and left at the house of one Abdul Rahman. When Abdul Rahman came to know the facts from the girl, he put her in a lorry and sent her back to Mau. On arrival at Mau the girl went into the house of Khalil. She was seen going there by some neighbours and thereafter she was brought back from Khalil's house by her father. It is unnecessary to recount the facts as stated by the girl. The learned Sessions Judge has found that her statement is not quite reliable in certain particulars. But the appellant has admitted that while he was staying with Khalil, he contacted intimacy with the girl who told him that she was about to be taken away to her *sasural* and that he should take her somewhere and threatened to commit suicide if he did not. In the evening of August 10 she came to Khalil's quarters and asked the appellant to take her away by train. He then took her to Ghazipur and left her at the house of Abdul Rahman. It will appear that Khalil and his wife Nabuat were also sent up for trial under S. 366 read with S. 109, Penal Code, but the learned Sessions Judge acquitted them. On the facts admitted by the appellant and established by the prosecution evidence he convicted him under S. 366, Penal Code

[2] Learned counsel for the appellant argues that inasmuch as the girl was a willing party and had left her parents' house of her own accord and come to the house of Khalil from where she was taken away by the appellant, no offence was committed by the latter. It will be noted that according to the medical and other evidence which

has been believed by the Court below the age of the girl was about 15 or 16 years on the date of the occurrence. No doubt on the facts as found by the Court below there was no abduction. According to S. 362 a person is said to abduct another when he "by force compels, or by any deceitful means induces" that person to go from any place. In this case the girl was willing party and the facts do not constitute an offence of abduction.

[3] The question is whether the facts as found by the Court below would constitute an offence of kidnapping. According to S. 366 :

"Whoever kidnaps or abducts any woman with intent or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished ....."

Anwari was a married woman and if she was kidnapped by the appellant with the object that she may marry him an offence under S. 366 must be deemed to have been committed. Kidnapping is of two kinds. But we are concerned only with kidnapping from lawful guardianship. Section 361 runs as follows :

"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

The contention of learned counsel for the appellant is that as the girl had left her father's house of her own free will, the appellant cannot be said to have taken her out of the keeping of her lawful guardian.

In the case of *Emperor* v. *Ramchander*, A. I. R. 1914 ALL. 376 (1) (A) a young woman under 16 years of age had run away from her father-in-law's house. She was met by the accused and stayed with him for sometime. Afterwards the girl became dissatisfied and made complaints which led to the arrest of the accused. A Bench of this Court held that in the circumstances it could not be said that the girl had been taken by the accused out of the keeping of her lawful guardian inasmuch as "the leaving" and the removal out of the keeping of the lawful guardian was the act of the girl herself long before she met the accused. They further pointed out that "the case would be very different" if the girl had been going on a visit or message or any such like occasion. They accordingly acquitted him.

In another case *Ewaz Ali* v *Emperor*, A. I. R. 1915 ALL. 390 (B), a Judge of this Court acquitted the accused person in somewhat similar circumstances. In this case a minor married girl had run away more than once from her home and had on that occasion "got clean away, and was making her way along the public road to Agra when she was met by the appellant, Ewaz Ali, who was a road chaukidar." It was held that inasmuch as the girl had voluntarily left the keeping of the guardian with the intention of remaining out of that keeping the appellant was not guilty. On a perusal of these cases it seems to me that if it is found that the minor has *abandoned* her guardian with no intention of returning she cannot be held to continue in the guardian's keeping and if a person takes her away he cannot be held to be guilty of an offence of kidnapping.

In the present case I do not think it is possible to say that Anwari had *abandoned* her guardian. She had left her parents' house only with the object of going away with the appellant and if the appellant had refused to take her away, there can be no doubt that she would have gone back to her parents' house. In other words she had left her father's house for a particular purpose and cannot be said to have *abandoned* her guardian. In the case of *Nag Te Hla* v. *Emperor*, 7 CRI. L. J. 210 (UPP.BUR.) (C), decided by the Judicial Commissioner of Upper Burma it was held that where a female minor by preconcerted arrangement with the accused left the house of her parents of her own accord intending not to return and met the accused at a place appointed and eloped with him willingly, an offence of kidnapping from lawful guardian had been committed.

In a Madras case *Abdul Sathar* v. *Emperor*, A. I. R. 1928 MAD. 585 (D), it was found that the girl alleged to have been kindnapped by the accused had written letters in which she was desperately calling him to come and take her away and she was soon after discovered to be with the accused or under his control. It was held that from these two facts it is legitimately open to a Court of law to assume that the accused yielded to the girl's solicitations and made it possible for her to get away from her guardian's house and that that was sufficient 'taking' in law for the purposes of S. 361, Penal Code.

In the case of *Nura* v. *Rex*, A. I. R. 1949 ALL. 710 (E), however, a Judge of this Court in the circumstances somewhat similar to those of the present case held that no offence of kidnapping from lawful guardianship had been committed. But in my opinion this view is somewhat contrary to the view taken by a Bench of this Court in A. I. R. 1914 ALL. 376 (1) (A). Moreover the learned Judge seems to have been under the impression that kidnapping from lawful guardianship means taking possession of her from the house of the lawful guardian, as would appear from the following observations occurring in the judgment :

"It is rather curious that on the evidence led by the prosecution, the learned Judge, while acquitting both Najmuddin and Saeedan, should have held Azimuddin guilty of kidnapping Mt. Hajra from the house of her father. As I have already pointed out, Azimuddin had absolutely no concern in the matter of the girl leaving her father's place, and, indeed, it was after a fairly long interval that the two had got together after Najmuddin had left them on the way leading to Jasoi."

In my view it cannot be said in the circumstances of the present case that Anwari had abandoned her guardian when she was admittedly taken away by Rashid to Ghazipur. I am, therefore, of opinion that the appellant has been rightly convicted. The learned Sessions Judge has awarded a fairly lenient sentence and has taken

into consideration the fact that the girl was a consenting party.

(4) I accordingly dismiss the appeal. The appellant was granted bail. But I am informed by the learned counsel for the appellant, Shri Majid Uddin, that he has been unable to furnish the necessary security and is still in jail.

B/K.S. Appeal dismissed.

AIR 1953 ALLAHABAD 414 (Vol. 40, C. N. 191)

MALIK C. J. AND V. BHARGAVA J.

Commr. of Income-tax, U.P. and C.P. and Berar, Lucknow, Applicant v. I. D. Varshani, Respondent.

Misc. Case No. 44 of 1944, D/- 11-11-1952.

Income-tax Act (1922), S. 66(1) — Abatement of reference under — (Civil P. C. (1908), O. 22) — (Limitation Act (1908), Arts. 176, 177 and 181).

There are no provisions either in the Indian Income-tax Act or in the Rules made thereunder for bringing the legal representatives on the record, nor are there any rules providing for abatement of the reference under S. 66(1) in case the legal representatives are not so brought within a certain time. In other words, O. 22, C. P. C. has not been made applicable to a reference under S. 66. It cannot therefore be urged that the reference abates by reason of the fact that the assessee has died during its pendency. (Para 3)

Further, Arts. 176 and 177, Lim. Act, which apply to the legal representatives of a deceased plaintiff or a deceased defendant, or the legal representatives of a deceased appellant or a deceased respondent, cannot be said to be specifically applicable to an Income-tax reference under S. 66 or to the application made, by the Commissioner of Income-tax giving the names of the legal representatives of the deceased assessee and praying that notices be issued to them and they be brought on the record, after the expiry of 90 days. Such application is governed by the residuary Art. 181 which provides for three years limitation. (Para 6)

Anno: Income-tax Act, S. 66, N. 2; C.P.C. O. 22 (Gen.) N. 2; Lim. Act, Art. 181, N. 13.

S. C. Das, for the Applicant; S. N. Katju, for the Respondent.

ORDER: On an application under Section 66 (1) of the Income-tax Act made by the Commissioner of Income-tax, U. P., C. P. and Berar, the Appellate Income-tax Tribunal, Allahabad, referred to this Court a question of law for its decision on 16-12-1943. The assessee, Mr. I. D. Varshani, was an individual. While the reference was pending the assessee died and it is admitted that death took place on 10-12-1948. In the counter-affidavit filed on behalf of the three sons of the assessee detailed facts are given to show that the Income-tax Officer, Kanpur Circle, was informed of Mr. Varshani's death and in subsequent years the sons of the deceased were assessed to Income-tax. The reference was put up before a Bench of this Court for hearing on 13-9-1949, when Mr. S. N. Katju, learned counsel for the assessee, stated that his client had died on 10-12-1948. The Court directed that

> "the Commissioner of Income-tax should make an application within one month, giving the names of the legal representatives of the deceased to whom notice may be issued."

The Commissioner, however, did not furnish the information asked for with the result that the legal representatives of the deceased assessee could not be informed of the next date of hearing of the reference. The reference came up again before a Bench of this Court on 26-7-1950, when it passed the following order:

> "The assessee died on 10-12-1948, and in spite of the fact that learned counsel for Income-tax Department was given time to bring the legal heirs of the assessee on record he has failed to do so. A point has been raised whether the reference has or has not abated. It is desirable that we should hear the heirs of the assessee on this point. Mr. Walter Dutt wants three weeks' time to make an application for bringing the heirs of the deceased on the record. The time prayed for is granted and the question as to whether or not the reference has abated will be gone into when that application is put up for hearing."

(2) Before we proceed further we may mention that though the assessee had died on 10-12-1948, when the reference was put up before a Bench on 13-9-1949, nobody had contended that the reference had abated, nor did the Bench direct that a substitution application should be filed praying for the legal representatives of the deceased assessee to be brought on record. The direction given to the Commissioner of Income-tax was that he should, within one month, furnish the names of the legal representatives of the deceased to whom notice may be issued. Under Chapter 27, Rule 13 of this Court the Registrar on receipt of a reference under sub-s. (1) or (2) of S. 66, Income-tax Act is required to give notice thereof to the parties. The Rules do not provide that the party which had applied for a reference, should take steps to have notices issued to the opposite party after the reference is made to this Court.

(3) So far as we could find, there are no provisions either in the Income-tax Act or in the Rules made thereunder for bringing the legal representatives on the record, nor are there any rules providing for abatement of the reference in case the legal representatives are not so brought within a certain time. In other words, O. 22, C. P. C. has not been made applicable to a reference under S. 66, Income-tax Act. Section 37, Income-tax Act makes portions of the Civil P. C. applicable to proceedings before the Income-tax Officer. He has been given the right to enforce the attendance of any person and examine him on oath. He has also been given the right to compel the production of any document. He can also issue commissions for examination of witnesses etc. The same powers have been granted also to the Appellate Assistant Commissioner and the Tribunal. How a reference is to be dealt with after it is made under S. 66 is provided for in Ss. 66(5) and 66A(1) of the Income-tax Act and all that they provide is that a reference shall be heard by a Bench of not less than two Judges. It may be said that since the sections provide for a hearing,

it is expected that the Court would before passing final orders on the reference inform the parties interested and hear them if they so desire. Section 66(3), which dealt with appeals to His Majesty in Council and now deals with appeals to the Supreme Court, on the other hand, provides that the relevant provisions of the Civil P. C. are applicable to such applications. Order 22, Civil P. C. not having been made applicable and there being nothing either in the Income-tax Act or the Rules framed thereunder, it cannot be urged that the reference has abated by reason of the fact that the assessee has died.

(4) Mr. S. N. Katju, on behalf of the legal representatives of the deceased assessee, has relied on the provisions of Arts. 176 and 177, Limitation Act, and has urged that the Commissioner of Income-tax should have made an application within 90 days to bring the legal representatives on the record and not having done so, the application made on his behalf is belated and should be rejected.

(5) As directed by a Bench of this Court on 26-7-1950, learned counsel for the Commissioner of Income-tax made an application on 11-8-1950, giving the names of the legal representatives of the deceased assessee and praying that notices be issued to them and they be brought on the record. Notices were duly issued and after service of the notices the application was put up before a learned single Judge on 30-1-1952. The learned Judge brought them on the record but only for the limited purpose of the decision of the question whether the reference has or has not abated. The order of the learned single Judge is as follows :

"The sole opposite party in the reference is dead. No application has been made for bringing on record the names of his legal representatives. The question whether the reference has abated or not was raised before the Bench hearing the reference and the Bench has postponed passing orders on that question. In order to decide the question, it ordered that the legal representatives of the deceased opposite party should be impleaded. Consequently, the applicant applied for bringing them on record and a notice has gone to them and they have appeared through Mr. S. N. Katju. Now, it is to be decided whether the reference abated or not. Let the names of the three sons of the deceased opposite party be added as 'pro forma' opposite party in the reference and list the reference for orders before the Bench concerned. I make it clear that I have not ordered the names of the sons to be brought on record as legal representatives of the deceased opposite party. The name of the opposite party is still retained on the record and the names of the sons are added in the record as 'pro forma' opposite party, only for the purpose of deciding whether the reference has abated or not."

As a result of this order, we confined the arguments today to the question whether the reference can be deemed to have abated and whether the application made on 11-8-1950, could be said to be barred by limitation. We have already said that we find no provision either in the Income-tax Act or in the Rules making O. 22, C. P. C. applicable to a reference under S. 66, Income-tax Act. There can, therefore, be no question of abatement.

(6) Articles 176 and 177, Limitation Act apply to the legal representatives of a deceased plaintiff or a deceased defendant, or the legal representatives of a deceased appellant or a deceased respondent. Even these two Articles cannot be said to be specifically applicable to an Income-tax reference under S. 66 or to the application made on 11-8-1950. It is urged by Mr. Das on behalf of the Commissioner of Income-tax that if any Article of the Limitation Act does apply it is the residuary Art. 181, which provides for three years' limitation from the date when the right to apply accrues.

(7) It is true that in case the assessee is dead and no one comes forward to represent him in this Court, this Court will be at a disadvantage as it will not have the benefit of hearing counsel for both parties. We can, if such a case arises, direct the Commissioner to supply to the Registrar the names and addresses of the legal representatives to enable the Registrar to issue fresh notices to them, and in case the Commissioner does not comply with the order within a reasonable time, the Court may be entitled to consider whether in the circumstances it will answer the reference at all, but in the absence of any law or any rule having the force of law it is not possible for us to hold that this reference had abated by reason of the Commissioner not having applied to bring the legal representatives of the deceased assessee on the record within 90 days of his death.

(8) Mr. S. N. Katju, who had appeared for the assessee and now represents the legal representatives, has asked for ten days' time to take fresh instructions so that he may be able to argue the reference on the merits. We give him the time prayed for and direct that the case may be listed after ten days.

B/D.R.R. Order accordingly.

AIR 1953 ALLAHABAD 415 (Vol. 40, C. N. 192)

SAPRU AND CHATURVEDI JJ.

Biswa Nath Singh, Applicant v. The District Board of Ballia, Opposite Party.

Civil Misc. Writ No. 7732 of 1951 connected with Writ Nos. 7733 and 7734 of 1951, D/- 11-11-1952.

U. P. District Boards Act (10 of 1922), S. 174(2)(k) — License fee.

The licence fee contemplated by S. 174 (2)(k) is a fee which will only cover, more or less, the actual and special expenses incurred by the Board in regulating the trade, and it cannot be levied for the purpose of augmenting the general revenue: AIR 1952 Mad 764, Rel. on. (Paras 5, 6)

S. C. Khare, for the Applicant; K. L. Misra, for the Opposite Party.

CASE CITED :

(A) ('52) AIR 1952 Mad 764: 1952-2 Mad LJ 410

SAPRU J. : These three applications have been presented to this Court under Art. 226 of the Constitution by three brick-kiln owners who have been carrying on the business of manufacturing bricks in the district of Ballia for the last 15 years or so and are at present working several brick-kilns in that district. Under the powers conferred by S. 174(2)(k), District Boards Act, the District Board of

Ballia first made a bye-law introducing the licensing of brick-kilns of every description on 4-7-1932. By the notification issued under that bye-law, a licence fee for a chimney brick-kiln was fixed at Rs. 10/, for a deshi brick-kiln at Rs. 5/- and for a kankar lime kiln at Rs. 2/-. This bye-law came to be subsequently amended in 1937 and 1947. By these amendments, the licence fee for chimney brick-kilns was raised to Rs. 25/- and Rs. 100/-. The District Board of Ballia approved of a third amendment in 1950 which raised the licence fee for chimney brick-kilns to Rs. 250/-, deshi brick-kilns to Rs. 50/- and kankar lime-kilns to Rs. 15/-.

(2) Other restrictions have also been imposed by the bye-laws, viz., (a) that the kilns should be 300 feet from institutions like hospitals etc., (b) that the kilns should be 1000 feet from places where jute, cotton or other inflammable materials are stored, (c) that no excavations be made at a distance of less than 100 feet from any public road.

(3) We are not concerned in the present applications with these restrictions. The grievance of the applicants is that the recent amendment which has been sanctioned by the Commissioner raising the amount of the licence fee for chimney brick-kilns from Rs. 100/- to Rs. 250/-, deshi brick-kilns to Rs. 50/- and kankar lime-kilns to Rs. 15/-, is contrary to the provisions of S. 174(2)(k) of the Act. Section 174(2)(k) reads as follows:

"(2) In particular, and without prejudice to the generality of the power conferred by sub-section (1), a board may, in the exercise of the said power, make any bye-laws described in the list below —

(k) regulating slaughter-houses and offensive, dangerous or obnoxious trades, callings, or practices and prescribing fees to defray the expenditure incurred by a board for this purpose."

(4) It will be seen that S. 174(2)(k) of the Act authorises a Board, without prejudice to the generality of the power conferred by the preceding sub-section to make any bye-law regulating slaughter-houses and offensive, dangerous or obnoxious trades, callings or practices and prescribing fees to defray the expenditure incurred by the board for this purpose.

(5) Learned counsel for the applicants contends that the District Board of Ballia has completely ignored the provisions of cl. (k), sub-s. (2), S. 174, inasmuch as, in prescribing the licence fee for the regulation of the trade in question, the board had paid no attention to the actual expenses incurred by it for the purpose of regulating it. It is urged that the licence fee which has been imposed is very much in excess of the amount needed for the regulation of the trade in question. It is clear from a perusal of the clause which has been referred to above that the licence fee contemplated by it is a fee which will only cover, more or less, the actual and special expenses incurred by the board in regulating the trade. It is well known that there is a basic difference between a tax and a licence fee. One of the main functions that boards have to perform is to regulate specified trades. For purposes of this regulation, they have been given powers of imposing a licence fee. This licence fee can be levied only for the purpose of meeting the probable expenses for the regulation of a particular trade or business and not for the purpose of augmenting the general revenue.

(6) There is thus a clear distinction between the taxation power which has been given to the boards and the power of levying a licence fee and it is incumbent on Boards to bear this distinction in mind. We may refer in this connection to the case of — 'K. C. Varadachari v. The State of Madras', AIR 1952 Mad 764 (A) where the question is fully discussed.

(7) After hearing learned counsel for the parties and perusing the various affidavits that have been filed on behalf of the parties in this case, the impression left on our minds is that it is possible that the distinction between a tax and a licence fee was not sufficiently clear to the District Board of Ballia. Learned counsel for the applicants has drawn our attention to certain circumstances which go to show that the board did not keep the proper object for which a licence fee can be levied in view, but allowed itself to be guided purely by revenue considerations and went on increasing the licence fee for the purpose of augmenting its general revenue.

We, however, do not think it necessary, in view of the eminently fair and proper statement which the learned Advocate General has made, to enter into an elaborate discussion of the questions of fact raised in this case. The learned Advocate-General has given us an assurance that the District Board will consider any representations that the applicants may make on the subject of the licence fee, in the light of the observations made in this judgment; and amend the licence fee in the light of the observations made by us regarding the law on the point. He has further assured us that the licence fee fixed, after a consideration of the representations, will be retrospective in its effect from the date of enhancement. We have been further assured that there will be neither any criminal prosecutions against the applicants nor revenue attachments, till the matter has been considered by the Board.

(8) Mr. Khare who appears for the applicants undertakes to make a representation on behalf of his clients to the board within two months.

(9) In view of the assurance that the learned Advocate-General has given, we have come to the conclusion that the proper course for us is to dismiss the applications. We direct that the parties shall bear their own costs.

B/D.H. Applications dismissed.

AIR 1953 ALLAHABAD 416 (Vol. 40. C. N. 193)

WALI ULLAH AND BIND BASNI PRASAD JJ.

Beni Madho Prasad Singh, Appellant v. Adit and others, Respondents.

Second Appeal No. 1170 of 1941, D/- 24-9-1952.

Civil P. C. (1908), O. 20, R. 3 and O. 41, R. 31 (All) — Judgment of High Court in civil case dictated but transcript not signed — There is no final disposal of case.

So long as the transcript has not been signed, the power of the court to reconsider its order or re-hear a case is not

put an end to: Case law Ref.
(Paras 8, 10 and 13)

Anno: C.P.C., O. 20 R. 3 N. 3.

S. B. Jauhari, M. B. Bhatnagar and S. S. Varma, for Appellant; S. N. Varma, for Respondents.

CASES CITED:
(A) ('33) AIR 1933 All 40: 55 All 132: 34 Cri LJ 703
(B) ('51) AIR 1951 All 709: 52 Cri LJ 1088
(C) ('99) 21 All 177: 1899 All WN 15
(D) ('05) 27 All 92: 1 Cri LJ 710
(E) ('16) AIR 1916 All 183: 38 All 134: 17 Cri LJ 47
(F) ('51) AIR 1951 Bom 49: 52 Cri LJ 441
(G) ('11) 38 Cal 828: 13 Cri LJ 120
(H) ('44) AIR 1944 Pat 209: 46 Cri LJ 30
(I) ('47) AIR 1947 All 211: ILR (1947) All 180
(J) ('33) AIR 1933 All 49: 143 Ind Cas 324

WALLI ULLAH J.: This appeal was heard by a Bench of two learned Judges of this Court, Sinha and Wanchoo JJ., on 10-11-1947. At the close of the hearing, judgment was dictated in open Court by the learned Judges. In the result, the appeal was allowed, the decrees of the courts below were set aside and the claim of the plaintiff-appellant was decreed with costs. Before the transcript of the judgment was signed by the learned Judges, it appears that the case was 'mentioned' to the learned Judges with the result that the transcript was not signed by either of the two learned Judges. On the contrary, it appears that at the stage of signing the transcript either one or both the learned Judges felt the necessity of having some points further clarified by further arguments from counsel. Thus on 9-12-1947, as the "order sheet" shows, some arguments were heard but they were not finished, and it was ordered that the case might be listed again after a week for further arguments. After this stage, it appears the case was never listed again before the learned Judges concerned. Meanwhile various other proceedings such as applications for substitution of names on account of successive deaths of various respondents were held and quite a lot of time appears to have been taken up by these proceedings. In this interval both the learned Judges ceased to be Judges of this Court. The appeal has now been listed before us for hearing and final disposal.

(2) Mr. Johari, the learned counsel for the appellant, has contended that, as a result of what happened on 10-11-1947, the appeal must be deemed to have been heard and finally disposed of. There is, therefore, according to the argument of the learned counsel, no appeal to be heard and disposed of by this Bench. Mr. Verma, the learned counsel for the respondents, on the other hand, has contended that the transcript of the judgment, which was dictated orally in Court at the close of the hearing of the appeal on 10-11-1947, was never approved of, or signed, by the learned Judges who heard the case. The argument of the learned counsel is that, according to law, a judgment of the High Court in a 'civil case' like the present, is not complete until it is signed by the learned Judges who hear the case. It is contended, therefore, that the present appeal cannot be considered to have been decided by this Court. Learned counsel, in the course of their arguments, brought to our notice, quite a number of rulings of various Courts in India including our own. We shall examine the relevant rulings a little later. Here it may be stated at once that most of the rulings cited by learned counsel are rulings given in criminal cases. The provisions contained in the Code of Civil Procedure are very different from those contained in the Code of Criminal Procedure. It is, therefore, clear that rulings given in criminal cases are not of much use and do not give any direct help in deciding the question when it arises in connection with a civil case.. We shall now proceed to consider the more important rulings to which our attention has been invited.

(3) Learned counsel for the appellant has placed strong reliance upon the decision given in the case of —'Pragmadho Singh v. Emperor', AIR 1933 All 40 (A) decided by Sulaiman, C. J. What happened in that case was this: Certain criminal cases were heard and judgments in them were dictated in open court by a learned Judge of this Court, Mr. Justice L. M. Banerji. The judgments were taken down by the judgment-writer, but the transcript remained unsigned owing to the death of the learned Judge. After the death of the learned Judge the office brought this fact to the notice of the Chief Justice for directions. The learned Chief Justice considered the question with reference to the provisions contained in the Code of Criminal Procedure. It was held:

"There is no provision which requires that the High Court, after pronouncing a judgment in open court, should date and sign the same. The criminal appeals disposed of by a Judge of the High Court by the delivery of judgment in open court and taken down by his Judgment Writer must be deemed to have been finally disposed of by him; the omission to initial the fair copy of the judgment is in no way a serious defect."

(4) The next case of this Court which has been cited by learned counsel before us is that of —'Saru-Smelting and Refining Corporation Ltd. Meerut v. State', AIR 1951 All 709(B), decided by a learned single Judge of this Court, Brij Mohan Lall, J. It appears that a criminal revision was filed in this Court which came on for hearing before a learned Judge of this Court, Seth J. It was heard and eventually dismissed by his order dated 14-9-1950. Sometime after the dismissal of the revision, learned counsel made an application under S. 561 A, Cr. P. C., by which it was prayed that the order dated 14-9-1950, be reviewed. This application was put up before the same learned Judge. He heard arguments and at the close of the hearing dictated a judgment in open court on 22-1-1951, rejecting the application. Before, however, the transcript of the judgment could be placed before the learned Judge for signature, he died. Thereupon by an office report, the matter came up for consideration. After discussing quite a large number of rulings, including several decisions of this Court, and, in particular, after referring to the decision given by Sulaiman, C. J., in the case of AIR 1933 All 40(A) ('ubi supra') the learned Judge reached this conclusion:

"Though a judgment dictated in open court can be altered by a Judge before it is signed, nevertheless it cannot be said that such a judgment is not valid until signed. Further, it is the Judge concerned alone who can review and alter such a judgment."

It would be observed that in both these cases it has been made clear that there is no provision anywhere in the Code of Criminal Procedure to the effect that judgments delivered by the High Court, in its criminal appellate jurisdiction, have to be dated and signed in the manner stated in S. 367, Cr. P. C.

(5) Learned counsel for the appellant has also referred us to the cases of —'Queen Empress v. Lalit Tiwari', 21 All 177(C); —'Emperor v. Kallu', 27 All 92(D) and —'Emperor v. Gobind Sahai', AIR 1916 All 183(E). It is not necessary to consider these cases in detail. Suffice it to say that they are all criminal cases. What was laid down there was only this that the judgment of the High Court is not complete until it is sealed; and that it may be altered by the same Judge.

(6) Turning to cases decided by other High Courts, we may refer to the case of —'State of Bombay v. Geoffrey Manners & Co. (No. 2)', AIR 1951 Bom 49(F), decided by a Division Bench of the Bombay High Court consisting of Rajadhyaksha and Chainani JJ. It was a Criminal case. It was held that there was no provision anywhere in the Criminal P. C. to the effect that judgments delivered by the High Court in its Criminal appellate jurisdiction must be dated and signed. Further it was held:

"When an oral judgment is delivered by the High Court, in its criminal appellate jurisdiction, the order made receives its finality when it is recorded and a writ in terms of the order is issued under the seal of the Court. The recording of the order and issuing of a writ in terms thereof under the seal of the Court, invest that order with finality which cannot thereafter be altered or reviewed."

Next, we may refer to the case of —'Amodini Dasee v. Darsan Ghose', 38 Cal 828(G), decided by a Division Bench of the Calcutta High Court. It was a 'criminal' revision by which review of a judgment discharging a rule before signature was sought. After considering the case law including the decision of this Court in the case of 21 All 177(C) (ubi supra), the learned Judges held:

"It is competent to a Division Bench of the High Court, which has erroneously discharged a rule on a point of law and a misapprehension of the facts in connection therewith to review its judgment before it has been signed."

The next case to which our attention was called is a decision of the Patna High Court in the case of —'Mohan Singh v. Emperor', AIR 1944 Pat 209(H). It was also a 'criminal' case. It appears that at the close of the hearing, judgment was delivered by the High Court, but before it was signed it was discovered that the judgment which was pronounced was due entirely to an inaccurate copy of certain notifications filed. It was held in these circumstances that the judgment could be re-considered as it was not signed; moreover, in the particular circumstances that had happened, it was necessary to revise the judgment delivered earlier.

(7) It is not at all necessary to refer to many other rulings of this type. Suffice it to say that the position of a judgment given by the High Court in a 'criminal' case in the exercise of its appellate or revisional jurisdiction is well established now in view of the rulings referred to above.

(8) The crucial question, however, remains whether in a 'civil case', like the present, a judgment delivered in open court and dictated to a shorthand writer before the transcript of the same is signed by the Judge or Judges concerned, amounts to a final disposal of the case. As stated already, in the present case, the transcript of the judgment dictated in open court on the 10-11-1947, was never signed by the two learned Judges who heard the case. On the contrary, later on, the same learned Judges heard further arguments regarding the merits of the case on 9-12-1947, but the arguments were not finished on that day. It seems to us clear that in this case one has to look to the provisions of the Code of Civil Procedure in order to discover the relevant provisions of law which bear on this question.

(9) First of all, we may refer to the provisions of O. 20 Rr. 1 to 3 and Order 41, Rules 30 and 31 of the Civil Procedure Code. Order 20, Rule 1 provides that the Court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future date of which due notice must be given to the parties or their pleaders. Rule 2 of the same Order provides for the delivery of a judgment written, but not pronounced by the predecessor. Rule 3 provides:

"The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review."

The provisions of Rule 3 clearly indicate that the judgment has to be dated and signed at the time it is pronounced.

A contention has, however, been raised before us that Order 20 Rule 3 is not applicable to the High Court. In urging this point, learned counsel appears to have overlooked a recent decision by a Full Bench of this Court. The question whether O. 20 R. 3 would apply to a case decided by the High Court has been decided and answered in the affirmative by a Full Bench of this Court in the case of —'Allah Rabul Almin v. Ganga Sahai', AIR 1947 All 211 (FB) (I). The facts of the case were these: A civil revision under S. 115, Civil P. C. was dismissed by a learned single Judge of this Court. The learned counsel appearing for the applicant was not present at the time of the hearing. The case was, however, decided on its merits. The learned single Judge felt satisfied, after going through the record, that if was not a fit case, in which he would interfere with the order passed by the court below. Thereafter judgment was delivered on merits and it was signed, but before it could be actually sealed under R. 8 of Chapter VII of the High Court Rules, the learned counsel appeared and prayed for a rehearing. It was in these circumstances that the question arose whether it was open to the learned single Judge who had heard and decided the revision in the first instance to rehear the case and, if need be, to alter the judgment which he had already given. This was one of the two questions which were considered and decided by the Full Bench in this case. The decision of the Full Bench makes it clear that O. 49, R. 2, C. P. C., as also Chapter 7 of the High Court Rules have nothing whatsoever to do with the question whether a Judge can or cannot alter a judgment after a judgment has been pronounced and signed by him. In this case, it was definitely laid down by the Full

Bench that the provisions of Rule 3 of Order 20 Civil P. C. were applicable to judgments given by Chartered High Courts in their appellate or revisional jurisdiction. Further, it was held that the applicability of R. 3 of O. 20 was not affected in any way by the provisions of Rule 2 of Order 49, Civil P. C. Consequently it was held that it was not competent to a Judge of the High Court who has once pronounced and signed a judgment on merits in a revision case 'ex parte' before him to recall and alter that judgment at the request of either party. It was laid down that there is no law which would justify a Judge in recalling or altering a judgment except, may be, in those cases where the Court may have inherent jurisdiction to rectify its own mistake.

(10) In the present case, as mentioned above, the stage of dating and signing the judgment was never reached. It follows, therefore, that the jurisdiction of the Court to reconsider its order, if it deems desirable, and order a rehearing of the case continues. By reason of the provisions contained in R. 3 of O. 20 of the Civil P. C., jurisdiction of the Court to reconsider and rehear a case will cease only when a judgment has been signed. After it has been signed, the judgment cannot be altered or added to except as provided by S. 152 Civil P. C. or on review. The reason seems to be clear. Once a final judgment has been pronounced and the transcript has been signed, the Court becomes 'functus officio' so far as the particular case is concerned and it cannot alter that judgment or order or even amend it except with regard to clerical errors or on review. So long as that stage has not been reached, as in the present case, obviously the power of the court to reconsider its order or rehear a case is not put an end to.

(11) At this stage, we may briefly refer to the case of — 'Jai Karan v. Panchaiti Akhara, Chota Naya Udasi Nanak Shahi', AIR 1933 All 49(J), decided by Sulaiman, C. J. After hearing arguments in this case, the learned Chief Justice dictated an order in open Court. Immediately after, the counsel appearing for one of the parties, made a request that the judgment might not be signed by the learned Judge and that the question of limitation arising in the case might be further considered. This request was acceded to by the learned Judge. Later, however, the transcript of the judgment was signed by sheer inadvertence. In these circumstances, it was held by the learned Chief Justice that in exercise of the inherent jurisdiction, the High Court can set aside the order and rehear the case. Obviously this was a case where a mistake committed by the Court itself was later set right in the exercise of its inherent jurisdiction. This case, therefore does not really help us so far as the present case is concerned. In the course of arguments, reference was also made to the rules contained in Chapter 7 of the High Court Rules. We are, however, quite clear in our minds that none of the rules contained in Chapter 7 of the High Court Rules is really of any help to us in deciding the question which has arisen in the present case. It is, therefore, unnecessary to refer to any of those rules.

(12) The provisions of O. 41, R. 31 of the Civil Procedure Code, as amended by the Allahabad High Court, also make it clear that the transcript of the judgment dictated to a shorthand writer in open court at the time when a Judge pronounces his judgment, shall, after such revision, as may be deemed necessary, be signed by the Judge concerned and it shall bear the date of the pronouncing of the judgment.

(13) For the reasons given above, in our judgment this second appeal has not yet been legally disposed of by this Court. We accordingly reject the contention urged by the learned counsel for the appellant. The case must now be put up for hearing and disposal before a Bench of this Court.

B/G.M.J. Order accordingly.

***A. I. R. 1953 ALL. 419 (Vol. 40, C. N. 194)**

WALI ULLAH J. on difference between RAGHUBAR DAYAL AND MUSHTAQ AHMAD JJ.

Satdeo Pandey, Applicant v. Baba Raghav Das, Opposite Party.

Criminal Misc. No. 14 of 1949, D/- 15-9-1952.

†*(a) **Contempt of Courts Act (1926), S. 2(1) — Contempt of revenue Court — (Constitution of India, Art. 215).**

Per Wali Ullah J.: The object of the provisions of S. 2(1) is to provide for the protection of the position of Courts subordinate to the High Court against unlawful interference with their judicial functions. For such a purpose, and in such a context, the position of an inferior Court, i.e., a subordinate Court must be considered in its totality in relation to the High Court and not with reference to a particular Act or provision of law under which it may happen to be acting at the time when an alleged interference with its judicial activity occurs. (Para 81)

Wali Ullah J. (agreeing with Mushtaq Ahmad J.; Dayal J. contra): High Court has jurisdiction under S. 2(1) to protect against unwarranted attacks all inferior Courts, including a revenue Court acting under the Land Revenue Act. Thus, the Court of an Assistant Collector, First Class, functioning under the Land Revenue Act is subordinate to the High Court for the purposes of S. 2(1). Case law Ref. (Paras 37, 64, 68, 89)

Anno: Cont. of Court Act, S. 1 N. 2; S. 2 N. 3.

(b) Contempt of Courts Act (1926), S. 2 — Court, meaning of — (Words and Phrases).

The term "Court" is used in S. 2 in a wide sense, as including a tribunal, legally authorized to deal with a particular matter judicially. It is enough if the tribunal is entrusted with certain judicial functions which include the function of deciding litigated questions according to law — Deciding them not arbitrarily, but according to certain rules and procedure which ensure that the person called upon to decide them acts with fairness and impartiality. (Para 75)

Anno: Cont. of C. Act, S. 2 N. 3.

(c) Contempt of Courts Act (1926), S. 2 — Subordinate.

In S. 2(1) subordination of a Court to the High Court refers to 'judicial subordination'. AIR 1950 All 556, Rel. on. (Para 79)

Anno: Cont. of C. Act, S. 2 N. 3.

S. N. Dwivedi and Kripa Shankar, for Applicant; G. A. and C. S. Saran, for The Crown; Bhagwan Das Gupta, for Opposite Party.

CASES CITED:
(A) ('83) 9 Cal 295: 9 Ind App 174 (PC)
(B) ('50) AIR 1950 All 80: 1949 All LJ 471 (FB)
(C) ('46) AIR 1946 Lah 316: ILR (1947) Lah 1 (FB)
(D) ('33) AIR 1933 Bom 1: 57 Bom 93 (FB)
(E) ('33) AIR 1933 Cal 118: 60 Cal 603: 34 Cri LJ 662
(F) ('40) AIR 1940 Rang 68: 41 Cri LJ 470
(G) ('20) AIR 1920 Bom 175: 58 Ind Cas 915 (FB)
(H) ('26) AIR 1926 All 623: 24 All LJ 849 (SB)
(I) ('13) 40 Cal 518: 20 Ind Cas 420
(J) ('14) AIR 1914 Cal 890(2): 23 Ind Cas 896
(K) ('29) AIR 1929 Oudh 389: 4 Luck 539 (FB)
(L) ('32) AIR 1932 All 651: 1932 All LJ 816
(M) ('45) AIR 1945 PC 156: 1945 FCR 195
(N) (1903) 2 KB 432: 72 LJ KB 839
(O) (1906) 1 KB 32: 75 LJ KB 104
(P) (1921) 2 KB 733: 90 LJ KB 871
(Q) ('84) 10 Cal 109: 10 Ind App 171 (PC)
(R) ('11) 12 Ind Cas 293: 12 Cri LJ 525 (Mad)
(S) ('34) AIR 1934 Bom 452: 59 Bom 10
(T) ('44) AIR 1945 All 1: 1944 All LJ 459: 46 Cri LJ 272
(U) ('49) 53 Cal WN 310
(V) ('39) AIR 1939 Cal 529: 40 Cri LJ 782 (SB)
(W) ('11) 38 Cal 832: 11 Ind Cas 207
(X) ('66) 6 WR (Act X) 68
(Y) ('68) 10 WR 341: 1 Beng LR AC 216
(Z) ('38) AIR 1938 Lah 855
(Z1) ('42) AIR 1942 Pat 33: 21 Pat 173
(Z2) ('49) AIR 1949 Lah 131: 50 Cri LJ 598 (FB)
(Z3) (1940) AC 1014: (1940) 3 All ER 549
(Z4) ('18) AIR 1918 Pat 103: 19 Cri LJ 833 (FB)
(Z5) (1913) AC 107: 82 LJ KB 232
(Z6) ('38) AIR 1938 All 358: 1938 All LJ 430: 39 Cri LJ 677
(Z7) ('50) AIR 1950 All 556: 1950 All LJ 458
(Z8) ('33) AIR 1933 Pat 142: 12 Pat 1: 34 Cri LJ 770
(Z9) ('32) AIR 1932 Cal 705: 33 Cri LJ 945
(Z10) ('36) AIR 1936 Lah 917: 38 Cri LJ 73
(Z11) ('40) AIR 1940 Nag 407: 42 Cri LJ 237
(Z12) ('41) AIR 1941 Pat 65: 20 Pat 373 (FB)
(Z13) ('46) AIR 1946 All 276: 1946 All LJ 23
(Z14) ('33) AIR 1933 All 764: 55 All 1008
(Z15) ('44) AIR 1944 Mad 139: ILR (1944) Mad 595
(Z16) ('45) AIR 1945 Pat 128: 10 Cut LT 85
(Z17) ('42) AIR 1942 Pat 1: 21 Pat 1 (FB)
(Z18) ('44) AIR 1944 Cal 401: ILR (1945) 1 Cal 506

DAYAL J.: A preliminary objection was taken at the hearing of this petition to the effect that this Court had no jurisdiction to take proceedings for contempt of the Court of the Assistant Collector, first class, with respect to proceedings pending before it for the correction of papers under S. 40, Land Revenue Act (Act 3 of 1901).

(2) Section 2, sub-s. (1), Contempt of Courts Act (12 of 1926) is:

"Subject to the provisions of sub-s. (3) the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice, in respect of contempt of Courts subordinate to them as they have and exercise in respect of contempts of themselves."

The contention for the opposite party is that the Court of an Assistant Collector, first class, under the Land Revenue Act is not subordinate to the High Court and that, therefore, this Court cannot take action with respect to contempts committed of that Court.

(3) It is submitted for the petitioner that the Court of the Assistant Collector, first class, under the Land Revenue Act, is subordinate to this Court on account of this Court having appellate jurisdiction over it. Support for this is sought in two ways. Firstly, it is argued that appeals against decrees passed by such Court under s. 111, sub-s. (3), Land Revenue Act, are appealable to the District Judge or the High Court under the rules applicable to appeals to those Courts and that, therefore, in view of this appellate jurisdiction this Court will be deemed to exercise superintendence over that Court in all matters, irrespective of the fact whether orders passed in those matters would be appealable to or revisable by this Court or not. Secondly, it is argued that under para 11 of the Letters Patent of the Allahabad High Court this Court is a Court of appeal from all civil Courts within its jurisdiction.

(4) It is clear that if this Court has no appellate jurisdiction over the Court of the Assistant Collector, first class, under the Land Revenue Act, that Court cannot be said to be subordinate to this Court.

(5) The provisions of the Land Revenue Act make it clear that the Court of the Assistant Collector, first class, is subordinate to the higher revenue Courts provided in that Act.

(6) There is no dispute about it. All orders of the Assistant Collector, first class, are appealable to the Collector under s. 210, sub-s. (1), cl. (a). Under s. 218 the Commissioner can examine the record of any case decided or proceeding held by an officer subordinate to him and can refer the case, with his opinion, for the orders of the Board if the case is of a judicial nature or connected with settlement, or for the orders of the Local Government if the case is of a non-judicial nature or not connected with settlement. Under s. 219 the Board itself can call for the record of any case of a judicial nature or connected with settlement and pass necessary orders in certain circumstances. Section 191 of the Act empowers the Board or the Commissioner to transfer any judicial case, including partition cases, from any subordinate revenue Court or revenue officer to any other such Court or officer competent to deal therewith. It shows that a revenue Court trying partition cases is subordinate to the Commissioner and the Board. Section 5 of the Act provides that the control of all judicial matters and of all matters connected with settlement under the Act is vested in the Board.

(7) It is, therefore, clear that the Board controls the proceedings connected with judicial matters in the Courts of the Commissioner, the Collector and Assistant Collectors, and that the Board is the final appellate or revisional authority in connection with the judicial orders of these Courts. The Court of the Assistant Collector, first class, must, therefore, be held subordinate to the Courts of the Collector, the Commissioner and the Board. The question then is whether the Court of the Assistant Collector, first class, under the Land Revenue Act, can also be said to be subordinate to the High Court for the purposes of proceedings under the Contempt

of Courts Act. It cannot be said to be subordinate to the High Court when it is considered that the High Court has no power or control over it. A Court is subordinate to another Court when its proceedings can be controlled by the other by way of appeal or revision. When proceedings cannot be so controlled, it is difficult to imagine how that Court can be subordinate to another Court, however superior the status of that Court may be.

(8) I shall now proceed to examine the first contention for the petitioner.

(9) I may quote here the three relevant sections, ss. 111, 112 and 112A, Land Revenue Act.

"Section 111.—(1) If, on or before the day so fixed, any objection is made by a recorded co-sharer, involving a question of proprietary title which has not been already determined by a Court of competent jurisdiction, the Collector may either:

(a) decline to grant the application until the question in dispute has been determined by a competent Court, or

(b) require any party to the case to institute within three months a suit in the civil Court for the determination of such question, or

(c) proceed to inquire into the merits of the objection.

(2) When the proceedings have been postponed under cl. (b), if such party fails to comply with the requisition, the Collector shall decide the question against him. If he institutes the suit the Collector shall deal with the case in accordance with the decision of the civil Court.

(3) If the Collector decides to inquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits."

"Section 112.— All decrees passed under subs. (3) of the preceding section shall be held to be decrees of a Court of civil judicature of the first instance, and shall be open to appeal to the District Judge or the High Court as the case may be, under the rules applicable to appeals to those Courts."

"Section 112A.— The appellate Court may issue a precept to the Collector directing him to stay the partition pending the decision of the appeal, whether the appeal is pending from a civil Court under S. 111 (1) (b) or from the Court of the Collector under S. 111 (3)."

(10) It is admitted, and is clear from the provisions of the Land Revenue Act, that no other order of an Assistant Collector, first class, under the Land Revenue Act is appealable or revisable by the High Court, and that an appeal lies only against the decrees referred to in S. 112 of the Act. I am of opinion that this particular appellate power of the High Court cannot vest the High Court with any such appellate jurisdiction as would give it the power of superintendence over that Court and make that Court subordinate to this Court, even if that Court can be said to be subordinate to this Court with respect to the matters in connection with which the decrees referred to in S. 112 of the Act were passed.

(11) It may be noticed first that S. 112, Land Revenue Act, does not confer any appellate jurisdiction on this Court over the Court of the Assistant Collector first class. It just provides that decrees of that Court shall be held to be decrees of a Court of civil judicature of the first instance and shall be open to appeal to the District Judge or the High Court. It follows that in essence these decrees are not decrees of a Court of civil judicature. They are deemed to be decrees of a civil Court and it is in view of their being so deemed that an appeal is provided to the District Judge or the High Court, as the case may be. No appeal to the District Judge or the High Court is provided by this section against the decree of an Assistant Collector, first class, as a decree of a revenue Court. A revenue Court as such as not a civil Court. If it had been so, there would not have been any necessity for S. 112.

(12) An Assistant Collector, first class, can deal with the question of proprietary title raised before him during partition proceedings in three ways. He can either decline to grant the application until the question in dispute has been determined by a competent Court, or require any party to institute within three months a suit in the civil Court for the determination of the question or proceed to inquire into the merits of the objection. It is only when the Assistant Collector proceeds to inquire into the merits of the objection that under S. 111 (3) he is required to follow the procedure laid down in the Code of Civil Procedure for the trial of original suits. There is no provision in the Land Revenue Act for appeals or revisions to the High Court against the orders of the Assistant Collecor in the course of his inquiry into the merits of the objection. Such orders must of necessity be appealable or revisable by the higher revenue authorities which, therefore, must have control over these proceedings. It is only after the Assistant Collector pronounces his final decree & passes the decree that an appeal against that decree is allowed to the Dist. Judge or the High Court as the case may be. In the circumstances, the High Court or the District Judge would be mainly dealing with the question of proprietary title on merits and will not be concerned with the proceedings during the inquiry before the Assistant Collector. Such a limited power of interference with the decrees of the Assistant Collector, first class, cannot, in my opinion, be said to vest any general appellate jurisdiction in the High Court over the Court of the Assistant Collector, first class.

(13) It is also to be noticed that even this limited power of appeal to the High Court comes into existence after the Assistant Collector decides to take action in a certain way. The Assistant Collector is free to change his mind and ultimately make orders as contemplated under S. 111, subs. (1), cl. (a) or (b). It looks to me odd that a Court should be free to make itself subordinate to another Court and that its subordination should not be definitely provided by enactment establishing that Court.

(14) I am, therefore, of opinion that such a special appellate jurisdiction is a jurisdiction of a very limited character and is to be exercised within the defined limits. It is too much to say that due to such limited power over a particular kind of order of the Assistant Collector, first class, the High Court can exercise jurisdiction of any larger character and exercise superintendence over that Court which is specifically vested under section 5 of the Act in the Board of Revenue.

(15) Section 224, Government of India Act, provides that every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and that this power of superintendence shall not be construed as giving to the High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. This makes it clear that the High Court

cannot interfere with any judicial order of an inferior Court, unless there is special provision for appeal or revision against that order. It follows that the High Court cannot interfere with any order of the Assistant Collector, first class, except with an order passed by him under S. 111, Sub-s. (1), cl. (C). Power of superintendence implies control. I have already indicated that no control is vested in this Court over judicial matters before the Assistant Collector, first class, such control being vested in the Board of Revenue. I am, therefore, of opinion that the provisions of section 224, Government of India Act, 1935, do not vest any power of superintendence in the High Court over the Court of the Assistant Collector, first class when it does not possess any general appellate jurisdiction over that Court. Even if it can be said that, due to this particular limited appellate power, the High Court has appellate jurisdiction over the Court of the Assistant Collector, first class, I am of opinion that it would be a matter of grave doubt that in the presence of the provisions of S. 5, Land Revenue Act, this Court can be said to have the power of superintendence and consequently the power of control over the Court of the Assistant Collector, first class. It can be only in very exceptional cases, if ever, that two independent superior Courts should have superintendence and control over one Court. It is understandable that the two Courts may have control over the other Court with respect to different matters, but such would not be the case if it be held that the Court of the Assistant Collector, first class, is subordinate to the High Court because the High Court has power of superintendence over it in view of its exercising appellate jurisdiction which itself is to be inferred from such a limited power of appeal to the District Judge or the High Court against a particular order of that Court.

(16) The second contention for the petitioner that under cl. 11 of the Letters Patent the High Court is constituted a Court of appeal from all civil Courts under its territorial jurisdiction, that the Court of the Assistant Collector is a civil Court and that, therefore, the High Court has appellate jurisdiction over the revenue Court of the Assistant Collector, first class, appears to me to be without force. In this connection reliance was placed on the Privy Council case reported in — 'Nilmoni Singh v. Taranath Mukerji', 9 Cal. 295 (P. C.) (A) I need not discuss that case at present. Suffice it to say, that there has been a lot of change in law since that case was decided in 1882. In 1887 the Bengal, Agra and Assam Civil Courts Act (Act 12 of 1887) came into force. The Act is described to be an Act to consolidate and amend the law relating to civil Courts in Bengal, North-Western Provinces and Assam. It would appear, therefore, that the Courts which can be said to be civil Courts must come within the provision of this Act. Section 3 of the Act is:

> "There shall be the following classes of civil Courts under this Act, namely, the Court of the District Judge, the Court of the Additional Judge the Court of the subordinate Judge and the Court of the Munsif".

It would follow, therefore, that the Court of an Assistant Collector, first class, is not a civil Court. I need not dilate on this matter, and would refer to the Full Bench case of — 'H. C. D. Mathur v. E. I. Rly', AIR 1950 All 80 (B). The question before the Full Bench was whether an authority constituted under section 15, Payment of Wages Act, was or was not a 'Court' within the meaning of S. 115, Civil P. C. It was observed 'at page 81' column 2:

> "So far as a Court of law, in the wider sense of the word, is concerned the tests laid down by the Acting Chief Justice in — 'Works Manager, Carriage and Wagon Shops, Mogalpura v. K. G. Hashmat', AIR 1946 Lah. 316 (C) might well be applied, and it might be held that any person or body of persons, called upon to decide any question of right in accordance with judicial principles and a 'tribunal which exercises jurisdiction by reason of the sanction of the law' is a Court. It does not, however, follow from this that every such tribunal is a Court of civil jurisdiction, to which alone section 115, C. P. C. applies. There is a large variety of such tribunals, e. g., the revenue and rent Courts, the criminal Courts, commissioners for the trial of election petitions and special Courts, such as those of Special Judges under the U. P. Encumbered Estates Act. It cannot be predicted of such Courts that they are subject to the powers vested in High Courts by reason of S. 115, C. P. C."

It would follow from the concluding portion of the above remarks that revenue and rent Courts are not subject to the powers vested in the High Court by reason of S. 115, C. P. C.

(17) Further on it was observed:

> "Thus while the law prevailing in the Agra province limits the civil Courts to the classes enumerated in the Bengal, Agra and Assam Civil Courts Act, the Oudh Act permits the creation of such Courts by other enactments".

Still further at page 82, column 2 it was observed:

> "The Code of Civil Procedure regulates the procedure not only of civil Courts, but of other authorities as well. Section 5, C. P. C., contemplates that it might be made applicable to revenue Courts also & it has in fact been made so applicable, with certain modifications, by the U. P. Tenancy Act, but for this reason the Courts constituted under that Act do not become civil Courts."

I may say here that the Land Revenue Act does not make the provisions of the Code of Civil Procedure applicable to the proceedings before the revenue Court. It provides a special procedure. It is only under section 111 (3) that the Assistant Collector, first class, has to follow the procedure laid down in the Code of Civil Procedure for the trial of original suits when he is inquiring into the merits of an objection to proprietary title. The claim for such a revenue Court to be called a civil Court merely because the matters which come up for decision before it are of a civil nature will not be correct. It would appear that all cases which are not of a criminal nature are of a civil nature and that, so far as civil cases go, the High Court would become the appellate Court from all the tribunals deciding particular types of civil matters if this contention for the petitioner about the interpretation of cl. 11 of the Letters Patent be accepted. If such was the interpretation, similar would be the interpretation about the High Court being the appellate Court from all criminal Courts by virtue of cl. 11 of the Letters Patent. It would then follow that all Courts, civil or criminal, would be under the appellate jurisdiction of the High Court and would consequently be subordinate to it. It would then be futile to have used the words "subordinate to them" in section 2 (1), Contempt of Courts Act, 1926, as the High Court could take action for contempt of all Courts which in the nature of things must either be civil or criminal.

(18) I am, therefore, of opinion that the High Court exercises no appellate jurisdiction over the

revenue Court by virtue of cl. 11 of its Letters Patent.

(19) I have gone through the various cases referred to by the learned counsel for the petitioner during his arguments and I consider them not to apply to the present case fully. Reliance is mainly placed on the case,—'Balkrishna H. Phansalkar v. Emperor', A. I. R. 1933 Bom 1 (D) for the proposition that the High Court exercises appellate jurisdiction and consequently superintendence over a Court, some of whose orders, if not all, are appealable to the High Court. This Bombay case related to a revision case by one who was convicted under the Emergency Powers Ordinance.

(20) The Ordinance provided for the constitution of Courts of criminal jurisdiction, and also provided for an appeal to the Court of Sessions and to the High Court against orders of the Special Magistrate in certain cases. Orders passing a sentence of transporation or imprisonment for a term of less than a year or fine for a sum less than Rs. 2000/- were not appealable. Section 51 further provided in effect that notwithstanding other provisions of law, no Court would have authority to revise any order or sentence of Special Magistrate except as provided under the Ordinance.

(21) It was contended that the High Court had no power of revision or superintendence over the Courts constituted by the Emergency Powers Ordinance and, therefore, could not entertain the revision application. Beaumont C. J. observed at page 4':

"Under S. 107, the High Court has superintendence over all Courts for the time being subject to its jurisdiction. It is not disputed that rights of superintendence include not only suprintendence on administrative points, but superintendence on the judicial side too, & that under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction. It seems to me clear that the Special Courts under the Ordinance are Courts subject to the appellate jurisdiction of the High Court, because under S. 39 the High Court has power to hear appeals in certain cases. It was suggested by the Advocate General that the Special Courts were not subject to the High Court's appellate jurisdiction because there was no right of appeal to the High Court in all cases. But, in my opinion, if there is a right of appeal in any case to the High Court, the Court from which an appeal is allowed is subject to the appellate jurisdiction of the High Court, which can then exercise the right of superintendence in respect of all matters, and not only those matters in respect of which a right of appeal is given".

It was observed at page 4:

" I will assume for the moment that if the Ordinance had excluded all rights of appeal to the High Court, there would have been no right of superintendence under section 107, though I would observe in passing that the correctness of that proposition is not altogether free from doubt, and that there are many decisions of this Court which suggest that even if there be no right of appeal from Courts exercising a form of criminal jurisdiction in the Presidency, nevertheless this Court would, having regard to the relations between those Courts and the High Court have a power of superintendence".

Similarly Broomfield J. stated at page 6:

"There are authorities for holding that the power of superintendence may exist even where there is no appellate jurisdiction in the ordinary sense at all. But anyhow it has been frequently held that a limited appellate jurisdiction is sufficient, and appellate jurisdiction is conferred on the High Court by S. 39 of the Ordinance itself".

(22) This case is, therefore, no authority for holding that the power of hearing an appeal in a certain contingency only against an order of a Court makes that Court subject to the appellate jurisdiction of the High Court. It is to be noticed that appeals in cases in which a person was sentenced by a Special Magistrate appointed under the Ordinance, to more than four years' imprisonment, lay to the High Court. What the High Court has really held was that it was not necessary for a Court being subject to the appellate jurisdiction of the High Court that appeals against all orders passed by that Court should be appealable to the High Court. The case merely decided that if appeals lay in general against certain orders of a Court, that Court will become subject to the appellate jurisdiction and consequently to the superintendence of the High Court. It is to be noticed that appeals from orders of the Special Magistrate appointed under the Ordinance lay either to the Sessions Judge or to the High Court and did not lie to any other tribunal which was independent of the High Court. It is also to be noticed that S. 224, Government of India Act, 1935 limits the powers of superintendence on the judicial side, as I have indicated above and bars the High Court from interfering with the judicial order unless a definite appeal or revision is provided against that order.

(23) Similarly in the case of — 'Governor of Bengal in Council v. Tusharkanti', AIR 1933 Cal 118 (E) it was held that the Court of Commissioner appointed under the Bengal Criminal Law Amendment Act of 1925, is a Court subordinate to the High Court within the meaning of S. 2 (1), Contempt of Courts Act of 1926. Under this Act a person convicted on a trial held by the Commissioner under section 3 (1) of the Bengal Criminal Law Amendment (Supplementary) Act, 1925, could appeal to the High Court. No right of appeal was given to the Local Government against an order of acquittal. It was argued that as the local Government was not given a right of appeal against an order of acquittal, the Court of Commissioner was not subject to the appellate jurisdiction of the High Court. It was observed at page 120:

"The jurisdiction to hear appeals from Commissioners is nonetheless appellate jurisdiction, because the right of appeal from Commissioners is less extensive than the right of appeal from the ordinary criminal Courts".

Reference was made to the aforesaid 'Bombay case' (D). This case again is no guide for the determination of the question before us. Appeals under that Act against the orders of the Commissioners lay to the High Court and to no other Court. The High Court, therefore, exercised appellate power over the Court of the Commissioner in general. Merely that certain orders were not appealable could not have deprived the High Court of its appellate jurisdiction, and as the Court of Commissioner in general was subject to the appellate jurisdiction of the High Court, it was a Court subordinate to the High Court.

(24) In — 'Advocate General v. Maung Chit Maung', AIR 1940 Rang 68 (F) it was held that a Magistrate holding an enquiry under section 176, Criminal P. C. was a Court. It was not disputed that if he was a Court, the High Court exercised superintendence over him and his Court was subordinate to the High Court. This case, therefore, does not throw any light on the question before us.

(25) No help is derived from the case reported in — 'In re Mohandas Karamchand Gandhi', AIR 1920 Bom. 175 (G). It was merely observed at page 175 that the High Court should extend protection to the Courts in the Mufassil over which it exercises supervision. This is perfectly correct. The question before us is whether the High Court exercises any supervision over the Court of an Assistant Collector, First Class.

(26) It may be mentioned here that before the enactment of the Contempt of Courts Act, Sulaiman, J. as he then was, was not prepared to hold that the High Court could punish for contempt of Court of inferior criminal courts and left this question open. He observed at p. 629 in the case in —'Re Hadi Husain v. Nasir Uddin Haider', AIR 1926 All 623 (H)

"I prefer to leave the question of contempt of inferior criminal Courts still open, for that question does not arise in this case. Owing to their respective constitutions there is undoubtedly some difference between the criminal Courts and the civil Courts. The Criminal Courts are not directly under the High Court to the same extent as the civil Courts are and the High Court does not possess the same power of control over the officers of the criminal Courts. On the other hand the civil Courts are directly and exclusively under the superintendence and control of the High Court."

(27) The control which the High Court exercises over the revenue Courts under the Land Revenue Act is, as shown above, practically none. Those Courts are under the control of the Board of Revenue.

(28) Reliance was also placed for the petitioner on the case reported in — 'Kartik Chandra v. Gora Chand', 40 Cal 518 (I). It was held in this case that the Court of Deputy Commissioner when acting in connection with an application for enhancement of rent under s. 27, Chota Nagpur Tenancy Act, was subject to the appellate jurisdiction of the High Court as the proceedings were judicial proceedings and a second appeal was allowed to the High Court under the provisions of S. 224 (2) of the Act in certain cases. Apart from any other consideration, this case can be distinguished on the ground that second appeal in certain cases lay to the High Court. If appeals in general in certain kind of cases lay to the High Court, it may be said that the other Court was subordinate to the High Court. Such appeals lay when those conditions were fulfilled and not only when the Court of the Collector happened to exercise a certain discretion and passed an order, which not as an order of the Collector but as a decree of a Civil Court, was made appealable to High Court under a special provision of the enactment. In — 'Uma Charan v. Midnapore Zamindari Co.', AIR 1914 Cal 890 (J) it was held that the High Court had no jurisdiction to exercise the power of superintendence it possesses under S. 15, High Courts Act, 1861, in relation to a proceeding for settlement of fair rents before a Revenue Officer under S. 85, Chota Nagpur Tenancy Act, 1908. It was observed at p. 892:

"But where a Court is made subordinate to the appellate jurisdiction of a tribunal different from and in no way subordinate to this Court, it cannot reasonably be held that the Court is subordinate to the appellate jurisdiction of this High Court."

Referring to the various cases holding that the High Court had jurisdiction to interfere with the orders of the Collectors and the Deputy Collectors under Act 10 of 1859, which cases included the Privy Council case reported in 9 Cal 295 (A) it was observed:

"The provisions, it may be pointed out, for appeals under Act 10 of 1859 are on entirely different lines from those prescribed in Chota Nagpur Tenancy Act, 1908."

The case reported in 40 Cal 518(A) was also distinguished on the lines indicated by me above. It was further observed:

"It would, in our opinion, be anomalous to hold that where, by statute, superintendence over a revenue officer is vested, in a particular matter, in the Commissioner and the Board of Revenue, the Revenue Officer should be deemed, even for the purposes of that particular proceeding, a Court subordinate to the appellate jurisdiction of this High Court."

These remarks would fully apply in this present case, if it be held that the Court of an Assistant Collector, first class, is subordinate to the appellate jurisdiction of the High Court in matters in which appeals lay to the Commissioner and the Board of Revenue.

(29) It was held by a Full Bench of the Oudh Chief Court in — 'Gaya Prasad v. Kalap Nath', AIR 1929 Oudh 389(K), that a District Judge when exercising the appellate powers against the orders of the Assistant Collector under the Oudh Rent Act was not subordinate to the Chief Court.

(30) I may again refer to the Full Bench decision in AIR 1950 All 80(B). It is observed in this case at p. 84:

"A very great difference exists between the Workmen's Compensation Act and the Payment of Wages Act, inasmuch as the former Act provides for an appeal from certain orders of the Commissioner appointed under the Act to the High Court while the latter does not provide for any such appeal. Thus under the Workmen's Compensation Act, the Commissioner is a Court subordinate to the appellate jurisdiction of the High Court and can well be held to be a Court subordinate to the High Court for the purpose of S. 115, C. P. C."

Firstly, it does not amount to a decision of the Full Bench that the Court of the Commissioner under the Workmen's Compensation Act is a Court subordinate to the High Court. It simply means that the decision of the Patna High Court, in the circumstances, can be said to be correct with respect to the proposition that the Court of the Commissioner under the Workmen's Compensation Act, is subordinate to the High Court. It is to be noticed that under that Act whatever appeals are allowed, they are allowed to the District Judge or to the High Court. No appeal is allowed to any other Court which is independent of the High Court.

(31) In — 'Bishambhar Nath v. Achal Singh', AIR 1932 All 651 (L), it was held that the Court of the District Magistrate while deciding an appeal under s. 318, Municipalities Act, was not subordinate to the High Court and accordingly no revision lay to the High Court, Iqbal Ahmad J. observed at p. 652:

"It appears to me, however, that a Court can be said to be subordinate to another Court only if the latter Court has appellate or revisional jurisdiction or power of superintendence given to it by some statutory provision over the former Court and that the mere authority to decide a reference does not necessarily make the Court making a reference subordinate to the Court deciding the same. Further, as by s. 115 this Court is given revisional powers only with reference to cases decided by subordinate Courts, that section can only have reference to Courts

over which this Court has a judicial and not a purely administrative power."

It was further observed at p. 652:

"The mere fact that under certain circumstances the District Magistrate is authorised to make references under the Municipalities Act to this Court, cannot, in my opinion, be a justification for holding that the District Magistrate is subordinate to this Court in matters coming under the Municipalities Act."

This case tends to support my view to the effect that the mere fact that an order under s. 111 (c), Land Revenue Act, by an Assistant Collector, first class, is under s. 112 of that Act deemed to be a decree of a civil Court and is made appealable to the District Judge or to the High Court as the case may be, does not justify holding that an Assistant Collector, first class, is subordinate to this Court in other matters coming under the Land Revenue Act.

(32) I do not consider that the decision of the Judicial Committee in — 'Emperor v. Shibnath Banerji', AIR (32) 1945 P. C. 156(M), is of any help in determining the question before us. There a Home Minister was held to be an officer subordinate to the Governor within the meaning of s. 49 (1), Government of India Act, 1935, because it was the Governor who was the appointing authority and had the power to distribute work between the ministers. No such consideration exists in considering the question of subordination of the Court of an Assistant Collector, first class, under the Land Revenue Act to this Court.

(33) I, therefore, find nothing in the case law to support the contention of the petitioner.

(34) It appears to me wrong to infer the powers of this Court with respect to the contempts committed of Courts which are of lower status than the High Court by keeping in view the powers which the Court of King's Bench in England has for punishing the contempts of inferior Courts. It is under the common law that the King's Bench exercises the power to punish contempt of Courts inferior to it. No other superior Court in England, which is also a Court of record, exercises such powers merely on the ground that it is a superior Court and a Court of record. The Court of King's Bench appears to control all proceedings of the inferior Courts and it is in view of this consideration that it exercises power of punishing contempt of those Courts.

(35) The question about the power of King's Bench to punish contempt of inferior Courts was left open in — 'Rex v. Parke', (1903) 2 K. B. 432 (N), even though Wills, J. remarked at p. 442:

"This Court, "the High Court", exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others."

It was later held in — ' Rex v. Davies', (1906) 1 K. B. 32 (O), that the King's Bench Division has the power to punish contempts of inferior Courts. In coming to such a conclusion Wills J. remarked at p. 37:

"The present King's Bench Division of the High Court stands in the place of the three ancient Superior Courts of Common law, and besides representing the powers and exercising the authority of the Courts of Common Pleas and Exchequer inherits all the jurisdiction and powers of the Court of King's Bench. From the most ancient times that Court exercised functions which belonged to no other Court in the Kingdom. ..... They do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts, and that it is in a special manner the guardian and protector of public justice throughout the Kingdom."

Later on, after considering the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders, Wills J. remarked at P. 42:

"If it is to be secured at all in the case of the inferior Courts it can only be secured by the action of this Court, for they have not the power to protect themselves; and if it be true that the King's Bench is in any sense the 'custos morum' of the Kingdom, it must be its function to apply with the necessary adaptations to the altered circumstances of the present day the same great principles which it has always upheld. 'Law', to use the words of Lord Coleridge, 'grows; and though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the time."

Later on at p. 42 Wills J. observes:

"The preservation of the stream of justice in the case of other Courts could affect no other Court than that which was exercising the jurisdiction. They were not the custos morum (to use Hawkins' phrase) in any sense analogous to that which the phrase bears when applied to the King's Bench, whose peculiar function it was to exercise superintendence over the inferior Courts and confine them to their proper duties. This, however, as it seems to us, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected as well as the misfeasances of the inferior Courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others whose conduct tends to prevent the due performance of their duties by those Courts have to be corrected as well as the Courts themselves."

(36) In — 'Rex v. Editor of the Daily Mail', (1921) 2 K. B. 733(P), Avory J. remarked at p. 752, after quoting from (1906) 1 K. B., 32(O).

"The result of that judgment is to show that wherever and whenever this Court has power to correct an inferior Court, it also has power to protect that Court by punishing those who interfere with the due administration of justice in that Court. It is admitted that this Court always had had jurisdiction to correct courts-martial either by the process of certiorari or by prohibition, and, that being so, it appears to follow from this judgment in the case of — 'Rex v. Davies', (D) that the Court also has power to protect a court-martial by punishing those who interfere with the due administration of justice in it."

It follows that the King's Bench exercises power of punishing contempt of inferior Courts, not because they are inferior Courts, but because they are such inferior Courts over whom the King's Bench exercises power of correction. If the High Court can correct the other Court it has also to give it protection from unjustified attacks.

As this Court has no power of correcting the proceedings of the Court of an Assistant Collector, first class, it cannot on the basis of English law be said to have the power of punishing contempt of those Courts.

(37) I am, therefore, of opinion that the Court of the Assistant Collector, first class, under the Land Revenue Act is not subordinate to the High Court and that, therefore, the High Court has no jurisdiction to take proceedings for contempt of the Court of the Assistant Collector, first class, under the Land Revenue Act. I would, therefore, allow the preliminary objection.

(38) MUSHTAQ AHMAD J. : This is an application praying that the opposite party be committed for contempt of Court, the alleged contempt being of Mr. G. S. Seth, S. D. O., Salimpur, district Deoria.

(39) The basis of the charge was that the opposite party had sent a letter to the said officer on 16-9-1947, with reference to a proceeding for correction of entries then pending in his Court. Those proceedings had been initiated by one Sia Ram against one Vidyarthi Das in respect of a certain property appertaining to what is known as the Lakhna Asthan.

(40) The letter in question did not, in fact, purport to have been addressed to Mr. G. S. Seth. It may, however, be rendered into English as follows:

"Sri Baba Vidyarthi Dasji is the Mahant of Lakhna Kuti. On the 30th July 1947, at noon I went and stayed there for some time. I learnt from the people, old, young, tenants, banyas, zamindars and cultivators that the Asthan was his. A certain old worker in the Post Office, who has no connection with this Kuti, has raised a dispute alleging the same to be his and only to cause harassment."

There can be no doubt that this letter did refer to the proceedings then pending in the Court of Mr. G. S. Seth, Sub-Divisional Officer as there is no suggestion that it had reference to any other proceeding initiated against Baba Vidyarthi Das. The opposite party was himself present in Court on the first day of hearing, and there was no indication of any desire in his behalf to negative this position. Nor had any attempt been made by him in his counter-affidavit in this case to suggest that the allusion in the letter was to any other proceeding by Sia Ram who was in fact, a 'post office worker'. Indeed, the opposite party tried to justify the contents of the letter in paras 7 and 8 of that affidavit.

(41) A preliminary objection was taken by Mr. C. S. Saran, learned counsel for the opposite party, to the hearing of this application on the ground that the alleged contempt being of a revenue officer in respect of proceedings under the Land Revenue Act, this Court had no jurisdiction to entertain the same, as that officer was not 'subordinate' to it within the meaning of S. 2, sub-s. (1), Contempt of Courts Act, 12 of 1926. That sub-section reads as follows :

"Subject to the provisions to sub-s. (3) the High Court of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of Contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves."

The decision of this preliminary objection would entirely depend on the scope to be assigned to the words "Courts subordinate" in the above section, that is to say, in this case, on whether the Sub-divisional Officer, Salimpur was, under S. 2 (1) of the said Act, a "Court subordinate" to the High Court. There can be no doubt that that officer was a 'Court', as defined in S. 3, Evidence Act, which provides that

" 'Court' includes all Judges and Magistrates, & all persons, except arbitrators, legally authorised to take evidence."

(42) The difficulty arises with regard to the meaning and implications of the word 'subordinate' in S. 2(1), Contempt of Courts Act. This, in my view, should be determined from certain general stand-points and not on a narrow and restricted meaning of the word, as normally ascribed to it in judicial proceedings. The question having arisen in connection with a charge of contempt of Court, it must be considered not only in this narrow perspective but also in the background of the previous history of the law dealing with the jurisdiction of the High Court to punish contempt of Courts of inferior jurisdiction. It would also be necessary to consider the question in the right of certain well known rules of interpretation of statute, in so far as they bring into prominence two divergent aspects, each leading to a different consequence. Lastly, it would be useful to examine the case-law on the point and eventually to see whether all these different considerations lead to the result at which I have arrived, namely that a Sub-divisional Officer is a Court 'subordinate' to the High Court within the meaning of S. 2(1), Contempt of Courts Act.

(43) The literal meaning of the word 'subordinate' in Webster's Dictionary is 'inferior in order, nature, importance or the like' and as a noun it is described as 'one who stands in order or rank below another'. The word 'inferior' in the same dictionary is described as 'of lower degree or rank in any scale' or 'of less importance, value or merit' and is shown as synonymous with 'subordinate'.

(44) An examination of the law relating to contempt in England would undoubtedly reveal that inferiority in rank was always taken as a test of subordination to a higher Court 'in matters relating to that offence'. The Court of the King's Bench exercised an extensive jurisdiction in punishing contempt of inferior Courts, though not so much as a Court of record as by virtue of its being a 'custos morum' under the common law. The contempt committed was not considered to be so much of the Judge as of the sovereign whom he represented, and it was popularly accepted that any attempt to undermine his dignity or to interfere in his administration of justice was to pollute the stream of jusice and bring about a state of affairs which the law could not sanction. The two leading cases on this point are those of '(1903) 2 K. B. 432 (N) and (1906) 1 K. B. 32 (O))' the judgment of the Bench in each case being delivered by Wills J. At p. 442 of the former report the learned Judge observed as follows:

"Many inferior tribunals are not Courts of record, and, therefore, have no means of checking practices of the kind with which we are dealing. Many of them sit only at long intervals, and, before they can do anything to interfere with such offences against public justice, all the mischief possible may have been effectually done. This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interference with their independence on the part of others."

Later, 'on page 443,' the learned Judge, adopting the dictum of Wright J. said that

"We should hesitate long, before casting any more doubt than may already exist upon the capacity of this Court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice, and to interfere with its proper and unfettered administration by Courts which possess no adequate means of protecting themselves in this respect."

In the latter case '(1906) 1 K. B. 32 (O)' the same learned Judge at p. 39 quoted with approval S. 4 of Howkins' Pleas of the Crown, Bk. 2, C. 3, to the effect that

"Neither is it necessary in a prosecution of any such offence in this Court to show a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances, for this Court being the 'custos morum' of all the subjects of the realm, 'wherever it meets with an offence contrary to the first principles of common justice,' and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it".

Again, 'on page 40', it was remarked:

"But what possible difference in principle can there be in respect of direct attacks upon Courts or judges, and of writings, the tendency of which is to deprive the inferior Courts beforehand of the possibility of doing even-handed and impartial justice according to the due course of law?"

The position was further affirmed in the following emphatic words:

"The mischief to be stopped is in the case of the inferior Courts identical with that which exists when the due administration of justice in the Superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior Courts have not such powers, although some of them, quarter sessions for example, try many more cases than are tried at assizes and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the Superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings."

A few years later, the question again arose of the jurisdiction of the King's Bench to punish contempt of inferior tribunals, and in '(1921) 2 K. B. 733 (P) it was held that a Court-martial was an 'inferior Court' within the meaning of the judgment in '(1906) 1 K. B. 32(O)'. Referring to the latter case Avory J. remarked that:

"the result of that judgment is to show that wherever' and whenever this Court has power to correct an inferior Court it also has power to protect that Court by punishing those who interfere with the due administration of justice in that Court.....".

(45) The above passages leave no doubt that in England it was generally recognised that the Court of the King's Bench had full authority to punish contempt of all inferior Courts, and the main test applied was whether the Court aggrieved stood in a lower rank with reference to that Bench. The principle underlying the rule was that the Court of the King's Bench, as the guardian of good conduct in the realm and supreme protector of the dignity and independence of inferior Courts, had full jurisdiction to punish persons guilty of contempt not only of itself but also of those other Courts and tribunals which stood in a lower scale. One of the questions to be considered in the present case would be whether the same principle was applicable in this country also or, on the contrary, a different rule prevailed, and if so, for what particular reasons. 'Prima facie', there appears to be no basis for any variation on the point in this country, for the obvious reason that the principles governing the rule appear to be of general application as serving a common policy.

(46) In India the Supreme Court of judicature, which was the predecessor of the Calcutta High Court, was under cl. (2) of its Charter granted under 13 George, III, c. 63, made a Court of record. The same position was conferred on the Calcutta High Court under its Letters Patent. The Allahabad High Court was also under cl. 1 of its Letters Patent made a Court of record, and the recognition was maintained by S. 220, Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order 1947. By virtue of this, the High Court had inherent power of punishing its own contempt, long before the Contempt of Courts Act 12 of 1926 was passed. This was affirmed by the Judicial Committee in — 'Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court at Fort William in Bengal', 10 Cal. 109 (Q). It was clearly pointed out 'in the matter of K. Venkat Row,' 12 Ind. Cas. 293 (Mad) (R) that the High Court had the same power as the old Court of the King's Bench. This position is indeed not challenged.

(47) The scope of the jurisdiction to punish its own contempt has even been extended to areas outside the territorial jurisdiction of the High Court, as would appear from — 'Kilachand Devchand & Co., Ltd. v. Ajodhya Prasad Sukhanand & Co.', AIR 1934 Bom 452 (S) and the well known ruling of this court in — 'Emperor v. Benjamin Guy Horniman', AIR 1945 All 1 (T). Mujumdar J. in — 'Onkermull Jalan v. Padampat Singhania', 53 Cal. W. N. 310 (U) in this connection held that

"in matters of contempt the High Courts which have inherited the powers of the Supreme Court exercise somewhat extra-ordinary jurisdiction, and the powers are arbitrary. Consequently no territorial limitation should be put in cases of contempt which is really a contempt against the Sovereign, when neither any statute nor the provisions of the Charters expressly put such limitation".

I mention these cases only as illustrating the tendency to give a wide jurisdiction to the High Court to punish contempt, though of itself, for a very sound reason, namely that nothing should be allowed to contaminate the administration of justice, and none found guilty of it should go without punishment.

(48) An examination of certain cases in this country would also lead to the position that the High Court has power to punish contempt of inferior Courts. In the Full Bench case in 'AIR 1920 Bom. 175, (G) Marten J. remarked that

"It makes no difference. I think that the alleged abuse here was of a District, and not of a High Court Judge. — 'Rex v. Davies', (1906) 1 KB 32(O) shows that in England the High Court has power to protect the Courts of inferior jurisdiction and that in a proper case it should do so. I think the same power exists in India, and that, subject to the precautions which Lord Russell mentions on pp. 40 and 41 this Court should extend its protection to all Courts in the mufassil, over which it exercises its supervision".

(49) Quite recently the Judicial Committee in — 'A. I. R. 1945 P. C. 156 (M), reversing the judgment of the Calcutta High Court in — 'Emperor v. Hemendra Prosad', AIR 1939 Cal. 529 (V) held that the Home Minister was an officer "subordinate" to the Governor within the meaning of S. 49 (1), Government of India Act, 1935. The basis of the view obviously was that the Home Minister stood in a position of inferiority to the Governor, although this was not a 'subordination' in which that word was generally known.

(50) The policy I mentioned at the outset, namely to authorise the highest Court to protect the honour and prestige of all inferior Courts is found illustrated in a variety of ways. The Madras High Court in '12 Ind. Cas. 293 (Mad) (R), already referred to by me in another connection held that, on principle, there was no reason why there should be a distinction between cases of contempt of inferior civil Court and contempt of an inferior criminal Court. The Rangoon High Court in 'AIR 1940 Rang. 68 (F) at page 70 pointed out that a Magistrate, holding an enquiry into the cause of death, who must come to a finding as to what caused that death came within the definition of a 'Court', and that that word was used in the Contempt of Courts Act in that wider sense. The learned Judges observed that such a Magistrate was a Court 'inferior' to the High Court for the purposes of S. 435, Criminal P. C. and that the words "subordinate Court" in the Act were used in a wide sense as including any Court over which the High Court had superintendence for the purposes of S. 85, Government of India Act, 1935, that is to say, all Courts subject for the time being to its appellate jurisdiction. Sulaiman J., no doubt, in 'AIR 1926 All. 623 (H) left the question of the subordination of criminal Courts to the High Court in cases of contempt open. I shall deal later with the implications and scope of the word 'superintendence' and the word 'appellate' in proper context.

(51) There can, thus, be no doubt that the test of the High Court's jurisdiction over another Court was the comparative inferiority of the Court over which such jurisdiction was claimed, without meaning that this inferiority necessarily subjected the inferior Court in every detail to a position of control by and subordination to the High Court.

(52) Learned counsel for the opposite party pressed his objection to the hearing of the present application also with reference to the provisions of S. 224 (1), Government of India Act, placing it along side the previous law as contained in S. 15, High Courts Act of 1865, and section 107, Government of India Act of 1915'. The former provided 'inter alia' that

> "Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction....."

and the latter also embodied the same provisions. The present Act of 1935, in section 224 (1) of it, reproduces the same law with a slight verbal change. The argument was that this Court could not be conceived as having a right of superintendence over any other Court in the country, unless the latter was subject to its 'appellate jurisdiction' and that a Court acting under the Land Revenue Act, not being subject to such jurisdiction, did not come within the scope of superintendence of the High Court. The question would depend on the meaning of the words 'appellate jurisdiction'. If the revenue Court could be deemed to be under the appellate jurisdiction of the High Court, it would also be subject to the superintendence of the High Court. Such superintendence may or may not exist, where the other Court is not subject to the appellate jurisdiction of the High Court. On that question there is a good deal of divergence in the case-law, some cases holding that there may be superintendence exercised by the High Court even where it only exercises a power of revision, and not of appeal, over another Court, and some denying the superintendence altogether. For the purposes of the present case, in the first instance, I propose to consider whether the revenue Court can be regarded to be under the appellate jurisdiction of the High Court, for, if it can be, then superintendence 'a fortiori' must be implied. I proceed now to consider this.

(53) The contention of the learned counsel raising the preliminary objection was that 'appellate jurisdiction' did not mean such jurisdiction in any particular respect, but in all cases coming within the ambit of the power of the inferior Court. Section 112, U. P. Land Revenue Act provides that

> "all decrees passed under sub-s. (3) of the preceding section shall be held to be decrees of a Court of Civil Judicature of the first instance and shall be open to appeal to the District Judge or High Court, or the Judicial Commissioner, as the case may be, under the rules applicable to appeals to those Courts".

That is to say, in matters of title in partition suits the revenue Court is to be deemed to be a civil Court, and its decree may be appealable in certain cases to the High Court. Admittedly, there is no other case coming under the Act, in which also the High Court may exercise appellate jurisdiction. It was contended that such jurisdiction being thus confined to a particular class of cases, namely those of title in partition suits, and not exercised in any other case under the Act, the revenue Court could not be deemed to be under the 'appellate jurisdiction' of the High Court within the meaning of section 224 (1), Government of India Act, 1935. The learned counsel for the applicant, on the other hand, replied that, if the High Court enjoyed an appellate jurisdiction over the revenue Court in any respect whatsoever, it could be regarded as a Court having 'appellate jurisdiction' over that Court. That is to say, according to him, it was not necessary that such jurisdiction may be exercisable in other respects also. There is ample authority in the case-law which throws lurid light on this question, and, in my opinion, it is by no means difficult of solution.

(54) In — 'Chaitan Patgosi v. Kunja Behari', 38 Cal. 832 (W) the Bench, after a consideration of several cases, adopted the dictum of Norman J. in — 'Bhyrub Chunder v. Shama Soonderee', 6 W. R. 68 (X) to the following effect:

> "It is clear that the Collector's Court is a Court over which at the time of the passing of the Charter Act the Sudder Court possessed Appellate Jurisdiction, and therefore it is clear that the 15th section of the Charter Act gives us a superintendence over such Courts for the purpose to which I have already alluded".

that purpose being

> "to compel them to do any act which by law they should do, to command them to execute all powers with which they are vested and to restrain them from meddling when they have no jurisdiction".

Proceeding further, the learned Judges, referring to a judgment of Sir Barnes Peacock, C. J. and D. N. Mitter J. in — 'Desaratulla v. Nazim Nazir Ali', 10 W. R. 341 (Y) observed that

> "The Execution of Decrees for Rent Act 10 of 1859 conferred upon the Revenue Courts only a limited jurisdiction and the High Court under its

general power of control had the right to prevent them from exceeding that jurisdiction".

(55) In 40 Cal 518 (I), another Bench following the last case held that proceedings on application for enhancement of rent were judicial proceedings, and, in view of the express provisions of section 224 (2), Chhota Nagpur Tenancy Act (Beng. 6 of 1908) which allowed 'in certain cases' a second appeal to the High Court, the Deputy Commissioners, in the performance of their judicial duties under that Act, were subject to the appellate jurisdiction of the High Court. This was in spite of the fact that, under that Act, the powers of revision, direction & control was vested in the Commissioner and in the Board of Revenue and not in the High Court. The case just cited had also relied upon the judgment of the Judicial Committee in '9 Cal. 295' (P. C.) (A) which was a case of a claim to title in a rent suit giving the Collector certain powers of deciding the question and entitling the party aggrieved by his decision to re-agitate the question in the civil Court. The question was with regard to the meaning of the words "civil Court" in S. 77, Execution of Decrees for Rent Act, 10 of 1859, and their Lordships remarked that:

"It must be allowed that in those sections (of Act 10 of 1859) there is a certain distinction between the civil Courts there spoken of and the Rent Courts established by the Act and that the Civil Courts referred to in S. 77 and the kindred section means Civil Courts exercising all the powers of Civil Courts, as distinguished over suits of a limited class. In that sense there is a distinction between the terms, but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil right and whether, being a civil Court in that sense, it does not fall within the provisions of Act 8 of 1859 (Civil Procedure Code)."

(56) In AIR 1953 Bom 1 (D) a Full Bench of the Bombay High Court, while deciding the meaning of the relevant words in S. 107, Government of India Act, 1915, pointed out that the special Courts under the Emergency Power Ordinance 1932 were Courts subject to the appellate jurisdiction of the High Court, because, under S. 39, the High Court had power to hear appeals in 'certain cases,' it being immaterial that there was no right of appeal to the High Court in all cases, because, if there was a right of appeal in any case to the High Court, the Court from which an appeal was allowed was subject to the appellate jurisdiction of the High Court which would then exercise the right of superintendence in respect of all matters and not only those matters in respect of which a right of appeal was given.

(57) The Calcutta High Court, again, in AIR 1933 Cal 118 (E), held that the High Court had jurisdiction to entertain an application for contempt of the Commissioner's Court, even though the right of appeal from Commissioner's Court was less extensive than the right of appeal from the ordinary criminal Courts in that there was no ordinary right of appeal to the High Court from the Commissioner's Court and that the fact that the rule-making power with regard to the Commissioner's Courts was vested in the local Government was immaterial, for, under S. 107, the rule-making power was something different from and additional to the right of superintendence. This was a case calling in question certain improper comments in the Amrita Bazar Patrika on proceedings pending before the Commissioner appointed under the Bengal Criminal Law Amendment Act, 1930. The High Court was held as having full jurisdiction to punish the contempt committed.

(58) A number of cases under the Workmen's Compensation Act arose, in which an order of the Commissioner appointed under that Act being challenged in the High Court, the question was whether he was a 'Court subordinate to the High Court'. It was held that, as S. 30 of the Act allowed an appeal to the High Court where the amount in dispute was over Rs. 300/-, the Commissioner was under such jurisdiction of the High Court. Some of these cases are: — 'Firm G. D. Gianchand v. Abdul Hamid', AIR 1938 Lah 855 (Z) and — 'Mt. Dirji v. Smt. Goalin', AIR 1942 Pat 33 (Z 1).

(59) Cornelius, J. in — 'Sultan Ali v. Nur Hussain', AIR 1949 Lah 131 at p. 137 (Z 2), in a case of contempt of a special Tribunal, expressed himself thus:

"The High Court is also the superior Court within the province, charged with the duty of setting limits to the jurisdiction of all other judicial tribunals or Courts within the province, and this imports subordination in the latter tribunals qua the High Court. Further, if it can be shown that over 'any part of its' jurisdiction, a tribunal is directly subordinate to the appellate or revisional authority of the High Court then it must be held to be subordinate to the High Court in the respects relevant for the application of S. 115, Civil P. C."

A Full Bench of this Court (Lucknow branch) in AIR 1950 All 80, at p. 84(B), on a review of the relevant case-law on this point, made the following observations:

"A very great difference exists between the Workmen's Compensation Act and the payment of Wages Act, inasmuch as the former Act provides for an appeal 'from certain orders' of the Commissioner appointed under the Act to the High Court, while the latter does not provide for any such appeal. Thus under the Workmen's Compensation Act, the Commissioner is a Court subordinate to the appellate jurisdiction of the High Court and can well be held to be a Court subordinate to the High Court for the purposes of S. 115, Civil P. C."

(60) There can thus be no doubt that, where a certain order of a Court is subject to an appeal to the High Court, that Court is subject to the 'appellate jurisdiction' of the High Court, no matter if, against so many other orders of that Court, there is no right of appeal to the High Court. Any other view would inevitably raise the question as to where the line is to be drawn, 'namely in the case of how many orders there should be a right of appeal to the High Court in order to make that Court exercise a position of control over another Court which may, on that account, be deemed to be subordinate to the High Court'. I put it repeatedly to the learned counsel raising the preliminary objection to define the position and, very naturally, he appeared helpless. The 'number' of the species of cases in which appellate jurisdiction can by statute be exercised by the High Court cannot alone determine the existence of such jurisdiction in the abstract but also the factum of 'any' order of a certain Court being appealable to the High Court. Otherwise, an arbitrary and meaningless minimum will have to be fixed of the orders appealable to the High Court to justify a designation of the inferior Court as one subject to the 'appellate jurisdiction' of the High Court. Such a process would neither be logic nor law.

(61) In the present case, an order of the revenue Court under S. 112 at least of the Revenue Act being in certain cases appealable to the High Court, the latter Court would be deemed to be exercising an 'appellate jurisdiction' over the revenue Court, and the revenue Court would, on that account, be subject to the 'appellate jurisdiction' of the High Court.

(62) It would be useful to visualise the anomalies resulting from a contrary view in the present case and others like this. I repeatedly asked the learned counsel for the opposite party to explain why the Legislature, in case his contention was right, omitted to protect the dignity and honour of Land Revenue Officers against such conduct with reference to them as amounted to contempt of Court. No answer came. I cannot imagine that the Legislature should have been so lacking in foresight, so barren prospectively, as not to have foreseen the possibility of people encroaching on the freedom and integrity of this particular class of officers, thereby interfering with their judicial functions with impunity, when the law, both in England and in India, was so jealous of the independence of all Courts and Judges and of their immunity from all attacks and affronts as a member of the public in any manner ventured to commit. Surely there could have been no judicial basis for such an illogical discrimination between other Courts including the High Courts on the one side and officers presiding over revenue Courts on the other. And yet this would be the result, if a restricted meaning were to be given to the words 'appellate jurisdiction' in S. 224 (1), Government of India Act.

(63) The same position is reached by taking into account the normal rules of interpretation of statutes in England, as also followed in India. Maxwell in his "Interpretation of Statutes", Edn. 9, pp. 70 and 71, points out that the construction of a statute should be such as shall "suppress the mischief and advance the remedy" and, again, on p. 212, observes that, an interpretation, the consequence of which would be to lead to an absurdity, must be avoided. In — 'Nokes v. Doncaster Amalgamated Collieries, Limited', (1940) A. C. 1014 at p. 1022 (Z3), Viscount Simon L. C. observed that

> "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

I am tempted further to quote an observation of Dawson-Miller C. J. in the Full Bench case of — 'Sheo Nandan Prasad Singh v. Emperor', AIR 1918 Pat 103 (Z4), at p. 105 which itself was based on — 'Vacher and Sons Ltd. v. London Society of Compositors', (1913) A. C. 107 (Z5):

> "I agree that if a statutory enactment is ambiguous and capable of two interpretations, one is entitled to take into consideration that there are certain consequences which it may be presumed the Legislature did not intend to bring about and to prefer a construction which would avoid such consequences rather than one which would lead to them."

The absurdity of accepting the restricted meaning stressed by the learned counsel for the opposite party for the words "subordinate Court" would be to eliminate an important class of officers conducting judicial proceedings in this country from the protection enjoyed by all other Courts over which the High Court can exercise a power of appellate or even revisional jurisdiction. This cannot be conceived as coming within the intention of the Legislature or being sanctioned by any sound legal principle.

(64) A number of cases were cited by the learned counsel for the opposite party in support of his preliminary objection. I do not propose to deal with them in detail, apart from saying that they were either cases where the question was whether the High Court had revisional jurisdiction over a certain Court or tribunal under S. 115, Civil P. C. or were cases in which it was contended that a revision lay to the High Court under S. 253, Tenancy Act, and it was held that that section did not permit the same. Some cases were also cited arising under the U. P. Municipalities Act, wherein it was ruled that the High Court had no jurisdiction to entertain a revision against an order of an Election Commissioner appointed under that Act. None of these questions need be considered in the present case which is susceptible of a much simpler solution, depending on the meaning of the words "subordinate Court". I have already held that, having regard to the history of the law of contempt in England and also as engrafted in the Indian Legal system, both prior and subsequent to the Contempt of Courts Act 12 of 1926, followed by the Amendment Act 12 of 1937, and also in view of the literal meaning of the words 'subordinate Court' in section 224 (1), Government of India Act and the interpretation of those words in the Indian case-law, there is only one conclusion possible, namely that the High Court has complete jurisdiction to protect the honour and dignity of all inferior Courts including those, under the Land Revenue Act.

(65) I would, therefore, hold that the Court of Mr. G. S. Seth, S. D. O. Salimpur, was subject to the 'appellate jurisdiction' of the High Court, which was vested with a power of superintendence over it within the meaning of S. 224 (1), Government of India Act, 1935.

(66) Accordingly, I would disallow the preliminary objection taken by the learned counsel for the opposite party to the hearing of this application.

(67) BY THE COURT.— In view of the difference of opinion between us, we order that the case be laid before the Hon'ble the Chief Justice for obtaining the opinion of a third Judge on the following question:

> "Is the Court of an Assistant Collector, First Class, under the Land Revenue Act subordinate to the High Court for the purposes of section 2 (1), Contempt of Courts Act (12 of 1926)?"

(Note. After the reference was made an application was filed by Sri S. N. Dwivedi, the counsel through whom the applicant had moved the High Court, that his client did not wish to press the application. The case was, however, not put up for orders and on 10-10-1950, another application was filed by Sri Kripa Shanker Sinha, Advocate, that the application was filed under undue influence and the applicant wished to proceed with the application. Upon this Malik C. J. observes: "It appears to me that unless it is first held that a contempt was committed it is no use going further with these proceedings. I have said more than once that the question whether a party is guilty of contempt or not is a matter primarily for the Court and we cannot allow parties to use the proceedings for contempt to wreak their private vengeance or to further their own interest. It is for the Court to decide whether it will or will not take steps to punish for contempt and

what punishment, if any, it would award. Learned counsel has urged that I can consider only the point referred to me and cannot consider or pass orders on the two applications filed by the applicant. The two applications filed on 29th September and 10th October, 1950, may, therefore, be put up before the Bench concerned and in case the Bench is still of the opinion that the case should be referred to a third Judge, the papers may be put up before me for orders. When the matter came before the Division Bench, Dayal, J. who made the order, said:"

"As we differed about our having jurisdiction to take action with respect to contempt committed of the Court of an Assistant Collector, First Class, acting under the provisions of the Land Revenue Act, it is necessary that that question be first decided before we enter into the question of merits. For the same reason we did not hear either of the parties on merits on the previous occasion and expressed no opinion on that point. We, therefore, order that the case be again laid before the Hon'ble the Chief Justice for his opinion on the point on which we had differed." The matter thus was placed before a third Judge who delivered his opinion as follows:)

(68) WALI ULLAH J.: The question which has been referred to me for opinion reads thus:

"Is the Court of an Assistant Collector, First Class, under the Land Revenue Act, subordinate to the High Court for the purposes of S. 2 (1), Contempt of Courts Act (12 of 1926)?"

Section 2, sub-s. (1), Contempt of Courts Act (12 of 1926) stands thus:

"Subject to the provisions of sub-s (3), the High Courts of Judicature established by Letters Patent, shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves".

Sub-section (3) reads:

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code".

(69) It is thus clear that under S. 2, Contempt of Courts Act, this Court has the same jurisdiction, powers & authority "in respect of contempts of Courts subordinate to it", as it has, and exercises in respect of contempts of itself. The only limitation, however, imposed on such jurisdiction is the one contained in sub-s. (3) i. e. that the High Court shall not take cognizance of a contempt in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code. I may here observe in passing that as the result of case-law, it is now well-settled that, under sub-s. (3), the High Court is precluded from taking cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it only when such contempt is punishable 'as a contempt' under the Indian Penal Code Vide — 'Emperor v. Jagannath Prasad', AIR 1938 All 358 (Z6). The view taken in this case was affirmed by a Full Bench of three learned Judges of this Court, to which I myself was a party, in — 'State v. Brahma Prakash', AIR 1950 All 556 (F.B.) (Z7). The High Courts of Patna, Calcutta, Lahore and Nagpur have also taken the same view vide —'Kaulashia v. Emperor', AIR 1933 Pat 142 (Z8), — 'Dharnidhar Singha Roy v. Satish Chandra', AIR 1932 Cal 705 (Z9), — 'Bennett Coleman & Co. Ltd. v. G. S. Monga', AIR 1936 Lah 917(Z10) and — 'Sub-Judge, First Class, Hoshangabad v. Jawahar Lal Ram Chand', AIR 1940 Nag 407 (Z11).

(70) Again, it must be borne in mind that the Contempt of Courts Act does not create any fresh powers at all. It merely recognises the fact that such powers already existed. It no doubt seeks to define and limit the powers. Professedly, the Act was passed to remove doubts as to the powers of a High Court to punish contempts of 'subordinate courts". Later by the amending Act of 1937, the word "subordinate" was omitted. The Act is not described as a codifying and consolidating Act, nor are its contents such as would make the Act a codifying and consolidating piece of enactment. It seems to me, therefore, that it is not permissible to construe it as such. Further, it is clear, to my mind, that the quantum of authority and powers possessed by the High Court, prior to the passing of the Contempt of Courts Act which came into force on 1-5-1926, would have a very important bearing on the question which has to be decided. Prior to the enactment of this Act, High Courts in India, so far as the law of contempt of Courts was concerned, acted entirely in accordance with the principles followed by English Courts. It is, therefore, very necessary to bear in mind the principles of English law relating to contempt of Court while interpreting the Indian enactment. It seems to me that the provisions of sub-s. (1) of S. 2 of the Act have to be interpreted against the background afforded by the English Law relating to contempt of Court.

(71) The law relating to contempt of Court in England clearly shows that the Court of King's Bench possessed extensive powers for punishing contempts of inferior Courts. This was under the Common law. The Court of the King's Bench was undoubtedly a Court of Record and under the Common law it had always been looked upon as a 'custos moram' (guardian of the morals) of the Citizens of the Realm. In the leading case of (1903) 2 K. B. 432 (N), Wills, J. delivering the judgment of the Court, observed at p. 442:

"Many inferior tribunals are not Courts of record, and therefore, have no means of checking practices of the kind with which we are dealing. Many of them sit only at long intervals, and before they can do anything to interfere with such offences against public justice all the mischief possible may have been effectually done. This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interference with their independence on the part of others."

The question, however, was, in a way, left open, for at p. 443, the learned Judge remarked thus:

"We should hesitate long before casting any more doubt than may already exist upon the capacity of this Court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice and to interfere with its proper and unfettered administration by Courts which possess no adequate means of protecting themselves in this respect."

(72) The next English case which took the matter a step further and definitely decided that the King's Bench Division had power to punish by attachment contempts of inferior Courts is (1906) 1 K. B. 32 (O). Wills, J., who delivered the judg-

ment in this case also, approvingly referred to what had been said in the earlier case of — 'The King v. Parke', (N). After examining the available authorities, the learned Judge observed at p. 47:

"The mischief to be stopped is in the case of the inferior Courts identical with that which exists when the due administration of justice in the Superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other Superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior Courts have not such powers, although some of them, quarter sessions for example, try many more cases than are tried at assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the Superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings."

(73) The next case which may be noticed is that of (1921) 2 K. B. 733 (P). In this case Farnsworth was tried before a court-martial on charges of desertion and loss of kit. He was found guilty and sentenced. The finding of guilty as well as the sentence of the court-martial were, however, subject to confirmation. Before confirmation the 'Daily Mail' published an article in regard to the proceedings of the court-martial. The Court applied the principle laid down in the case of the — 'King v. Davies', (O), (ubi supra). It was held:

"Where contempt of Court is committed against a court-martial by a person not subject to military law, the King's Bench Division has inherent jurisdiction on the application of a party to the proceedings before the court-martial who is aggrieved by the contempt to punish the person guilty of the contempt."

At p. 746, Lord Coleridge J. observed:

"A court-martial has no inherent power apart from statute to protect itself by such proceedings (i. e. proceedings in contempt), but, if this Court can interfere with the proceedings of a court-martial to check irregularities by that Court, it seems to me that it must also be clothed with inherent jurisdiction to protect a court-martial from contempt calculated or tending to obstruct the administration of justice in that Court."

Similarly at p. 750, Avory J. considered the question of jurisdiction to deal with the contempt of Court in respect of proceedings of a court-martial. The learned Judge observed:

"Having regard to the decision of this Court in — 'Rex v. Davies', (O), question of jurisdiction resolves itself into a question whether a court-martial is an inferior Court within the meaning of that judgment."

Further, at p. 752, the learned Judge observed:

"The result of that judgment — 'Rex v. Davies', (O), is to show that wherever and whenever this Court has power to correct an inferior Court, it also has power to protect that Court by punishing those who interfere with the due administration of justice in that Court."

(74) In view of the authorities mentioned above, it seems to me that in English law the Court of the King's Bench had, and its successor, the King's Bench Division, has full authority to punish contempt of all inferior Courts i.e. Courts which were or are, subject to a power of correction or superintendence possessed by the higher Court i. e. the Court of the King's Bench or the King's Bench Division.

(75) In the present case, the whole difficulty has arisen with regard to the proper interpretation of the expression "Courts subordinate to them" in sub-s. (1) of S. 2. The 'Court' of an Assistant Collector of the First Class, obviously, as its name indicates, is a "Court". It is a Court as understood in the Contempt of Courts Act where the term has been used in a wide sense, as including a tribunal, legally authorized to deal with particular matter judicially. The Assistant Collector is undoubtedly entrusted with certain "judicial functions"; such judicial functions include the function of "deciding litigated questions according to law" — deciding them not arbitrarily, but according to certain rules and procedure which ensure that the person called upon to decide them acts with fairness and impartiality.

(76) Reference may be made in this connection to the case of — Mst. Dirji v. Smt. Goalin', AIR 1941 Pat 65 (Z12), where a Full Bench of the Patna High Court held that the Commissioner appointed under the Workmen's Compensation Act is a 'Court'. A further question, whether the Commissioner was a Court subordinate to the High Court within the meaning of S. 115, Civil P. C., was left open by the Full Bench. It was, however, decided by the Division Bench of the same Court in the same case, when it came to it after the decision of the point referred to the Full Bench, that the Commissioner being subject to the appellate jurisdiction of the High Court under S. 30(2), Workmen's Compensation Act, was also subject to the revisional jurisdiction of the High Court under S. 115, Civil P. C.

(77) Again, in the case of AIR 1946 Lah 316 (C), decided by a Full Bench of three learned Judges of the Lahore High Court, certain tests were laid down for determining whether a tribunal is or is not a 'Court'. At p. 318, it was observed:

"One of the fundamental tests whether a certain tribunal is a Court or is not so is whether it exercises jurisdiction by reason of the sanction of the law or whether jurisdiction is given to it by the voluntary submission of the parties to a dispute.....

Another important test whether a certain tribunal is or is not a Court is whether it can take cognizance of a lis and whether in exercising its functions it proceeds in a judicial manner."

(78) In AIR 1950 All 80(B), a Full Bench of three learned Judges of this Court approved of the tests laid down by the Full Bench of the Lahore High Court in the abovementioned case. At p. 81, it was observed:

"The word 'Court' is not a term of art having a fixed meaning. It indicates a large number of entirely divergent things. So far as a Court of law, in the wider sense of the word, is concerned, the tests laid down by the Acting Chief Justice, in — 'Works Manager, Carriage and Wagon Shops, Mogalpura v. K. G. Hashmat', (C), might well be applied, and it might be held that any person or body of persons, called upon to decide any question of right in accordance with judicial principles and is a tribunal which exercises jurisdiction by reason of the sanction of the law is a Court. It does not, however, follow from this that every such tribunal is a Court of civil jurisdiction to which alone S. 115, Civil P. C. applies".

(79) The crucial question here is whether the Court of an Assistant Collector is subordinate to the High Court within the meaning of S. 2 (1), Contempt of Courts Act. In this sub-section,

"subordination" of a Court to the High Court clearly refers to 'judicial subordination'. This has been made clear by the decision of the Full Bench in the case of — 'State v. Brahma Prakash', (Z7), (ubi supra).

(80) In the course of arguments before me, learned counsel have referred to a number of rulings of this Court as well as of other High Courts. Many of these rulings have dealt with the question of subordination of a Court or tribunal to the High Court within the meaning of S. 115, Civil P. C. Thus in — 'H. C. D. Mathur v. East India Railway Administration', (B), (ubi supra) it was held by the Full Bench of this Court that 'the authority' constituted under S. 15, Payment of Wages Act, is not a 'Court' within the meaning of S. 115, Civil P. C., and consequently no revision lies to the High Court from the order of such authority. To the same effect is the decision given by a Division Bench of this Court in the case of — 'Triloki Nath v. Lord Krishna Sugar Mills Ltd., Saharanpur', AIR 1946 All 276 (Z13). Similarly, it was held in — AIR 1932 All 651 (L) by Iqbal Ahmad J. that a Collector or other officer hearing an appeal under S. 318, U. P. Municipalities Act is not a Court subordinate to the High Court and no revision under S. 115, Civil P. C. lies from his orders. Again, in — 'Masoon Ali Khan v. Ali Ahmad Khan', AIR 1933 All 764, (Z14), the question involved related to an "election Court" constituted under S. 20, District Boards Act. The question was whether such a Court could be held to be subordinate to the High Court within the meaning of S. 115, Civil P. C. The District Judge had been appointed as the Election Court in that case. It was held that the District Judge in presiding over the Election Court acted as 'persona designata' and not as 'a Court', hence it was held that no revision lay under S. 115, Civil P. C. Again, in the case of — 'Raja of Venkatagiri v. Mahaboob Sahib', AIR (1944) Mad 139: ILR (1944) Mad 595 (Z15), a Division Bench of the Madras High Court, held:

> "In proceedings under S. 15, Madras Agriculturists' Relief Act, the Sub-Collector and the District Collector hear and determine disputes of a civil nature and the proceedings before them should be regarded as "civil proceedings" and their Courts as "civil Courts" for the purposes of S. 3, Civil P. C."

It was further held:

> "The declaration of the relative subordination of the 'civil Courts' in S. 3, Civil P. C. for the purposes of the Code must be taken to cover 'revenue Courts' as well in the absence of any saving of such Courts, and they must be deemed to be subordinate to the High Court and subject to its revisional jurisdiction under S. 115, Civil P. C. Section 3 was intended to declare, as a matter of corollary, the relative status and authority of all Courts including revenue Courts in the hierarchy of civil Courts of which the High Court forms the apex."

Similarly in — 'Umakant Nayak v. Gyanendra Prasad Bose', AIR 1945 Pat 128 (Z16), it was held by Agarwala J.:

> "The Collector acting under S. 204 (5), Orissa Tenancy Act of 1913 is a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. and therefore the High Court has power to revise an order made by him under S. 204 (5)....."

Similarly in — 'Arjun Rautara v. Krishna Chandra Gajpati Narayan Deo' AIR 1942 Pat 1: 21 Pat 1 (Z17), it was held by a Full Bench of three learned Judges of the Patna High Court that the Collector's Court acting under the provisions of the Orissa Tenancy Act of 1913 was subordinate to the High Court within the meaning of S. 115, Civil P. C. and its orders could be revised by the High Court. In — Bazler Rahman Khandakar v. Amiraddin', AIR 1944 Cal 401 (Z18), it was held by a Division Bench of that Court that the District Judge acting under S. 40A, Bengal Agricultural Debtors Act does not act as a 'persona designata'. but as 'a Court' subordinate to the High Court, hence his order could be revised by the High Court under S. 115, Civil P. C.

(81) The decisions in all the cases referred to above relating to a right of revision to the High Court under S. 115, Civil P. C., relate to a matter of revision or correction of the decision of an inferior Court held to be subordinate to the High Court. In a case of the present character, however, obviously there is no question of correction or revision by a superior Court of an order passed by an inferior Court. In a case like the present the subordination of an inferior Court to a higher Court i.e. the High Court must necessarily relate to 'the status of the inferior Court as a whole'. It need not refer to the character of a particular order passed by the inferior Court. In this connection, I may refer to the phraseology in which the question referred to me is couched. The mere fact that an Assistant Collector of the First Class is, at the time when the question arises, acting under the Land Revenue Act, or under any other Specific statute, would, to my mind, make no difference. There may or may not be an appeal or a revision available to the High Court against a particular order under a particular statute passed by the revenue Court. It is 'the position of the revenue Court as a whole', and not its position with reference to a particular order passed by it that has to be considered. The object of the provisions of S. 2, sub-s. (1), Contempt of Courts Act is to provide for 'the protection of the position of' Courts subordinate to the High Court against unlawful interference with their judicial functions. For such a purpose, and in such a context, the position of an inferior Court i.e. a subordinate Court must be considered in its totality in relation to the High Court and not with reference to a particular Act or provisions of law under which it may happen to be acting at the time when an alleged interference with its judicial activity occurs.

(82) I now proceed to consider the decisions referred to by learned counsel in the course of their arguments which relate to cases of Contempt of Court. In AIR 1926 All 623 (H), a Special Bench of three learned Judges of this Court, had to consider the High Court's power to punish contempt of Court committed against an inferior civil Court. It was laid down by the Full Bench:

> "Any conduct that tends to bring the authority of the Court into disrespect or which amounts to a false and scandalous attack upon the administration of justice, or an insult offered to the Judge or the dignity of a Judge, even though it may be after the termination of a pending case, amounts to contempt of Court.
>
> The High Court as a Court of Record and 'as the protector of public' justice throughout these provinces has general power of superintendence and control over the inferior civil Courts subordinate to it. It has inherent jurisdiction and power to punish in a summary manner all attempts directed against it or against Courts subordinate to it irrespective

of the fact whether the contempt is committed out of Court or in their presence."

In this case, Sulaiman J. at p. 630, while considering the nature of the power of the High Court to protect its subordinate Courts, observed:

"It is not the territorial limits of the jurisdiction of a Supreme Court, but rather the very nature of its constitution that is of importance. The question which one has to consider is whether the power to protect its inferior Courts is not co-eval with its very foundation and institution, and a necessary incident to every High Court of justice. The circumstance that it is the Supreme Court in these provinces would suggest that it must be armed with the power and have imposed on it the duty of preventing 'brevi manu' attempts to interefere with the administration of justice in the subordinate Courts, for such interference affects the whole administration."

At p. 631, the learned Judge has mentioned three grounds in support of his view. They are:—

"(1) That it is not the indignity of the individual officers which requires to be prevented, but public confidence in the Courts has to be maintained,

(2) that inferior Courts themselves possess no such powers and would be entirely helpless if even the superior Courts cannot protect them, and

(3) that ordinary remedies under the penal laws of the land are meant for offences against officers in their individual capacity and would, if resorted to, be cumbrous and cause considerable delay."

The learned Judge in the course of his judgment has reviewed the leading English cases in support of his view.

(83) In 'AIR 1933 Cal 118 (E)' a Division Bench of the Calcutta High Court, had to consider the scope of S. 2(1), Contempt of Courts Act. In particular, it had to consider whether the Court of Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, was a Court subordinate to the High Court within the meaning of that sub-section. At p. 120, the learned Judges observed:

"It was not suggested that Commissioners are not a Court; and indeed their powers including those of trying, convicting and sentencing are powers peculiar to Courts."

It was held:

"The Court of Commissioners appointed under the Bengal Criminal Law Amendment Act of 1925, is a Court subordinate to the High Court within the meaning of S. 2(1), Contempt of Courts Act."

The reason given for this opinion was that there was a right of appeal to the High Court from the decision of the Commissioners under S. 3(1) of the Act and it followed therefrom that there was power of superintendence vested in the High Court under S. 107, Government of India Act, 1915, which provided for High Courts' power of superintendence over all Courts which were subject to their appellate jurisdiction. The decision of a Special Bench of three Judges of Bombay High Court, in 'AIR 1933 Bom 1 (D)' was followed.

(84) In the case of — 'Bal Krishna Hari v. Emperor', (D) (ubi supra) a Special Bench of three learned Judges of the Bombay High Court, 'inter alia', considered the scope of the High Court's power of superintendence over inferior Courts under S. 107, Government of India Act, 1915. It was held:

"The rights of superintendence which the High Court has under S. 107, Govt. of India Act, 1915, include not only superintendence on administrative points, but superintendence on the judicial side too, and under its powers of superintendence the High Court can correct any error in a judgment of Court subject to its appellate jurisdiction.....

The exercise of a power of superintendence is not the same thing as the hearing of an appeal. The High Court has a discretion to revise or set aside any conviction under its powers of superintendence, but it must exercise its discretion on judicial grounds and only interfere if considerations of justice require it to do so."

(85) In 'AIR 1940 Rang. 68, (F)' a Division Bench of the Rangoon High Court had occasion to consider the meaning of the expression "a Court subordinate to the High Court" within the meaning of sub-s. (1) of S. 2. At p. 70, the learned Judges observed thus:

"We have no doubt that the words, 'subordinate Court' in the Contempt of Courts Act were used in a 'wide sense' as including any Court over which the High Court has superintendence for the purposes of S. 85, Government of Burma Act, 1935 (corresponding to S. 224, Government of India Act, 1935), that is to say, all Courts subject for the time being to its appellate jurisdiction."

(86) Next, I may specifically refer to the provisions of the Land Revenue Act as well as of the U. P. Tenancy Act. The provisions of the Land Revenue Act make it clear that at least the order of an Assistant Collector, First Class, passed under S. 111 (1) (c) 'is appealable to the District Judge or the High Court' as the case may be. So far as the U. P. Tenancy Act (1939) is concerned, S. 243, read with Sch. 2, List I, makes it clear that S. 115, Civil P. C., is not to apply to cases under that Act; but that is so, simply because under S. 276 the Tenancy Act itself provides for the revisional jurisdiction of the High Court over a subordinate revenue Court, in an appropriate case, in which an appeal lies to the District Judge, but no appeal lies to the High Court.

(87) In view of the above provisions, it seems to me clear that the revenue Court i.e., the Court of an Assistant Collector, First Class, is a Court 'subordinate to the High Court.' Consequently, it comes within the power possessed by the High Court to protect its subordinate Courts against unwarranted attacks upon the discharge of its judicial functions. As I have indicated above, in my opinion, it is not necessary that the subordinate Court for purposes of S. 2 (1), Contempt of Courts Act must be subordinate in all its activities to the High Court.

(88) Lastly, I may once more refer to the case of — 'State v. Brahma Prakash (Z7) (ubi supra)', decided by a Full Bench of this Court. In that case, a specific contention was raised before the Full Bench that a 'revenue officer' was not subordinate to the High Court and consequently contempt of his Court could not be punished under the Contempt of Courts Act. On this point, the Full Bench held:

"Section 2, Contempt of Courts Act, when it speaks of Courts subordinate to the High Court, clearly, in our opinion, refers to judicial subordination. Judicial Magistrates are Magistrates of the first class whose judgments come before

Sessions Judges & the High Court in appeal & revision, & their Courts are, we think, clearly subordinate to the High Court within the meaning of S. 2, Contempt of Courts Act. Similarly, the Courts of Revenue Officers, many of whose judgments come before District Judges and the High Court in appeal and second appeal, are subordinate to the High Court for the purposes of S. 2."

(89) In view of the above, it must be held that the High Court has jurisdiction under S. 2(1), Contempt of Courts Act to protect against unwarranted attacks all inferior Courts, including a revenue Court acting under the Land Revenue Act. In my judgment, therefore, the answer to the question referred to me must be in the affirmative i.e. that a Court of an Assistant Collector, first class, under the Land Revenue Act, is "subordinate to the High Court "for purposes of S. 2(1), Contempt of Courts Act (12 of 1926).

(Note.—When the case came up finally before the original Division Bench, Mushtaq Ahmad J. passed the order. He held that the letter referred to in para. 40 was written by the opposite party with a view that it should be filed in the Court of the S. D. O. to influence his mind in deciding the case, even though it was not actually filed by him but by Vidyarthi Das for whose benefit it had been written. His Lordship observed:

"It seems to us quite clear that the letter was not only intended to work up the mind of the S. D. O. but had at least a tendency to create that effect. As a matter of fact the intention underlying the language used is not so material. In certain cases this may be quite irrelevant, the real question being the tendency of the writing to produce a certain effect. To answer the question whether this writing had that tendency one may only read its plain language. If the dispute referred to in the letter had an allusion to the case pending in the Court of the S. D. O., if the word 'niyay' used in the letter alluded to the desired justice to be obtained from the Court of the S. D. O., there can be no doubt that the letter was not only intended to have but also did actually have a tendency to influence the mind of the Magistrate. In view of these facts we are of opinion that the opposite party did commit an offence of contempt of Court by writing the letter in question". Consequently his Lordship was of the opinion that the ends of justice would be met if an award of sentence of Rs. 50/- only as fine on the opposite party is made.)

B/V.S.B. Fine imposed.

A.I.R. 1953 ALL. 435 (Vol. 40, C. N. 195)

MALIK C. J. AND V. BHARGAVA J.

Tejpal Jamunadas, Applicant v. Commissioner of Income-tax, U. P. and V. P. Lucknow, Respondent.

Misc. Judicial Case No. 67 of 1945, D/- 27-10-1952.

(a) Income-tax Act (1922), S. 10 (2) (xi) (as amended in 1939) — Allowance for bad debt — Irrecoverability.

The mere fact that the assessee had lived in hope of recovery of bad debt would not be of any assistance to him unless the Income-tax Officer were to come to the conclusion that there was some basis for that expectation. If the assessee writes off a particular sum as a bad debt in a particular year, the amended section does not prevent the Income-tax officer from considering whether a debt so written off was irrecoverable or not and when it became irrecoverable. AIR 1932 P. C. 178, Rel. on. (Para 7)

Anno: Income-tax Act, S. 10 N 12.

(b) Income-tax Act (1922). Ss. 66(1), 10(2) (xi) — Recoverability of debt is question of fact.

If the Tribunal came to the conclusion that the debt had become irrecoverable in a particular year it is not for the High Court to consider whether, on the same facts they would have come to the same or to a different conclusion. All that they are entitled to see is whether there was material on which the Tribunal could come to the conclusion arrived at by it. (Para 7)

Anno: Income-tax Act, S. 10 N. 12, S. 66, N. 7, 20.

(c) Income-tax Act (1922), S. 10(2)(xv) — Deduction of expenses of non-working branches must be permitted. **(Para 9)**

Anno: Income-tax Act, S. 10 N. 13.

Dr. N. P. Asthana and B. Upadhya, for Applicant; S. C. Das, for Respondent.

CASE CITED:

(A) ('32) AIR 1932 PC 178: 6 ITC 453 (PC)

MALIK C. J.: In this reference under S. 66(2), Income-tax Act, the following questions have been referred to this Court for its opinion:

"Q. 1. Whether there was any evidence to justify the conclusion of the Tribunal that the debt of Rs. 67,186/- became bad before the year under consideration?

Q. 2. Whether the loss of business at Kanpur and at Calcutta can be legally allowed to be set off against the profits of the running business at Mirzapur?

Q. 3. Whether the expenses of the business at Kanpur and at Calcutta can be legally allowed as business expenses of the year under consideration?"

(2) Learned counsel for the parties are agreed that the second question does not arise out of the appellate order of the Income-tax Appellate Tribunal and it is, therefore, not necessary to answer that question.

(3) The assessee is a firm carrying on business in cloth, money-lending and commission agency etc. with its head office at Mirzapur and its branches at Kanpur and Calcutta. A long time ago, the assessee had advanced a sum of Rs. 67,186/- to Jagannath Bagla, his uncle (his father's sister's husband). In the year of account, the assessee wrote off this sum from his account books and, in his return, he showed it as a bad debt. The Income-tax Officer, however, came to the conclusion that the debt had not become irrecoverable in the account year in question but much earlier in Sambat 1990 and refused to grant the deduction.

(4) The other point in dispute was that the two branches at Kanpur and Calcutta had ceased to do further business in cloth, money-lending and commission agency but the premises and the skeleton staff were maintained to realise the outstandings of the business. The assessee had claimed that the expenses incurred therefor at those two branches were allowable as proper expenditure under S. 10(2)(xv), Income-tax Act.

(5) The first and the third questions, which we are required to decide, arise out of those two matters. As regards the first question, we may mention that the assessee maintained his account on the mercantile system. It is not known in which year the amount was advanced to Jagannath Bagla, uncle of the assessee. The account was, however, carried forward year after year in the account books of the assessee and in Sambat 1993 he had got an acknowledgment from the debtor which extended the period of limitation by a further period of three years. On the expiry of the period of three years from Sambat 1993 which fell within the account year, the assessee wrote off the amount as bad debt. It was, however, admitted before the Income-tax Appellate Tribunal that the debtor had no assets in Sambat 1990 from which the amount could be realised and that, in the same year, the assessee stopped calculating interest on the amount advanced, and in Sambat 1990 and thereafter, no interest was added to the amount which had been advanced. It was further proved that no attempt had been made to realise the amount after Sambat 1990 and no reason has been given why no such attempt was made. There are no materials on the record from which it could be deduced that the assessee had any hope of realising any part of this debt. From all these facts, the Tribunal came to the conclusion that the amount had become irrecoverable, at least, in Sambat 1990 if not earlier and the assessee was not entitled to claim the amount as a bad debt in the account year in question.

(6) Learned counsel has urged that if the assessee had really considered the debt to be a bad debt, there was no reason why he should have got a fresh acknowledgment in Sambat 1993 so as to extend the period of limitation by another three years. Learned counsel has pointed out that the assessee lived in hope all these years and it was only when the debt became time-barred that he gave up all hope of its recovery.

(7) Section 10(2)(xi), Income-tax Act, on which reliance is placed, runs as follows:

"10(2)(xi). When the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee."

Since this amendment in 1939, there can be no question that it was for the Income-tax Officer to decide whether a particular debt is irrecoverable or not and the mere fact that the assessee had lived in hope would not be of any assistance to him unless the Income-tax Officer were to come to the conclusion that there was some basis for that expectation. Before the amendment, the point arose out of a decision of the Judicial Commissioner, Central Provinces, and their Lordships of the Privy Council in the case of — 'Commissioner of Income-tax, C. P. & Berar v. S. M. Chitnavis', AIR 1932 P C 178 (A) decided the point and in the light of that decision the amendment appears to us to have been made to provide statutory authority for what their Lordships had laid down in that case. In that case, the Judicial Commissioners had held that the assessee was the sole person to decide whether a debt was bad and when it became bad. Their decision was based on the following reasonings:

"The assessee must, for obvious reasons, be the sole arbiter of his own rights and privileges as regards the business he conducts in his own interests. What is to his interest, and what is prejudicial to him, must depend upon his own decision. It therefore follows that on the question whether to treat any particular debt as bad or irrecoverable, his word or decision must be final; for he alone is or can be the judge of the risks, chances and circumstances which may affect the recovery or non-recovery of that debt from his debtor."

Discussing these observations, their Lordships of the Judicial Committee held:

"Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions which, in their Lordships' view, are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the 'ipse dixit' of any one else."

Their Lordships further went on to hold that

"the mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute-barred debt is not necessarily bad; neither is a debt which is not statute-barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration."

The amendment, no doubt, provides that the Income-tax Officer cannot treat as a bad debt any amount in excess of the amount written off as irrecoverable by the assessee himself, but if the assessee writes off a particular sum as a bad debt in a particular year, the amended section does not prevent the Income-tax Officer from considering whether a debt so written off was irrecoverable or not and when it became irrecoverable. The question, as their Lordships of the Judicial Committee have said, is a question of fact to be decided on the materials placed before the Tribunal. The Tribunal had before it several circumstances which we have quoted above and, as against them, it had the fact that the assessee had continued to carry over and bring forward the amount of debt in his account books year after year and in Sambat 1993 got an acknowledgment to extend the period of limitation. On a consideration of all the facts and circumstances the Tribunal came to the conclusion that the debt had become irrecoverable in Sambat 1990. It is not for us to consider whether, on the same facts, we would have come to the same or to a different conclusion. All that we are entitled to see is whether there was material on which the Tribunal could come to the conclusion arrived at by it. We fail to see how it can be said, in view of the facts and circumstances detailed in the appellate order of the Tribunal, that there was no material for the finding arrived at by it. Our answer to the first question is, therefore, in the affirmative.

(8) We have already said that the second question does not arise.

(9) As regards the third question, we are of the view that the question has not been properly framed. From the appellate order of the Tribunal, it does not appear that there were

separate businesses at Kanpur and at Calcutta. The appellate order of the Tribunal as well as the second paragraph of the statement of the case show that the assessee had its head office at Mirzapur and its branch offices at Kanpur and Calcutta. It further appears from the second paragraph of the Statement of the case that the same business was carried on at the head office as was carried on in Kanpur and Calcutta. It had to be conceded on behalf of the Department that if the assessee's head office was at Mirzapur and he had merely branches at Kanpur and Calcutta for carrying on the same business, then he was entitled to deduct from his business income the expenses incurred in connection with the maintenance of the staff for the realisation of the outstandings at Kanpur and Calcutta and in connection with the rent of the premises at these two places. We, therefore, with the consent of the counsel, re-frame the questior as follows:

> Q. Whether the expenses of the branches at Kanpur and at Calcutta can, in the circumstances of the case, be legally allowed as business expenses of the year under consideration?

Our answer to this question is also in the affirmative.

(10) In view of the fact that we have answered one question in favour of the Department and another in favour of the assessee, we direct parties to bear their own costs.

B/D.R.R. Reference answered.

A.I.R. 1953 ALL. 437 (Vol. 40, C. N. 196)

MALIK C. J. AND V. BHARGAVA, J.

Sithoolal Chhoteylal, Applicant, v. Commr. of Income Tax/Excess Profits Tax, U. P. Lucknow, Respondent.

I. T. Misc. Case No. 220 of 1950, D/-21-10-1952.

Excess Profits Tax Act (1940) S. 10A — Object and Scope — Starting of new firms in order to avoid or reduce excess profits tax — Powers of Excess Profits Tax Officer — He can go behind transactions — Losses of firm must be taken into account in assessing excess profits. (Para 4)

Anno: Excess Profits Tax Act, S. 10-A N. 1.

G. Mehrotra, for Applicant; S. C. Das, for Respondent.

ORDER: The facts are set out in the statement of the case.

(2) In the year 1936 one Sitthoo Lal started a partnership business with his two sons, Banarsi Das and Chhotey Lal, as partners each having an equal share in the profits and losses of the firm which was styled as firm Sitthoo Lal Chhotey Lal. This firm was carrying on wholesale business in cloth at Kanpur. On 6-12-1941, Sitthoo Lal purported to start a new firm known as Anandi Prasad Sitthoo Lal. The partners of this new firm were Sitthoo Lal and one Lal Behari, the former having a fourteen anna share and the latter a two anna share in the profits and losses of the firm. This new firm did part of the business that was being done previously by the old firm Sitthoo Lal Chhotey Lal. On 4-7-1942, Banarsi Das, another partner of the parent firm Sitthoo Lal Chhotey Lal, purported to start a new business in cloth under the name and style of firm Banarsi Das Radhey Shyam. The partners of this firm were Banarsi Das, Chhotey Lal and four outsiders, Banarsi Das having a six anna share and each of the others having a two anna share. On 19-10-1942, the third partner Chhotey Lal started a new firm known as Chhotey Lal Mehrotra in partnership with one Ganesh Narain, each having an equal share. The Income-Tax Appellate Tribunal has held that all these three firms were started with the main purpose of avoiding excess profits tax. Shri Gopal Ji Mehrotra on behalf of the assessee wanted us to direct the Tribunal to refer the question whether the finding that these three firms were started with the main object of avoiding excess profits tax was based on any evidence. This is a belated prayer, the case having been decided by the Tribunal in the year 1949. Moreover, after having read the appellate order of 6-2-1948, when the case was remanded to the Excess Profits Tax Officer, we are satisfied that there were materials on which the finding could be arrived at by the Income-Tax Appellate Tribunal. We, therefore, do not propose to ask the Tribunal to refer any further questions to us.

(3) It appears, however, that, while the firms Anandi Prasad Sitthoo Lal and Banarsi Das Radhey Shyam made profits, the third firm Chhotey Lal Mehrotra incurred losses and the question arose before the Tribunal whether the losses incurred by the firm Chhotey Lal Mehrotra could be taken into account in assessing excess profits. The Tribunal relied on the language of S. 10A, Excess Profits Tax Act, 1940, and came to the conclusion that while the profits should be taken into account, the losses should be ignored. The relevant portion of S. 10-A reads as follows:

> "10-A. Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected..... .... was the avoidance or reduction of liability to excess profits tax, he may,..... ..... make such adjustments as respect liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions."

The Tribunal relied on the words "avoidance or reduction of liability to excess profits tax" and came to the conclusion that the Excess Profits Tax Officer could only avoid those transactions which resulted in the avoidance or reduction of liability to pay excess profits tax. That if the transaction did not, in any way, result in the avoidance or reduction of liability to excess profits tax, the Excess Profits Tax Officer was not bound to avoid that transaction to give, so to say, relief to the assessee. The Tribunal considered that this raised a question of law and referred the following question to this Court for its opinion:

> "Whether, on the true construction of section 10-A (1), Excess Profits Tax Act, could the loss of the firm Chhotey Lal Mehrotra be taken in account in determining the excess profits tax liability of the firm Chhotey Lal Mehrotra for the chargeable accounting period 4-7-1943 to 21-6-1944?"

(4) We may mention that the question raised is a question of first impression. There is

no authority either way. Before, however, going into the language of the sub-section, we may mention that it appears to us to be extremely inequitable that the Excess Profits Tax Officer should be able to avoid a transaction which results in profit and, in a similar transaction which results in loss, he should refuse to the assessee credit for the loss in computing the profits of the business. The Excess Profits Tax Act, as has been repeatedly pointed out, was a war measure for the purpose of bringing back, for national purposes, the extra profits made during the war years which were due to the extraordinary conditions created by the war. The amount was to be taken out of the business, leaving only the normal profit which was known as the standard profit. It was for that reason that while S. 10-A of the Excess Profits Tax Act gave the Excess Profits Tax Officer the right to ignore the artificial reductions in excess profits, that section gave extra power to the Excess Profits Tax Officer to go behind transactions which, though genuine, were mainly effected with the object of evading payment of the tax. In making the computation, therefore, it appears to be inequitable that the Excess Profits Tax Officer, when he finds that the circumstances are exactly the same, should add profits resulting from a transaction while ignoring the losses incurred either in the same transaction or in similar transactions forming part of the same scheme. In the case before us, the finding of the Tribunal is that, behind the starting of these three new firms, there was a common scheme which the Tribunal has expressed in the following words:

"The whole idea in starting these three new firms was to avoid or reduce the liability of the business of the firm Sitthoo Lal Chhotey Lal to excess profits tax."

If these three firms were started as a result of the same scheme and more or less form part of the same transaction, the Excess Profits Tax Officer could not ignore the third transaction which had resulted in loss while taking into account the first two which had resulted in profits.

(5) Sri Gopal Ji Mehrotra, learned counsel for the assessee, has urged that the words 'so as to counteract the avoidance or reduction of liability' do not apply to the power or the jurisdiction of the Excess Profits Tax Officer and merely set out the object behind his action. Learned counsel has urged that the Tribunal has understood this section in the same sense. It is not necessary for us to consider the language of the section in view of the finding that the three new firms were part of the same scheme and must, therefore, be more or less part of the same transaction. The Excess Profits Tax Officer was, therefore, bound to take the profits and losses in all the three new businesses into account.

(6) Our answer to the question is, therefore, in the affirmative. In view of the special circumstances, we make no orders as to costs.

B/H.G.P. Reference answered.

A.I.R. 1953 ALL. 438 (Vol. 40, C. N. 197)

MALIK C. J. AND V. BHARGAVA J.

Ram Gopal, Applicant v. State of Uttar Pradesh.

Civil Misc. Writ No. 200 of 1952, D/- 11-12-1952.

(a) Houses and Rents — U.P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 17 — Rules under — R. 7 — Rule makes previous consultation obligatory. (Para 2)

(b) Houses and Rents — U.P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 17 — Rules under — R. 7 — Scope.

Rule 7 was not intended to cover cases in which the owner of a premises shared the portion allotted to a tenant by the Rent Control Officer. (Para 2)

N. S. Singhal, for the Applicant; Standing Counsel, for the State.

MALIK C. J.: This is an application under Art. 226 of the Constitution by one Ram Gopal Vaish of District Hamirpur. He is the owner of a small three storeyed house, the second storey of which consists of two rooms, one kitchen, one verandah, a latrine and a bath room. Brij Kishore Sub-Registrar was in occupation of the whole of this second storey except one room which was in the occupation of Ram Gopal. On 28-4-1952, Brij Kishore Sub-Registrar was transferred to Karwi and Abdul Rashid Sub-Registrar was posted in his place. The accommodation in the occupation of Brij Kishore was allotted to Abdul Rashid on 29-4-1952, without consulting the applicant, who was the owner of the premises.

(2) Learned counsel for the applicant has relied on R. 7 framed under S. 17, U.P. Temporary Control of Rent and Eviction Act, 1947 (Act 3 of 1947). The rule is as follows:

"Where a portion of accommodation falls vacant and the owner is in occupation of another portion thereof, the District Magistrate shall, before making the allotment order, consult the owner and shall so far as possible make the allotment in accordance with the wishes of the owner."

The rule makes the previous consultation obligatory. The Magistrate is required, as far as possible, to make the allotment in accordance with the wishes of the owner. The learned Standing Counsel has, however, urged that this rule does not apply, as the applicant was not sharing that part of the accommodation which had been allotted to Brij Kishore. We do not think that the rule was intended to cover cases in which the owner of a premises shared the portion allotted to a tenant by the Rent Control Officer. Such a case would hardly ever arise.

If the interpretation put by the learned Standing Counsel is accepted, the rule would apply only to a case where the owner of the premises was sharing the same accommodation with the tenant in whose favour the allotment order had been made and the two had vacated the premises together. The rule clearly means that, where a portion of a building has fallen vacant, a part of which building is occupied by the owner himself, then the wishes of the owner should be ascertained. The reason is obvious. The owner might like to exclude a troublesome tenant whose presence in another part of the building might seriously inconvenience him.

The word 'accommodation' has been defined in the Act as meaning 'residential and non-residential accommodation in any building or part of a building .....' Reading the rule as a whole, we feel satisfied that this was a case

where the Magistrate was bound to give notice to the owner and consult his wishes before making the allotment order.

(3) We, therefore, cancel the allotment order dated 29-4-1952 and direct the Magistrate to make the allotment after complying with R. 7 mentioned above.

(4) The applicant is entitled to his costs of this application.

B/V.R.B. Order cancelled.

A.I.R. 1953 ALL. 439 (Vol. 40, C. N. 198)

BRIJ MOHAN LALL J.

Bhaga and others, Plaintiffs-Appellants v. Girwar and others, Defendants-Respondents.

Second Appeal No. 281 of 1950, D/- 4-11-1952.

Easements Act (1882), S. 62 — Scope.

Each clause of S. 62 is independent of the other. If a licensor can prove that his case falls under any one clause, the license stands revoked even if the remaining clauses do not apply. Thus, where land is given to the ryots so that they may make a house and live in the village, the moment they abandon the residence of the village the purpose is abandoned; in such a case, cl. (f) of S. 62 applies and the license stands revoked. (Para 8)

Anno: Ease. Act, S. 62 N. 1.

P. C. Chaturvedi, for Appellants; J. N. Chaterji, for Respondents.

JUDGMENT: This is a second appeal by the plaintiffs against a decree of the learned Second Civil Judge of Meerut who reversed a decree of the learned Additional Munsif of Ghaziabad and dismissed the appellants' claim with costs.

(2) The appellants lived as ryots in two houses situate in village Ramala, pargana Chaprauli, Tahsil Baghpat in the district of Meerut. They were labourers. They brought the suit which has given rise to this second appeal, to recover possession of the said houses. They alleged that during their temporary absence the respondents (Zamindars) had taken forcible possession of the said houses and had ejected their women folk and cattle.

(3) The respondents' defence, so far as material for the purpose of this second appeal, was that the appellants had abandoned the village and the house, had taken up residence in a different village and thereupon, they (respondents) had taken possession of the houses. It may be stated, however, that the respondents had proceeded in a very cautious and lawful manner. They had sent a report to the District Magistrate that the houses had been abandoned and they had obtained possession of the said houses through police help.

(4) The learned Munsif overruled the defence and decreed the suit. An appeal was preferred by the Zamindars. The learned Civil Judge came to the conclusion that abandonment had been proved. On that finding he allowed the appeal and dismissed the suit with costs.

(5) This appeal was first argued before me on 2-5-1952. Two points were raised, viz., (1) that the inference of abandonment was not justified; and (2) notwithstanding the finding of abandonment the revocation of licence could not take place because it was provided by S. 62(h), Easements Act that a licence could be deemed to be revoked only when it ceased to be used as such for an unbroken period of twenty years.

(6) In my order dated 2-5-1952 I considered the question of abandonment and held that the intention to abandon the house and the appellants' residence in village Ramala had been proved beyond doubt. A finding was called for from the Court below as to whether the two houses had been constructed by the appellants or their ancestors or whether ready built houses had been given to them by the Zamindars. The finding returned by the learned Second Civil Judge is that house No. 1 was not constructed by the appellants, while house No. 2 was constructed by Bhaga (one of the appellants) or his ancestors.

(7) So far as house No. 1 is concerned the appellants were mere licensees and the license could be revoked at any time. The Zamindar certainly revoked it when the appellants left the village Ramala and took up residence in a different village and the Zamindars took possession with police help.

(8) Since house No. 2 had been constructed by the appellants the Zamindars could not revoke the license at their sweet will. Section 60(b), Easements Act lays down that the license cannot be revoked when the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution. But it must be remembered that S. 60 is not the only section under which a license is revoked. This section deals with a case when the license is revoked at the will of the licensor. Section 62 enumerates the circumstances, on the happening of any of one which a license is revoked by operation of law. Clause (h) of section 62 lays down that where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee, the license shall be deemed to be revoked. There is no gainsaying the fact that license cannot be deemed to have been revoked under this clause. Twenty years have not yet elapsed since the appellants abandoned the residence of this village. But if the case does not fall within cl. (h), it does not mean that the license is totally irrevocable. If any other clause applies the licensor shall be entitled to take the benefit thereof. Each clause is independent of the other. If a licensor can prove that his case falls under any one clause, the license stands revoked even if the remaining eight clauses do not apply. The respondents rely in the present case on cl. (f) which says that where a license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable the license is deemed to be revoked. In the present case the land was given to the appellants so that they may make a house and live in the village. The moment they abandoned the residence of the village the purpose is abandoned. Clause (f), therefore, applies and the license stands revoked.

(9) I am, therefore, of the opinion that the decision given by the learned Second Civil Judge was correct. There is no force in this appeal. It is dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 ALL. 440 (Vol. 40, C. N. 199)

BEG J.

Tahawwar Husain, Applicant v. State through Jagannath and another, Opposite Party.

Criminal Ref. No. 118 of 1951, D/-6-11-1952.

Criminal P. C. (1898), S. 147 — Application — Dismissal for default.

It is not open to a Magistrate enquiring into a case under S. 145 or S. 147 to dismiss in default an application made under that section. (Para 7)

Anno: Cr. P. C. S. 145 N. 3 S. 147, N. 2.

M. B. Bhatnagar, for the State.

ORDER: This is a reference by the learned Sessions Judge Farrukhabad, recommending that an order of Sri P. P. Srivastava, Sub-Divisional Magistrate, Kanauj, dismissing an application under S. 147 of the Code of Criminal Procedure in default be set aside.

(2) The reference in question has arisen out of a petition made by one Tahawwar Husain under S. 147 of the Code of Criminal Procedure. Tahawaur Husain is a contractor on behalf of the Farrukhabad District Board of the Kusumkhore Ghat ferry on the river Ganges. The limits of the said ferry are specified in the provincial gazette of the year 1883. The district of Farrukhabad is separated from the district of Hardoi on the north by the river Ganges. A new ferry called the Sarhiapur Ghat ferry was established to the east of the Kusumkhore Ghat ferry by notification in the U. P. Gazette dated 16-11-1946 and its limits, too, were specified. A contract in respect of the new ferry was obtained by one Noor Mohammad from the District Board, Hardoi. This Noor Mohammad and another person named Jagannath, who was a partner of Noor Mohammad, figure as second parties in this application.

(3) The petitioner Tahawwur Husain alleged in his application that the second parties were plying boats within the limits of his ferry thereby encroaching upon his rights. He further alleged that they were interfering with the use of his ferry in such a manner as to practically dispossess him of the said ferry, its landing place and the part of the flowing current within its limits. It was also alleged by him that the second parties were illegally and mischievously stopping passengers from boarding the petitioner's boats, and were threatening to assault the petitioner's boatmen thereby causing a serious apprehension of a breach of the peace.

(4) The Magistrate called for a report from the station officer. On receipt of the said report, he passed an order that he was satisfied that there was an apprehension of a breach of the peace regarding the use of the Kusumkhore Ghat ferry. He accordingly issued notice under S. 147, Criminal P. C. to the parties to file their written statements.

(5) There were no less than 31 dates of hearing in the said case and the petitioner appeared on no fewer than 25. He was, however, absent on 30-9-1950, when the order in question dismissing the petition in default was passed.

(6) According to the allegations of the petitioner, the second parties had got him arrested by the police on 30-9-1950, and, therefore, he could not appear. Aggrieved with the order of the Magistrate dismissing his application for default he filed a revision before the learned Sessions Judge who has referred this case to the High Court with the above mentioned recommendation.

(7) The sole question for decision before me is whether, it is open to a Magistrate enquiring into a case under S. 147, Criminal P. C. to dismiss in default an application made under that section. Sub-clause (1), S. 147, Criminal P. C. lays down that the procedure to be followed for proceedings under S. 147 is to be the same as that followed in proceedings under S. 145, Cr. P. C. and the provisions of S. 145, Cr. P. C., shall, as far as may be, apply to proceedings under S. 147 of the Code.

Section 145 of the Code lays down that:

"(1) Whenever a District Magistrate, sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) ....

(3) ....

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

....

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) be treated as being in such possession of the said subject. he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of possession until such eviction, and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

* * * *

* * * *."

(8) The extracts from S. 145. Criminal P.C. quoted above show that the legislature has laid down a comprehensive procedure to be followed in such cases. There is no provision at all therein for the dismissal of such an application in default. On the other hand, it is

laid down there that if once the Magistrate comes to the conclusion that there is a likelihood or apprehension of a breach of the peace it is the bounden duty of the Magistrate to issue notice to the parties, to call upon them to file their written statements and to take such evidence as they adduce in support of their cases. It is also open to the Magistrate to summon such evidence 'suo motu' as he considers necessary to enable him to arrive at a conclusion regarding the factum of possession. Sections 145 and 147, Criminal P.C., find place in Chapter XII of the Criminal P.C., the heading of which is "Disputes as to Immoveable Property". The object of these proceedings is to enable the Magistrate to come to a conclusion regarding the factum of possession in order to avoid a breach of the peace. Once a Magistrate has given a finding that there is an apprehension of a breach of the peace it is his responsibility to see that the proceedings are continued till they are concluded in the manner prescribed by that section.

The Magistrate has to continue the said proceedings unless and until he comes to the conclusion that the danger of a breach of the peace has disappeared and in that case only he can cancel his order and stay further proceedings. Thus there are only two courses open to the Magistrate. He has either to pass a final order in the case under sub-cl. (6) or cancel the said proceedings under sub-cl. (5) of section 145 of the Code. It is also significant that the Code nowhere specifies that the procedure prescribed either for the trial of summons or of warrant cases is to be followed in such proceedings. Even the death of a party does not result in the termination of the proceedings which are to continue in spite of it. Thus sub-cl. (7) of S. 145, Criminal P.C. provides that when any party to such proceedings dies, the Magistrate should cause the legal representatives of the deceased party to be impleaded in the proceedings and to continue the inquiry. The procedure of dismissing such an application for default does not seem to be contemplated anywhere in the Code. On the other hand, there are definite and clear indications to the contrary.

(9) Under the circumstances, the order dismissing the aforesaid application for default is unwarranted, and cannot be sustained. I accordingly accept the recommendation made by the learned Sessions Judge, set aside the order passed by the Magistrate and direct the Magistrate to restore the case and proceed with it from the stage at which it was dismissed.

B/D.H. Reference accepted.

A.I.R. 1953 ALL. 441 (Vol. 40, C. N. 200)

BRIJ MOHAN LALL J.

Mahabir Prasad, Plaintiff-Appellant v. Kewal Krishna, Defendant and others, Pro forma Defendant, Respondents.

Second Appeal No. 2258 of 1952, D/- 27-11-1952.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7(1) — "Vacant" — Meaning of.

The word "vacant" does not mean that the tenancy should determine. It means that the tenant should have ceased to occupy the accommodation with the intention of not coming back to it again. If these conditions are satisfied, the house becomes "vacant" irrespective of the fact whether the tenant's liability to the landlord for payment of rent has ceased or not. (Para 4)

S. N. Divedi, for Appellant.

JUDGMENT: This is a second appeal by a plaintiff against a decree of the learned second Civil Judge of Kanpur who has affirmed a decree of the learned city Munsif of that place. The latter had dismissed the appellant's suit with costs.

(2) It appears that the appellant was the tenant of a house. One Gaya Prasad made an application to the House Allotment Officer of Kanpur praying that the house which was in the occupation of the appellant be allotted to him. On that petition the appellant made an endorsement to the effect that he would vacate the house on 30-11-1951. One Kewal Krishna, who was also anxious to get a house for himself, appeared on the scene and he too made an application for the allotment of the said house to him.

When the appellant came to know of Kewal Krishna's application, he intimated to the House Allotment Officer that he did not intend to vacate the house. The result was that the said officer rejected both the applications. Thereafter the appellant left the house and put Gaya Prasad in possession thereof in the first week of December 1951. Gaya Prasad made another application to the House Allotment Officer so that the house might be allotted to him formally. Kewal Krishna again put in appearance and made an application for the allotment of the said house. The allotment was made in favour of Kewal Krishna.

(3) It was, in these circumstances, that the appellant brought the suit, which has given rise to this second appeal, for an injunction to restrain Kewal Krishna from taking possession of the house. His contention was that he had not vacated the house and therefore the House Allotment Officer had no right to make any allotment whatsoever. The findings of the Courts below, as already stated, are that the appellant had actually gone out of the house and had no intention of coming back to it. The contention put forward on behalf of the appellant is that since he had given no notice to the landlord determining the tenancy and since he continued liable to him for the payment of rent he had not 'vacated' the said house.

(4) It is true that the House Allotment Officer's power to pass an order of allotment arises when the house falls 'vacant'. But the word 'vacant' does not mean that the tenancy should determine. Had it been the intention of the Legislature that the power of allotment should be exercised only after the determination of the tenancy, it would have said so in clear terms. The word 'vacant', as used in the U. P. Temporary Control of Rent and Eviction Act (3 of 1947) means that the tenant should have ceased to occupy the accommodation with the intention of not coming back to it again. If these conditions are satisfied, the house becomes 'vacant' irrespective of the fact whether the tenant's liability to the landlord for payment of rent has ceased or not. Since the findings in the present case are that the appellant had ceased to occupy the house and

had no intention of coming back to it, the house had actually fallen 'vacant', and the House Allotment Officer had jurisdiction to pass the order which he did.

(5) The propriety of the order passed by the House Allotment Officer cannot be gone into in these proceedings. It is not for this Court to say as to whether Kewal Krishna had a better right or Gaya Prasad. That was a matter within the jurisdiction of the House Allotment Officer.

(6) In the circumstances, I find no force in this second appeal. It is dismissed under O. 41, R. 11, C. P. C.

B/V.R.B. Appeal dismissed.

A.I.R. 1953 ALL. 442 (Vol. 40, C. N. 201)
(LUCKNOW BENCH)

MISRA J.

Chief Inspector of Stamps, U.P., Applicant.

In re:

Lal Dhananjay Singh, Plaintiff v. Lal Bhim Bikram Singh and another, Defendants.

Appln. No. 80 of 1949, D/- 5-9-1952.

Court-fees Act (1870), S. 7(ii), (U.P.) and Art. 17(iii) — Applicability — Suit for declaration of plaintiff's right to certain pension and for arrears thereof — Art. 17(iii) applies — (Pensions Act (1871), S. 6).

Section 7(2) has no application to a suit for a bare declaration of the plaintiff's right to receive arrears of pension or to get periodical payment in future to which the Pensions Act applies. It is obviously governed by Art. 17(iii).

(Para 4)

Anno: Court-fees Act, S. 7(ii) N. 1; Pensions Act, S. 6 N. 1.

B. K. Dhaon, for Chief Inspector of Stamps; B. N. Roy, for Defendants.

ORDER: This revision application filed by the Chief Inspector of Stamps, U.P. relates to court-fee payable by the plaintiff Lal Vir Dhananjai Singh in a suit filed by him in the Court of Civil Judge, Gonda. According to his court-fee report made in the Court below there was a deficiency of Rs. 856/14/-.

(2) The suit was for declaration that the plaintiff is the rightful successor to the estate of his father Lal Harihar Pratap Singh as heir or as legatee under his will executed in 1939 and further that he is entitled as such to half share of the monthly heritable pension of Rs. 200/-, which his father got from the Government. It would appear from the allegations contained in the plaint that the plaintiff's predecessor-in-interest Raja Udai Prakash Singh, whose estate was confiscated during the mutiny, was later on granted by the Government a number of villages and a heritable pension of Rs. 300/- per month for his own maintenance and the maintenance of his dependents as the earlier order of confiscation was found to be unjustified. The ultimate liability for the payment of this pension was made to rest on the Maharaja of Kapurthala to whom taluqa Ikauna belonging to Raja Udai Prakash Singh was given after confiscation. The Maharaja used to deposit Rs. 1800/- every six months under arrangement with the Government in the Bahraich treasury. During the life time of Raja Udai Prakash Singh the entire sum was paid to him by the Government. After his death it was divided between his brother Umrao Singh and Lal Harihar Pratap Singh, the plaintiff's father, the latter's share being Rs. 200/- per month. On the death of Lal Harihar Pratap Singh the plaintiff and defendant 1 Lal Bhim Bikram Singh, it was alleged, inherited this pension and each of them is entitled to get Rs. 100/- per month, but the latter fraudulently got his name entered in the papers as the sole heir of Lal Harihar Pratap Singh. It was further stated that a sum of Rs. 15600/- has now accumulated and is in the Government treasury at Bahraich in respect of the pension due to the heirs of Lal Harihar Pratap Singh for the period October 1942 — May 1948. The plaintiff Lal Vir Dhananjai Singh, therefore, claimed the following reliefs:

(a) A declaratory decree to the effect that the plaintiff is the rightful legatee or heir of his father and is as such entitled to half of the accumulated sum, that is Rs. 7800/- and Rs. 100/- per month hereafter as maintenance,

(b) The costs of the suit, and

(c) Any other relief to which he may be found entitled.

(3) The Chief Inspector of Stamps claimed that what the plaintiff sought in substance was a decree for recovery of Rs. 7800/- and a declaration to the effect that he is entitled to an annuity of Rs. 100/- per month. According to him these were consequential reliefs and, therefore, 'ad valorem' court-fee of Rs. 728/2/- was payable in respect of Rs. 7800/- and a further sum of Rs. 146/14/- on 12 times the annuity was due under S. 7(ii) (a), Court-fees (Amendment) Act. The total of these two amounts came to Rs. 875/-, but since Rs. 18/12/- had already been paid by the plaintiff, he reported that there was a deficiency of Rs. 856/4/-. The learned Civil Judge, Gonda, did not accept the report and the Chief Inspector of Stamps has, therefore, come up to this Court by way of revision.

(4) The suit related to a right in respect of pension and was filed after obtaining the necessary sanction of the Deputy Commissioner, Bahraich under S. 6, Pensions Act. That section also provides against the passing of an order or decree whereby the liability of the Government to pay the pension may be directly or indirectly affected. Thus the relief claimed in the present suit in view of S. 6 could not contain a prayer for a consequential relief and on the plain language of the plaint it is not possible to hold that a consequential relief was sought. Paragraph 2 of S. 7, Court-fees Act, relates to suits for recovery of maintenance and annuities or other sums periodically payable. It has no application to a suit for a bare declaration of the plaintiff's right to receive arrears of pension or to get periodical payments in future. The suits referred to there are those which terminate in executable decrees enabling the plaintiff to get under the order of the Court the arrears of maintenance or annuities claimed. Suits for mere declaration would obviously be governed by Art. 17(iii), Sch. II, which prescribes a fixed court-fee of Rs. 18/12/- when no consequential relief is prayed for. In my judgment the view taken by the learned Civil Judge is correct.

(5) The application is dismissed with costs.

B/D.R.R. Application dismissed.

A.I.R. 1953 ALL. 443 (Vol. 40, C. N. 202)
(LUCKNOW BENCH)
V. BHARGAVA J.

Shiam Manohar and others, Accused-Applicants v. The State.

Criminal Revn. Appln. No. 6 of 1952, D/-1-8-1952.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 11 — Report under, need not be identical with report of investigating officer under S. 173, Cr. P. C. — Report of Prosecuting Inspector alone with documents filed can be taken into account — S. 11 held complied with. (Para 2)

(b) Essential Supplies (Temporary Powers) Act (1946), S. 11 — Report under, need not mention particular clause of the Order which has been contravened — Mention of facts constituting offence, is all that is required — Facts mentioned showing contravention of cls. (iv), (v) and (ix) of S. 3, U.P. Foodgrains (Movement) Control Order, 1949 — Charge of Magistrate also correctly enumerating facts — Held there was no error. (Para 3)

(c) Criminal P. C. (1898), S. 342 — Accused pleading guilty — Fact that accused were not properly questioned under S. 342 held did not prejudice accused. (Para 5)

Anno: Cr. P. C., S. 342 N. 35.

(d) Essential Supplies (Temporary Powers) Act (1946), S. 7 — Facts in charge describing offence under cls. (v) and (ix) of S. 3, U.P. Foodgrains (Movement) Control Order, 1949 — No specific mention of cl. (ix) — Conviction under cl. (ix) and forfeiture of rice held not illegal. (Para 6)

Manik Chand Jain, for Applicants; B. L. Kaul for Govt. Advocate, for the State.

CASE CITED:

(A) ('46) AIR 1946 All 416: 47 Cri LJ 876

ORDER: This revision has been filed by four persons, viz., Shyam Manohar, Ram Piaro, Ganga Prasad and Ram Kishore, who have been convicted for an offence punishable under S. 7, Essential Supplies (Temporary Powers) Act, 1946, read with Cl. (V) of S. 3, U. P. Foodgrains (Movement) Control Order, 1949. Shyam Manohar and Ram Piaro have been sentenced to pay a fine of Rs. 500/- or, in default, to undergo rigorous imprisonment for three months each. Ram Kishore and Ganga Prasad have been sentenced to pay a fine of Rs. 250/- each, or, in default to undergo six weeks' rigorous imprisonment each. The offence is alleged to have been committed in October 1949.

(2) The main point, that has been taken by the learned counsel for the applicants in this revision, is that the trial Court wrongly took cognisance of this case as there was no report in writing by a public officer giving facts constituting the offence as required by S. 11, Essential Supplies (Temporary Powers) Act. It appears that the case was first investigated by a Sub-Inspector of Police who submitted a charge-sheet through the Prosecuting Inspector of Police. The Prosecuting Inspector on the same charge-sheet, recorded a report addressed to the Magistrate and made the documents, viz., the First Information Report which had been lodged at the Police Station and the report of recovery of certain foodgrains from the motor truck belonging to or driven by the applicant of the report. Learned counsel has contended that the report of the investigation officer in charge-sheet does not give facts constituting the offences and this is correct. That charge-sheet merely served the purpose of the report of the investigating officer under S. 173, Criminal P. C. There is no requirement that the report under S. 11, Essential Supplies (Temporary Powers) Act, 1946, must be identical with the report of the investigating officer under S. 173, Criminal P. C. nor is it anywhere laid down that the two reports must necessarily be by the same officer. In order to see whether S. 11, Essential Supplies (Temporary Powers) Act has been complied with or not, therefore, the report of the Prosecuting Inspector of Police can be taken into consideration. This report has to be read as a whole with the two documents which form part of this report. The report mentions that the First Information Report & the recovery report were being attached with it. All the three documents read together clearly give all the facts constituting the offence. It is clearly mentioned that wheat and rice were being transported on a motor truck and that, at the time when the motor truck was caught, it was coming out of the abadi of village Purwa and going towards Maurawan. It was also mentioned therein that the destination of the grain was Lucknow. These facts clearly make out that there was contravention of the orders made under S. 3, Essential Supplies (Temporary Powers) Act, 1946, relating to foodgrains.

(3) Learned counsel has further based his arguments on the fact that the report by the Prosecuting Inspector mentioned that the facts given by him constituted contravention of cl. (v) of S. 3, U. P. Foodgrains (Movement) Control Order, 1949. The lower Court in convicting the applicants also applied the same clause. Section 11, Essential Supplies (Temporary Powers) Act, 1946, does not, however, require that the report must correctly mention the particular clause of the order which has been contravened. All that is required by that section is that the facts constituting an offence should be clearly brought out. In this case, even the provision of law, under which the punishment was to be given, was correctly mentioned being S. 7, Essential Supplies (Temporary Powers) Act, 1946. There can be no doubt at all that the facts, which were given in the report and which were found to be established in the trial, clearly made out that there was contravention of the orders in cls. (iv) or (v) and (ix) of S. 3, U. P. Foodgrains (Movement) Control Order, 1949. Since the facts were correctly mentioned and the charge framed by the Magistrate also correctly enumerated them, there has been no error which can vitiate the trial. In the report as well as in the charge framed by the Magistrate, the provision of law, under which the punishment was awarded has also been correctly mentioned as S. 7, Essential Supplies (Temporary Powers) Act, 1946. The mere error in mentioning in the report as well as in the charge framed by the Magistrate the particular clause of the U. P. Foodgrains (Movement) Control Order, 1949 which had been contravened cannot, therefore, vitiate the trial or the conviction. Consequently this argument also has no force and there is no reason for interference on this ground.

(4) Learned counsel relied on various decided cases in which it has been held that provisions of law like those in S. 11, Essential Supplies (Temporary Powers) Act, 1946, must be strictly construed. So far as this case is concerned, even the strictest construction of S. 11, Essential Supplies (Temporary Powers) Act would show that that provision of law has been complied with. The strictest construction can only lead to the requirement that all the facts constituting the offence must be mentioned in the report and as I have said before, the report read with the documents which formed part of it does mention all these facts on the basis of which the applicants have now been convicted. Learned Counsel also referred to a decision of a learned Single Judge of this Court in — 'Dr. N. C. Chatterji v. Emperor', AIR 1946 All 416 (A) where it was held that incorrect mention of the particular order which had been contravened vitiated a conviction under the Defence of India Rules and that this incorrect mention was not merely an irregularity but an illegality. That case is however of no assistance in the present case because, in that case, what was required under the Defence of India Rules had to be taken into account was the requirement of S. 11, Essential Supplies Act. Under the Defence of India Rules the facts constituting the contravention of the order has to be given whereas under S. 11, Essential Supplies Act, what has to be given are facts constituting the 'offence" and not the facts constituting the "contravention". It was because the word "contravention" was used there that the learned Judge was of the view that the particular order contravened had to be correctly mentioned.

In this case, since all that was needed was to give facts constituting the "offence", the acts which resulted in the contravention of the order, need only be mentioned and there was no essential requirement of correctly mentioning the particular clause of the order contravened. Learned Counsel also cited before me two decisions of the Madras and the Bombay High Courts but it appears that neither of them is applicable to the present case and I do not therefore consider it necessary to discuss them. On this ground, the revision has no force.

(5) The second point that has been taken by the learned counsel for the applicants is that the applicants in this case were not properly questioned under S. 342, Criminal P. C. and, therefore, their conviction is vitiated. This is a case where all the four applicants pleaded guilty. This plea of guilty was certainly not to be treated as a plea relating to law but as a plea relating to facts. The plea is final and binding and there can now be no question of their being prejudiced after they have already pleaded guilty.

(6) The third point that the learned counsel raised was that the order of forfeiture in so far as it related to rice was, at least liable to be set aside because the conviction recorded by the lower Courts was for an offence punishable under S. 7, Essential Supplies (Temporary Powers) Act read with cl. (v) of S. 3, U. P. Foodgrains (Movement) Control Order, 1949, and not read with cl. (ix) of S. 3 of that Order. It is again to be noticed that when the Magistrate framed the charge against the applicants he clearly mentioned that rice had also been transported and that this transport of rice was an offence punishable under S, 7, Essential Supplies Act. The mere failure to mention cl. (ix) of S. 3, U. P. Foodgrains (Movement) Control Order, 1949 was not material and the conviction in respect of the transport of rice by the motor truck was also, therefore, correct. This being so, the order of forfeiture was valid.

(7) The revision has no force and it is dismissed. The fines shall now be paid within one month during which period the stay order will continue to operate. If the fines are not paid within this period, steps will be taken for realisation of fines and enforcement of the order of imprisonment in default.

B/R.G.D. Revision dismissed.

A.I.R. 1953 ALL. 444 (Vol. 40, C. N. 203)

SAPRU AND CHATURVEDI JJ.

Laxmi Talkies Ltd. through Kashi Bishambhar Agarwal, Managing Director, Katra, Allahabad; Applicant v. Collector, Allahabad, Opposite Party.

Civil Misc. Writ No. 250 of 1952, D/- 18-11-1952.

U. P. (Temporary) Storage Requisition Act (12 of 1947), S. 3 Proviso — Prior sanction.

Where the building was never used for storage purposes the order of requisition could be passed by the Collector only with the prior sanction of the State Government. The subsequent sanction cannot ratify the act of the Collector. (Paras 2, 3)

S. N. Kacker for Applicant; S. C. for Opposite party.

SAPRU, J.: This application has been presented on behalf of the Laxmi Talkies Ltd., through its managing Director, Shri Kashi Bishambhar Agarwal. The relief claimed under Art. 226 of the Constitution is that this Court may be pleased to issue a writ or suitable direction quashing the order of requisition passed by the opposite party, on 26-5-1952 under S. 3 of the U. P. (Temporary) Storage Requisition Act, 1947.

(2) The applicant is a limited company incorporated for purposes of exhibiting films at Allahabad. It is admitted that the building in question was never used for storage purposes. The building is not meant for storage purposes and it consists of delicate fittings. Nevertheless, on 26-5-1952 an order of requisition was passed by the Collector. This order could be passed under S. 3 of the U. P. (Temporary) Storage Requisition Act of 1947 only with the prior sanction of the State Government. Section 3(1) empowers the Collector to requisition any storage accommodation for storing foodgrains within a period which shall not be less than 3 days from the date of service of the order; provided that no accommodation which is not ordinarily used for storage shall be requisitioned without the prior sanction of the Provincial Government.

(3) The position in this case is that no prior sanction of the Provincial Government was obtained. After the writ application had been filed, the sanction of the Government was obtained on 2-6-1952. The question is whether this subsequent sanction can ratify the act of the Collector. In our opinion, importance has to be attached to the word 'prior'. We cannot, in considering the question whether the sanction was in fact obtained, ignore the word

'prior'. When the Legislature used that word it intended that, before the requisition order was passed, the Collector should have obtained the sanction of Government. In these circumstances there is no doubt, in our mind, that the order passed by the Collector was, at the time it was made, an illegal order. But, in the circumstances of this case, we do not think it necessary to make an order as to costs.

B/D.H. Application allowed.

A.I.R. 1953 ALL. 445 (Vol. 40, C. N. 204)

MALIK C. J. AND V. BHARGAVA J.

B. N. Rama and Co., Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

I. T. Misc. Case No. 19 of 1950, D/- 12-11-1952.

Income-tax Act (1922), S. 25(3) and (4) — Same or separate businesses.

The assessee claiming benefit of S. 25 (3) and (4) has to prove that the business, which had been discontinued, was the same business which had been charged with income-tax under the provisions of the Income-tax Act of 1918.

Where the assessee merely proves that the capital invested in the two businesses, in respect of which the benefit of S. 25(3) and (4) is claimed came out of the joint funds of the Hindu undivided family and were both owned by the same Hindu undivided family and assessed together, the necessary conclusion that the two businesses were the same business cannot be drawn so as to entitle the assessee to claim benefit of S. 25(3) and (4). (Para 2)

Anno: Income-tax Act, S. 25 N. 1.

A. Sanyal, for Assessee; S. C. Das, for Opposite Party.

MALIK C. J.: This is a reference under S. 66(1), Income-tax Act and the question referred to us for decision reads as follows:

"Q. Whether, in view of fact that the capital invested in the businesses in respect of which the benefit of S. 25(3) and (4) is claimed flowed out of the same nucleus of the Hindu undivided family from which the Hindu undivided family business in respect of which the tax was paid under the Act of 1918 and of the fact that both the businesses were owned by the same Hindu undivided family and assessed together, the businesses started subsequent to 1918 would be entitled to the benefit of the provisions of S. 25(3) and (4) as ramifications of the old business which was assessed to tax under the Act of 1918?"

(2) In effect, we have been asked to give our opinion on the point whether if the following two facts are proved that

(1) The capital invested in the two businesses, in respect of which the benefit of subss. (3) and (4) of S. 25, Income-tax Act is claimed, came out of the joint funds of the Hindu undivided family; and

(2) The two businesses were both owned by the same Hindu undivided family and assessed together;

the conclusion must necessarily be drawn that both the businesses were one and the same so that if the Hindu undivided family had paid income-tax for one business under the Income-tax Act of 1918, it would be entitled to benefit for the other business under subss. (3) and (4) of S. 25 of the Act. The mere fact that a Hindu undivided family and not an individual had carried on the business should make no difference and we fail to see how the fact that an individual had invested his own money and carried on two businesses must lead to the necessary conclusion that the two businesses were one and the same and were not two separate businesses. It was for the assessee to prove that the business, which had been discontinued, was the same business which had been charged with income-tax under the provisions of the Income-tax Act of 1918. It appears from the appellate order of the Income-tax Appellate Tribunal that the counsel for the assessee was asked whether he could prove that it was the same business, which had been charged with income-tax under the provisions of the Income-tax Act, 1918, from his account books or otherwise but he expressed his inability to do so on the ground that the old account books were not available. No evidence was tendered on behalf of the assessee but reliance was placed on certain old records. Learned counsel has stated that the records meant the old assessment records. Barring the fact that the assessee contended that both the businesses were carried on by the same Hindu undivided family and funds were invested out of the joint funds of that family, no other circumstance appears to have been relied upon and, as we have already said, it is impossible to hold that, merely on these two facts, the necessary conclusion must be drawn that it was the same business in respect of which income-tax had been paid under the provisions of the Income-tax Act of 1918. Not only there were no materials to prove to the satisfaction of the Tribunal that it was the same business, there were certain other facts and circumstances relied upon by the Tribunal which pointed towards a different conclusion. The Tribunal pointed out that, from the assessment order for the year 1922-23, it appeared that the account books for the two businesses were separate, that the expenditure over the staff and other expenses were separately claimed in the return, that the Johnstonganj business, which was assessed to tax under the Income-tax Act of 1918, was closed in the year 1926 and that there was nothing to show that either the capital or the assets of that business were transferred to the Canning Road business. The Tribunal held that there did not appear to be any interlacing or intermingling of the two businesses at any stage. The finding recorded was, therefore, clearly a finding of fact, based on such materials as were available.

(3) Our answer to the question referred to us for opinion, therefore, is in the negative. The assessee must pay the costs to the Department which we assess at Rs. 300/-.

B/K.S. Answer in the negative.

A.I.R. 1953 ALL. 446 (Vol. 40, C. N. 205)

SANKAR SARAN AND
BRIJ MOHAN LALL JJ.

Gauri Shankar and Sons, Plaintiff-Appellant v. Union of India (General Manager, E. I. Rly., Calcutta), Defendant-Respondent.

F. A. F. O. No. 8 of 1952, D/- 21-11-1952.

Arbitration Act (1940), S. 34 — Applicability and Scope.

Where resort to arbitration was to be made only in the event of a dispute arising "under these conditions, or in connection with the contract", it could never be the intention of the parties that if one of them committed a tort e.g. defamation the dispute relating to compensation for the alleged tort did fall within the purview of the arbitration clause. (1915) 3 KB 167, Rel. on; (1947) 2 All ER 260, Expl. (Paras 2, 3, 4, 6)

Section 34 does not make it obligatory on the Court to necessarily refer the dispute to arbitration. It gives the Court a discretion to stay the proceedings in Court "if it is satisfied that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement." (Para 7)

Anno: Arbitration Act, S. 34 N. 2 and 15.

A. P. Pande, for Appellant; J. Swarup, for Respondent.

CASES CITED:

(A) (1915) 3 KB 167: 84 LJ KB 1091
(B) (1947) 2 All ER 260

BRIJ MOHAN LALL J.: This is an appeal by the plaintiff against an order passed by the learned Civil Judge of Moradabad staying, under S. 34, Arbitration Act, (10 of 1940), a suit instituted by him against the Union of India.

(2) The appellant is a joint Hindu family firm carrying on the business of contractors. It entered into a contract to supply large quantities of stone boulders and stone chips to the East Indian Railway at railway station Kansrao. Some differences arose between the appellant and the railway authorities. Certain letters were exchanged between them, but they served only to widen the gulf between the two. Eventually, the railway authorities cancelled the contract, removed the appellant's name from the list of approved contractors and circulated that decision to all the Station Masters with the result that the appellant became debarred from securing any contract from the railway administration in future. Thereupon, it instituted the suit which has given rise to this appeal to recover a sum of Rs. 3,787-5-3 as damages for breach of contract and a further sum of Rs. 1,00,000-0-0 as compensation for libel. Its contention was that the railway authorities had acted maliciously with a view to harm its reputation and their conduct in circulating their decision to "blacklist" the appellant amounted to a libel. This part of the appellant's case may best be stated by reproducing a portion of para 12 of the plaint. It runs as follows:

"Further the removal of the name of the plaintiff firm from the list of approved contractors and blacklisting them was also made deliberately to put the plaintiff to disgrace, cause loss to them in the matter of their existing contracts, damage their professional career, injure their reputation as contractors and harass them in carrying out the running contracts with the railway department. With that end in view, the fact of the plaintiff firm having been blacklisted and removed from the list of approved contractors was circulated and published amongst other parties to bring the plaintiff into contempt and create hatred against them with the intention of ruining plaintiff's business and career as contractors."

(3) Before filing the written statement the respondent moved the learned Civil Judge to stay the proceedings under S. 34, Arbitration Act. It is common ground between the parties that para 65 of the publication entitled "The Specifications, Instructions and General Conditions of Contract" is applicable to the present case. This para runs as follows:

"In the event of any question or dispute arising under these conditions or in connection with the contract (except as to any matter the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator who shall be ....."

It was contended by the respondent before the Civil Judge, and the same contention is reiterated before us, that this clause barred the trial of the suit by the learned Civil Judge. The appellant concedes that the portion of the claim relating to the recovery of a sum of Rs. 3,787-5-3 on account of the breach of contract is covered by this agreement. But it is contended that the claim for recovery of Rs. 1,00,000-0-0 as compensation for libel does not fall within the four corners of this agreement.

(4) The language of para 65 quoted above makes it clear beyond doubt that a resort to arbitration is to be made only in the event of a dispute arising "under these conditions, or in connection with the contract." This means that if the parties are at variance as to the interpretation of any conditions of the contract, or one party asserts that any condition of the contract has been violated and the other denies it, or a demand is made by one party for getting some thing done under the terms of the contract which the other party considers to be outside the scope of the contract, the dispute has to be referred to arbitration. It is only matters relating to contract or the breach thereof that are to be referred to arbitration. It was never the intention of the parties that if one of them committed a tort giving rise to claim for compensation in favour of the other the dispute about the tortious act of the guilty party would also be referred to arbitration. Parties never contemplated that a claim for defamation brought by one party was to be referred to arbitration instead of being tried by a Court of law. The whole tenor of the agreement indicates that the parties were at pains to provide for the due fulfilment of contract and were anxious to have such disputes settled through arbitration. A claim for compensation for defamation, such as has been brought by the appellant, is totally different from the question of performance of contract of delivery of stone boulders and stone chips. It is totally immaterial for the decision of the claim for defamation as to whether the appellant was guilty of breach of contract to supply the aforesaid commodities, or whether the railway authorities prevented the appellant firm from performing his part of the contract. The claim under tort brought by the appellant is totally distinct from the contractual disputes arising between the parties.

(5) In this connection reference may be made to the case of — 'Monro v. Bognor Urban District Council', (1915) 3 KB 167 (A). In that case also there was an agreement between the parties that

"If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract, the matter shall be referred to and determined by the engineer."

(6) The contractor sued to avoid the contract, on the ground that his consent thereto had been obtained by fraudulent misrepresentation. The other party pleaded the aforesaid agreement in bar of the trial. It was held that the suit was not barred because the alleged fraudulent misrepresentation was not a dispute "upon or in relation to or in connection with the contract." On behalf of the respondent reliance was placed on the case of — 'Woolf v. Collis Removal Service', (1947) 2 All ER 260. In that case there was an agreement to the effect that the defendants would remove the plaintiffs' furniture and effects from London to Marlowe and would safely keep and take care of them there. The plaintiffs claimed damages on the allegations that the defendants had been negligent in the discharge of their duties and had caused loss to him. There was an arbitration clause and relying on that clause it was contended by the defendants that the dispute should be referred to arbitration. The plaintiffs maintained that the allegations of negligence raised an issue of tort and should be tried by Court. This plea was overruled by the Court. This authority has been cited by the learned counsel for the respondent in support of the contention that a question of tort also can be referred to arbitration. The decision in this case does not lend support to this proposition. It was pointed out in the judgment of that case that the terms of the agreement imposed an obligation on the defendants to observe due diligence in the discharge of their contract and that negligence shown by them amounted to a breach of the term of contract. It was pointed out that negligence was a negation of due diligence, and, therefore, a breach of contract. It was on this ground that the Court held that although allegation of negligence 'prima facie' gave rise to an issue of tort, it raised really no issue other than an issue of breach of contract. One important sentence in the judgment at page 263 will bear quotation. It runs as follows:

"In the present case there is an obligation of diligence in the contract itself, pleaded in para 2 of the statement of claim, and apparently co-extensive with the non-contractual obligation of diligence."

It will, therefore, follow that this authority does not support the respondents' contention. In the circumstances, we are of the opinion that the dispute relating to compensation for the alleged defamation does not fall within the purview of the arbitration clause.

(7) It may also be pointed out that S. 34, Arbitration Act, does not make it obligatory on the Court to necessarily refer the dispute to arbitration. It gives the Court a discretion to stay the proceedings in Court "if it is satisfied that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement." In the present case we find that a big claim like that for the recovery of sum of Rs. 1,00,000-0-0 has been instituted against the Union of India and serious allegations have been made against responsible public servants. The conduct of the Chief Engineer and the Deputy Chief Engineer will have to be examined and the decision of this case may affect the prospects and the pensions of the said officers. The arbitrator in the present case will be the Deputy Chief Engineer who will be equal in rank to one of the officials whose conduct will be subject to enquiry, and lower in rank than the other official, viz., the Chief Engineer. It does not seem desirable that an enquiry against the then Chief Engineer and the then Deputy Chief Engineer should be entrusted in the hands of the present Deputy Chief Engineer. We are of the opinion that even if otherwise the case had been one which fell within the purview of the arbitration agreement we would have refrained from staying the proceedings in Court and referring it to arbitration.

(8) It was suggested on behalf of the appellant that since the greater portion of the claim is to be tried by the Court, the portion relating to the breach of contract may as well, in the discretion of this Court, be directed to be tried by the Civil Judge. We are not prepared to accede to this request. It is true that the Court has undoubtedly a discretion in the matter, but the said discretion is to be used judiciously. Once it is conceded that the matter is covered by the arbitration agreement, the court should lend its weight to the enforcement of the agreement. If the parties intended that their disputes of a certain nature should be referred to arbitration, the Court should not, in the absence of any special reason to the contrary, nullify that agreement.

(9) The result, therefore, is that the appeal is allowed in part. The case shall be sent back to the Civil Judge who will try the portion of the claim which relates to the recovery of Rs. 1,00,000-0-0 as damages for defamation, and will refer the dispute to arbitration in respect of the claim for recovery of Rs. 3,787-5-3. The parties shall pay and receive the costs of this appeal in proportion to their failure and success.

B/H.G.P. Appeal partly allowed.

A.I.R. 1953 ALL. 447 (Vol. 40, C. N. 206)

MALIK C. J. AND V. BHARGAVA J.

Gandamal Gopi Nath, Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

Misc. Case No. 91 of 1949, D/- 30-10-1952.

Income-tax Act (1922), S. 22(1) and (2) — First notice under S. 22(2) — Subsequent general notice under S. 22(1) — Return filed before expiry of time given by latter notice — Assessment proceedings started on basis of return so filed are not rendered invalid.

(Para 2)

Anno: Income-tax Act, S. 22 N. 2 and 3.

Brij Lal Gupta, for Applicant; S. C. Das, for Respondent.

MALIK C. J.: The following question has been referred to this Court under S. 66(1) of the Income-tax Act:

"Whether on the facts and the circumstances of the case, assessment proceedings started by the issue of the notice under S. 22(2) of the Income-tax Act on 9-4-45 which

was served on 11-4-45 calling for a return of Income within 35 days and assessment completed on the basis of a return filed on 11-6-45 in pursuance to that notice was rendered invalid and illegal in law because a general notice under S. 22(1) of the Act had been issued at the end of April 1945 which allowed time for the filing of the similar return within 65 days of its issue?"

(2) The question can be answered only in one way. The facts appearing from the 'Statement of the Case' and the appellate Order are that on 9-4-1945, the Income-tax Officer had issued a notice under S. 22(2) of the Income-tax Act giving the assessee 35 days' time for filing his return from the date of the service of the notice, i.e., 11-4-1945. A general notice under S. 22(1) of the Income-tax Act was, however, published in the newspapers giving the assessees a period of 65 days to file their return. On 11-6-1945, the assessee filed a return on the basis of which assessment was made by the Income-tax Officer. The mere fact that the time given in the notice under S. 22(1) of the Act had not expired on the date when the assessee filed his return on 11-6-1945, could not take away the jurisdiction of the Income-tax Officer to make the assessment on the basis of the return filed. The notice under S. 22(1) of the Act gave a maximum period of 65 days. It was open to the assessee to file his return before the expiry of that period if he so desired. The question whether the return was filed under S. 22(1) or 22(2) of the Act is immaterial in this case as the notice under S. 22(1) did not invalidate the notice under S. 22(2).

(3) We, therefore, answer the question in the negative. The assessee must pay the costs which we assess at Rs. 300/-.

B/G.M.J. Answer in the negative.

A.I.R. 1953 ALL. 448 (Vol. 40, C. N. 207)
(LUCKNOW BENCH)
BRIJ MOHAN LALL J.

Raj Narain and others, Appellants v. The State.

Criminal Appeal No. 183 of 1951, D/- 9-9-1952.

Criminal P.C. (1898), Ss. 239 and 236 — Eight dacoities committed in same night in eight houses — Joint trial of sixteen persons for all dacoities is not legal since the dacoities were not parts of the same transaction.

Held that the defect of misjoinder was not a mere irregularity under S. 537, Cr. P. C.: AIR 1934 Oudh 325 and Cr. Revn. No. 103 of 1949 (All), Rel. on. (Paras 6 and 8)

Anno: Cr. P. C., S. 234 N. 7; S. 235 N. 2; S. 239 N. 6; S. 537 N. 10.

G. G. Chatterji, Babu Ram Gir and Kalbe Mustafa, for Appellants; B. L. Kaul, for Addl. Govt. Advocate, for the State.

CASES CITED:

(A) ('34) AIR 1934 Oudh 325: 11 Oudh WN 721: 35 Cri LJ 1048
(B) ('49) Criminal Revn. No. 103 of 1949, D/- 18-10-1949 (All)

JUDGMENT: As many as sixteen persons were put on their trial on a charge of dacoity before the learned Sessions Judge of Rae Bareli. The trial resulted in the acquittal of nine. The remaining seven have preferred appeals to this Court. Every one of them has been sentenced to undergo five years' rigorous imprisonment. Three of the appellants, viz., Raj Narain, Durga Din and Gaya Singh are represented by Mr. Chatterji, Bhagwan is represented by Mr. Kalbe Mustafa and the remaining three have preferred jail appeals.

(2) The prosecution case is that all the seven appellants together with their nine companions, who have been acquitted, committed no less than eight dacoities in the night between 18/19-12-1950, in village Pure Sheo Ghulam, which is a hamlet of village Dubhan, within police circle Salon in the District of Rae Bareli. These dacoities were committed in eight different houses situate in the aforesaid hamlet.

(3) Mr. Chatterji has placed in the forefront of his arguments the contention that there was a serious misjoinder of charges in this trial and that his clients were greatly prejudiced by the admission of evidence relating to no less than eight different dacoities. He contends that on this ground alone the convictions cannot stand.

(4) Section 233, Cr. P. C. lays down that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately. Exceptions to this general rule are provided by Ss. 234, 235, 236 and 239, Cr. P. C. Unless the case is covered by any one of these four sections, there should be a separate trial for each distinct offence.

(5) The learned counsel holding the brief of the learned Government Advocate has contended that the eight dacoities which formed the subject matter of prosecution in the present case were committed in the course of the same transaction. He, therefore, wishes to bring his case under Ss. 239 and 235 Cr. P. C.

(6) In order to make these sections applicable, it has to be established that the dacoities were committed in the course of the same transaction. The prosecution has not been able to establish any connection between the different dacoities. The only thing common about them is that the persons who committed them are the same and that the houses are situate in the particular hamlet. This is not sufficient to make the dacoities a part of the same transaction. If a person or body of persons commits a number of similar offences within a certain area, the offences do not necessarily form part of the same transaction, unless some continuity of purpose is established between them. In the case of —'V. Gunno v. Emperor', AIR 1934 Oudh 325 (A) six dacoities were committed in the same night. It was held that the mere fact that they were committed in the same night and the persons charged were the same, the dacoities did not become part of the same transaction. Similarly in an unreported decision Criminal Revn. No. 103 of 1949 D/- 18-10-1949 (All) (B) Sapru J., remarked as follows:

"There is no force in the argument that as the offences were committed on one and the same night they must be deemed to form part of a series of acts so connected as to form the same transaction."

With these remarks I respectfully agree. I am satisfied that the dacoities were not committed in the course of the same transaction.

Therefore Ss. 239 and 235 Cr. P. C. have no application.

(7) It is not suggested that S. 236 can possibly apply to present case. Section 234 permits the joining together of three charges of offences of the same kind committed within a period of twelve months. In the present case, the number exceeds three. Therefore there was a clear breach of the requirements of law.

(8) The defect of mis-joinder was not a mere irregularity such as could be condoned under S. 537, Cr. P. C. It was a clear case of illegality. It vitiated the whole trial. I have no doubt that the appellants were seriously prejudiced because evidence relating to all the eight dacoities was brought on the record in the same trial.

(9) The appeal is, therefore, allowed, the convictions and sentences are set aside and the case is remanded to the trial Court with directions that a 'de novo' trial shall take place in accordance with law.

B/D.R.R. Appeal allowed.

A. I. R. 1953 ALL. 449 (Vol. 40, C. N. 208)

SANKAR SARAN AND
BRIJ MOHAN LALL JJ.

Lalta Prasad, Appellant v. Brahmanand and others, Respondents.

F. A. No. 67 of 1946, D/- 14-11-1952.

(a) Hindu Law — Religious Endowment — Alienation.

Person dedicating land for erecting Goshala and appointing A, a trustee — According to deed of trust, A to erect buildings, well, pond etc., for purposes of Goshala, at A's cost — A erecting such buildings — Buildings become trust property — A cannot subsequently alienate or hypothecate buildings as his own — Hypothication cannot alter the nature of property — Property cannot be sold in execution of personal decree against A. (Paras 9, 11)

(b) Trusts Act (1882), S. 1 — Applicability. — (Hindu Law — Religious Endowment — Dedication).

Act has no application to public or private religious or charitable endowment — Under Hindu Law trust can be created without registered deed — Trust for erection of Goshala is a trust for charitable and religious purposes according to Hindu Law — Essentials for valid trust for charitable purposes under Hindu Law indicated. Case law Ref. (Para 10)

Anno: Trusts Act, S. 1 N. 3.

(c) Evidence Act (1872), S. 115 — Acquiescence.

Person who pleads acquiescence must be under mistaken belief of his right and person against whom it is pleaded must be aware of the mistaken belief — Auction purchaser in execution sale building on property purchased by him — Facts indicating that knowledge of trust nature of property would have known to auction purchaser with little inquiry — He cannot plead acquiescence against trustee. (1880) 15 Ch D 96, Relied on. (Para 12)

Anno: Evid. Act, S. 115 N. 5.

(d) T. P. Act (1882), Ss. 51 and 2 — Neither S. 51 in terms nor its principle applies to transfer in execution of decree — Consideration of equity does not arise in case of such sale — Principle of 'caveat emptor' applies to such sale. AIR 1931 All 277 (FB), Rel. on. (Para 14)

Anno: T. P. Act, S. 51 N. 1; S. 2 N. 6.

(e) Trust — 'De facto' trustee looking after trust for 5-6 years can maintain suit for recovery of trust property. Case law Ref. (Para 17)

J. Swarup, for Appellant; S. C. Asthana and Dr. N. P. Asthana, for Respondents.

CASES CITED:

(A) ('11) 33 All 253: 8 Ind Cas 832
(B) ('10) 37 Cal 128: 3 Ind Cas 642
(C) ('27) AIR 1927 PC 80: 54 Ind App 136 (PC)
(D) (1880) 15 Ch D 96: 43 LT 95
(E) ('31) AIR 1931 All 277: 53 All 334 (FB)
(F) ('35) AIR 1935 PC 44: 62 Ind App 47 (PC)
(G) ('36) AIR 1936 All 653: 1936 All LJ 515
(H) ('40) AIR 1940 Mad 617: 1940 Mad WN 71
(I) ('23) AIR 1923 All 160: 45 All 319

BRIJ MOHAN LALL, J.: This is an appeal by one of the defendants against a decree of the learned Civil Judge of Kanpur.

(2) It appears that one Debi Din owned an area of one 'biswa' out of plot No. 840 abutting on a public road in Juhi Khurd, Kanpur. By means of a registered deed dated 29-5-1914 he dedicated this area for the purpose of establishing a 'guashala'. One Shyam Lal alias Shamlu Baba, who was the 'pujari' of Mahabirji's temple in Cooperganj at Kanpur, was appointed a trustee under this deed. Shyam Lal agreed to construct a 'gaushala', a well, a cattle trough & four pucca shops "with his own money". He did erect certain constructions. Sometimes later he hypothecated the land and the constructions to the appellant. The latter is the natural born son of one Ram Asrey, but has been adopted by his (Ram Asrey's) brother Bisheshwar Prasad. Ram Asrey, Bisheshwar Prasad and their sons form a joint Hindu family.

(3) Ram Asrey had a simple money decree against Shyam Lal and in execution thereof he got the disputed land and constructions put up for sale in 1933. He purchased the said property in the auction sale. After the purchase he erected 13 'Kothris' thereon. A few years later Shyam Lal died.

(4) The suit which has given rise to this appeal was instituted by one Brahamanand (hereafter described as respondent) within 12 years of the auction sale. He claimed to be Shyam Lal's 'chela' and the present trustee of the 'gaushala'. He contended that the property in suit was trust property and as such it could not be sold in execution of a decree obtained against Shyam Lal personally. He prayed for possession of the property in suit after demolition of the constructions erected by the appellant and also sought a decree for Rs. 1,080/- as mesne profits. The defendants to the suit were Ram Asrey, his son, Satya Narain, and the appellant.

(5) The appellant alone contested the suit. He contended that the land in question was conveyed to Shyam Lal personally, that the trust sought to be created was not valid and that in

any case the constructions put up by Shyam Lal were his personal property and did not form part of the trust. It was urged that a valid title had passed to Ram Asrey as auction purchaser. Limitation and S. 41, T. P. Act, were also pleaded in defence. Another plea taken in defence was that in the event of the respondent's suit being decreed he should pay the costs of the constructions put up by the appellant. Lastly, respondent's status as trustee was disputed and it was contended that he had no right of suit.

(6) The learned Civil Judge overruled the defence and decreed the suit for possession of the property in dispute and for recovery of a sum of Rs. 540/- as mesne profits. He directed the appellant and his co-defendants to remove the 13 'kothris' put up by them on the disputed land within a period of six months.

(7) Dissatisfied with this decree the appellant alone has preferred this appeal. Ram Asrey and his son, Satya Narain, have been impleaded as 'pro forma' respondents. Four points were urged by the learned counsel for the appellant in his arguments, viz.:

1. The constructions made by the appellant had not been impressed with the character of a trust and were his private property.
2. The claim for demolition was barred by the doctrine of acquiescence.
3. In any event the appellant was entitled to claim compensation for the buildings constructed by him.
4. The respondent has no right of suit.

(8) It may be pointed out at the outset that the appellant has two independent titles, viz., (1) as mortgagee and (2) as auction purchaser. His mortgage was a simple mortgage and gave him no right of possession. Moreover, this mortgage has, on his own showing, been satisfied. A suit on its basis, if now instituted, would be time-barred. It is, therefore, clear that he has no right to remain in possession on the basis of this mortgage-deed and cannot, therefore, resist the respondent's suit on this ground. If he has any title, it is as an auction purchaser. Being a member of the joint Hindu family with Ram Asrey he can rely on that title, although the purchase was not made in his name. It has to be seen how far can that title furnish a good defence to the respondent's claim.

(9) It has not been denied before us that a valid trust of the site was created by Debi Din. What was contended was that the constructions put up by Shyam Lal did not partake of the nature of the trust. It was argued that if a trustee (and such was admittedly the status of Shyam Lal) puts up constructions on the trust land the constructions would not become part of the trust property. In deciding this question one has to bear in mind the intention of the trustee in erecting those constructions. In order to gather this intention it is necessary to examine the trust deed executed by Debi Din because, obviously, Shyam Lal accepted the terms of this deed and secured the land from Debi Din on terms mentioned in this document. Debi Din expressed himself thus:

> "I have of my own accord and free will without compulsion or coercion on the part of any one else made a perpetual wakf, with respect to, and subject to the terms which have been set up and are given below for the purpose of (construction of) a 'gaushala', a well, a 'charhi' and four pucca shops with his (Shyam Lal's) own money under the mutwalliship of Shyam Lal."

Thereafter, he goes on to mention the terms and says that Shyam Lal shall be the manager and 'sarbarakar' and shall "cause a 'gaushala', a well,, a 'charhi' and four shops to be constructed on the land with respect to which wakf is made at his own cost". Further on he forbids him to erect any other kind of building. He directs that the rent recovered from the shops shall be used to provide fodder, etc., for the cows. He goes on to add that:

> "Shyam Lal shall at no time have the power and title to make any sale, mortgage or gift, etc., or to transfer the property in any other way. Shyam Lal aforesaid shall always make great efforts for improvement and betterment of 'gaushala' and he shall maintain it intact. He shall not do anything contrary to the terms of this wakf, nor shall he have any power to bring the property made a wakf of to his own use."

It was on these terms that Shyam Lal agreed to take the property. He was debarred from alienating it in any manner. He was directed to keep it intact and to make constant endeavours for its betterment. These terms gave a clear indication that Debi Din and Shyam Lal had both agreed to bring the gaushala into existence and to maintain it. Debi Din made his contribution in the shape of the site, Shyam Lal agreed to provide funds for the construction of a 'gaushala' and further agreed to maintain it and to act as its trustee. In the circumstances, we have no doubt in our minds that the constructions were made by Shyam Lal in pursuance of the agreement arrived at between him and Debi Din. We have no doubt that his intention was to make the constructions a part and parcel of the trust property. In the circumstances, the constructions did partake of the nature of trust property. At the time of making the constructions it was not Shyam Lal's intention to treat the said constructions as his personal property. His subsequent conduct in raising money on the security thereof was an act in breach of the trust and it could not retrospectively operate to alter the nature of the constructions from one of the trust property to that of personal property.

(10) It was pointed out by the learned counsel for the appellant that the trust deed was executed by Debi Din alone and not by Shyam Lal. It was contended that without a document in writing Shyam Lal could not create a trust of the buildings made by him. Section 5, Trusts Act (2 of 1882) lays down the method for creating a trust of immoveable property, but it is provided by S. 1 of the said Act that the Act does not apply to public or private religious or charitable endowments. Therefore, the rule laid down in S. 5 regarding the execution of a registered document in writing does not govern a case like the present. There can be no doubt that the trust for maintaining a 'gaushala' is a trust for a charitable purpose. According to strict Hindu notions, it is a religious trust also because maintenance and breeding of cows is an act of religious merit according to Hindu belief. The creation of a trust whether for charitable or religious purpose is governed by rules of Hindu law and not by the provisions of the Trusts Act. The Hindu law does not require a registered deed.

The essentials of a valid trust of a charitable or religious nature under Hindu law are that—

(1) the object or the purpose of the trust must be a valid religious or charitable purpose according to the rules of Hindu law;

(2) the founder should be capable under Hindu Law of creating a trust in respect of the particular property which is the subject matter of trust;

(3) the founder should indicate with sufficient precision the purpose of the trust and the property in respect of which it is made and the trust must comply with the requirements of law, as regards the form in which it is to be made; and

(4) the trust must not be opposed to the provisions of law for the time being in force an infringement of which makes it void or voidable in law (Mukherjea's Hindu Law of Religious and Charitable Trust, 1952 ed. p. 52).

If the above requirements exist, a valid trust comes into existence and no document in writing need be executed. It is not necessary that somebody should accept the transfer. Nor is it necessary that the religious or charitable purpose should be in existence from before.

Reference may, in this connection, be made to the case of — 'Chaturbhuj v. Chatarjit', 33 All 253 (A). In that case a gift of certain Zamindari property was made to an idol which was not in existence at the time of the gift. Possession was handed over to a certain person as pujari. It was held that the deed of gift was valid and was not vitiated by the fact that the idol had not come into existence till then. This case was based on an earlier Full Bench decision of the Calcutta High Court (which was a case of a will) viz., — 'Bhupati Nath v. Ram Lal', 37 Cal 128 (B).

The Privy Council case of — 'Gangi Reddi v. Tammi Reddi', AIR 1927 P C 80 (C) may also usefully be referred to. Their Lordships remarked on page 82 as follows:

"A dedication of a portion of the family property for the purpose of a religious charity (and the charity which Gangi Reddi purported to endow is of this nature) may, according to Hindu law, be validly made without any instrument in writing, even if it be an appropriation of some landed property."

Their Lordships were discussing as to what proportion of the joint family property a Karta could dedicate. This question, however, is not before us. We are concerned with only that portion of their Lordships' remark which lays down that a written instrument is not necessary for the creation of a Hindu charitable or religious trust. We are, therefore, of the opinion that a valid trust did come into existence notwithstanding the absence of any registered instrument in writing by Shyam Lal.

(11) That the intention of the founder was actually carried into effect is proved beyond a shadow of doubt. (Evidence gone through). It is thus clear that the trust which was the outcome of the joint efforts of Debi Din and Shyam Lal did come into existence and it did function for a long number of years. The constructions in question were, therefore, trust property and could not be sold in execution of a personal decree against Shyam Lal.

(12) After the purchase the appellant or Ram Asrey constructed 13 'Kothris'. It is suggested that Shyam Lal saw the constructions but did not object and, therefore, the appellant could invoke the doctrine of acquiescence in this case. It may be pointed out that the respondent was made a trustee in 1935, i.e., two years after the purchase. There is no evidence on the record to prove that the constructions were made after 1935 and it cannot, therefore, be seriously contended that the doctrine of acquiescence will operate against the respondent. The essentials of doctrine of acquiescence were laid down in the case of — 'Willmott v. Barber', (1880) 15 Ch D 96 (D), and they require 'inter alia' that the person, who wants to plead that doctrine, must have been under a mistaken belief about his rights and the person against whom the doctrine is sought to be invoked should be aware of this mistaken belief. In the present case, it cannot seriously be contended that the auction purchaser was under a mistaken belief about the nature of the property. Had he taken the trouble to examine the title he would have come to know that Debi Din had created a trust. Moreover, even if it be assumed that there was such a mistaken belief on the part of the auction purchaser, there is no evidence whatsoever to prove that the respondent was aware of the existence of this mistaken belief in the auction purchaser's mind. Therefore the plea of acquiescence has no place in a case like the present.

(13) It is unnecessary to decide whether or not this doctrine could be invoked against Shyam Lal. The respondent is not claiming through Shyam Lal. On the contrary, he is seeking redress against the unlawful acts of Shyam Lal. Even assuming that the plea could be successfully raised against Shyam Lal it would not ipso facto, operate against the respondent.

(14) Learned counsel for the appellant next contended that the principle of S. 51, T. P. Act, should be applied to this case. This section runs as follows:

"When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid to or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

It is conceded that this section does not in terms apply because S. 2 of the Act clearly lays down that the provisions of the Act do not apply to a transfer in execution of a decree or order of a Court of competent jurisdiction. But it is contended that although the section may not in terms apply the principle thereof will apply. With this contention we do not agree. A transfer by act of parties stands on a totally different footing from an execution sale. In a

private transfer the transferor expressly or impliedly assures the transferee that he has a valid title to the property. An equity, therefore, arises against him and he is by the application of rule of estoppel precluded from denying his title afterwards. No such considerations arise in the case of an auction sale. It may be repeated at this stage that we are considering the appellant's title as an auction purchaser in a simple money decree. There was no contract between the auction purchaser and the judgment-debtor. The purchase was made neither at the request nor with the consent of the judgment-debtor, but very likely contrary to his wishes. There was no warranty of title by judgment-debtor. The maxim applicable to auction sales is 'caveat emptor'. The purchaser makes the purchase at his own risk. In the circumstances, it is not possible to apply the principle of S. 51 T. P. Act, to auction purchases. In the Full Bench case, — 'Nannu Mal v. Ram Chander', AIR 1931 All 277 (E), the auction purchaser was held not entitled to the benefit of S. 51. In that case benefit of S. 70 was given to him because he was a purchaser in execution of a mortgage decree. As already stated more than once, the appellant is not enforcing the rights under the mortgage. He has to take his stand on the auction purchase only. In the circumstances, we hold that the appellant is entitled to no compensation for the buildings erected by him, nor can he compel the respondent to purchase the said buildings. He has been permitted by the learned Civil Judge to remove his materials and that he certainly can do.

(15) Last of all comes the question about the respondent's competence to maintain this suit. In this connection reference is to be made again to the deed of endowment executed by Debi Din. The relevant passage in this deed runs as follows:

"Secondly, if God forbid, Shyam Lal aforesaid dies at any time his senior and competent disciple shall become the manager and mutwalli of the property made a wakf of, provided that he follows the 'Panth' (Sect) of Shyam Lal, resides in Kanpur proper and is considered by four respectable Hindus to be fit and capable for that purpose."

(16) It is conceded that the respondent is the only disciple of Shyam Lal, that he belongs to his sect and he resides in Kanpur proper, but it is pointed out that he has not been elected by respectable Hindus to the office of the trustee. The respondent has produced a document executed by Shyam Lal in which he declares that the respondent is his only disciple and in which he appoints him as his successor both to the office of Mutwalli of his trust and as priest of Mahabirji's temple. It is true that the deed of endowment executed by Debi Din conferred no power on Shyam Lal to appoint his successor. The nomination by Shyam Lal does not by itself help the respondent except that it proves that Shyam Lal, as one of the Hindus, approved of his appointment. But it may be pointed out that ever since the death of Shyam Lal, which took place 8 or 9 years before the hearing of the suit, the respondent has been acting as the priest of the temple of Mahabirji and has been making customary collections from the grain market, where the owner of every cart-load of grain has to contribute a cupfull of the grain towards the temple. It is in this temple that the cows are being kept after the auction sale held in 1933. He is thus running this 'gaushala' and managing the affairs of the temple with the tacit approval of the Hindu public in general who have been making contributions towards the temple and placing the same in his hands. The Hindu public in general has impliedly approved of his appointment. In the circumstances, the requirements of the deed, which lays down the conditions of his appointment, have been complied with.

(17) Even if it be assumed that he is not a 'de jure' trustee, he is certainly a 'de facto' trustee who has been carrying on the work as such. A 'de facto' trustee can maintain a suit. This was laid down by their Lordships of the Privy Council in — 'Mahadeo Prasad Singh v. Karia Bharti', AIR 1935 P C 44 (F). Reference may also be made to the cases of — 'Gopal Dutta v. Babu Ram', AIR 1936 All 653 (G); — 'Subramania Gurukkal v. Srinivasa Rao Sahib', AIR 1940 Mad 617 (H) and — 'Sheo Ramji v. Sri Ridhnath Mahadeoji', AIR 1923 All 160 (I). In all these cases persons who were not 'de jure' trustees were permitted to institute suits not for their own benefit but for the benefit of the trust. On the same principle the respondent who had been performing the duties of a trustee for about 8 or 9 years prior to the institution of the suit could validly institute this suit for the benefit of the trust.

(18) For the above reasons, we are of the opinion that the view taken by the learned Civil Judge was correct. We find no force in this appeal. It is hereby dismissed with costs. The stay orders are vacated.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 ALL. 452 (Vol. 40, C. N. 209)

SANKAR SARAN AND BIND BASNI PRASAD JJ.

Calcutta National Bank Ltd., Plaintiff-Decree-holder-Appellant v. Rahmat Ali Fateh Ullah, Defendant-objector-Respondent.

Ex. First Appeal No. 38 of 1952, D/- 20-11-1952.

Civil P. C. (1908), O. 21, R. 63 — Applicability — (Civil P. C. (1908), O. 21, R. 58 and O. 38, R. 8).

Suit against Q and R for recovery of sum — Pledged aeroscraps attached before judgment — Objection by R under O. 38, R. 8 — Dismissal without determining —R's title to scraps — No suit under O. 21, R. 63 — Subsequently, suit decreed against Q alone — Execution of decree by sale of aeroscraps — Objection by R under S. 47 — Held that the non-determination of R's title to the aeroscraps and dismissal of his objection filed under O. 38 R. 8 must be treated as an order passed "against" him under O. 21 R. 63 which applies also to orders, under O. 38, R. 8 — Difference between objection under O. 21 R. 58 and that under O. 38 R. 8 stated. Case law discussed. Observations in AIR 1937 All 635 held not obiter dicta. (Paras 11, 12)

Ambika Prasad and R. Mitra, for Appellant; Shambhoo Prasad, for Respondent.

CASES CITED:

(A) ('18) AIR 1918 Mad 26:
41 Mad 849 (FB)

(B) ('15) AIR 1915 All 275: 37 All 575
(C) ('37) AIR 1937 All 635: 171 Ind Cas 409
(D) ('19) AIR 1919 Mad 738: 41 Mad 985 (FB)
(E) ('39) AIR 1939 Cal 620: ILR (1939) 2 Cal 291
(F) ('42) AIR 1942 Mad 41: ILR (1942) Mad 336 (FB)
(G) ('23) AIR 1923 All 435: 45 All 438
(H) ('27) AIR 1927 All 593: 49 All 903
(I) ('30) 130 Ind Cas 200: 1930 All LJ 1322
(J) ('31) AIR 1931 Oudh 1: 6 Luck 461 (FB)

JUDGMENT: This is an appeal from the order dated 3-1-1952, passed by the learned Civil Judge of Allahabad in which the dispute is about certain aeroscraps which were attached before judgment. The material facts are as follows:

(2) On 17-12-1947, the Calcutta National Bank Limited, which is the appellant before us, brought a suit for the recovery of Rs. 42,753/13/3 against one Qudratullah and his son, Rahmat Ali Fateh Ullah. The latter is the respondent before us. The bank's case was that the father and the son were carrying on business jointly and while the father borrowed the money from the bank the son was a guarantor and both of them pledged the aeroscraps which they had bought from the Defence Department. Along with the plaint, the bank filed an application for attachment before judgment. In the affidavit which was filed in support of the application it was alleged that the aeroscraps were the property of both the defendants. It was also alleged that the defendants were trying to dispose of their properties and were trying to remove them from the local limits of the jurisdiction of the court with a view to defeat or delay the execution of the decree that might be passed in the suit. An apprehension was also expressed that the defendants might leave the Indian Dominion. Learned Civil Judge ordered notice to issue and directed that attachment be made in the meanwhile. The attachment was accordingly made. On 20-3-1948, Rahmat Ali Fateh Ullah made an objection to the attachment and prayed that the attachment might be withdrawn. In the affidavit filed in support of the petition of objection, it was stated that it was absolutely wrong that he ever intended to abscond or leave the Indian Dominion or to dispose of his property in order to defeat or delay the realisation of the decree that might be passed. Further, it was alleged that he and Qudrat Ullah had separate business in oil, metal and other articles on a large scale and, in order to hamper the same, the attachment before judgment had been obtained on wrong and incorrect facts. It was stated that Qudrat Ullah had immovable property of the value of Rs. 70,000/- from which the amount of the plaintiff could be realised and he had nothing to do with the amount claimed. It was denied that he ever stood as a guarantor. The objection of Fateh Ullah was dismissed by the learned Civil Judge on 10-12-1948. An appeal was filed against that order in this Court and that was also dismissed on 17-1-1949. No suit for a declaration of the title of Rahmat Ali Fateh Ullah in respect of the aeroscraps has been filed by him as contemplated by O. 21, R. 63, Civil P. C. On 9-4-1949, learned Civil Judge decreed the suit as against Qudrat Ullah only, but dismissed it as against Rahmat Ali Fateh Ullah on the finding that he never stood as a guarantor for the advance of the loan to Qudrat Ullah. A first appeal against that decree (First Appeal No. 171 of 1949) has been filed by the bank and is pending in this Court. On 9-5-1949, the bank applied for the execution of the decree by the sale of the attached aeroscraps. On 18-8-1949, Rahmat Ali made an application that as the suit had been dismissed against him and the aeroscraps were his property they might be delivered to him. On 14-2-1950, Rahmat Ali filed an objection under S. 47, Civil P. C., contending that the aeroscraps being his property and the suit having been dismissed against him they could not be sold in execution of the decree against his father, Qudrat Ullah. By the order, dated 3-1-1952, learned Civil Judge held that the aeroscraps in dispute were the property of Rahmat Ali Fateh Ullah and as the suit against him had been dismissed he was entitled to get them back and they were not liable to be sold in execution of the decree against Qudrat Ullah. He directed accordingly. This order purports to dispose of both the application, dated 18-8-1949, and the objection under S. 47 dated 14-2-1950. This appeal has been filed by the bank against that order.

(3) Sri Ambika Prasad, learned counsel for the appellant, contends firstly that as no suit for a declaration of title was brought by Rahmat Ali as contemplated by O. 21, R. 63, Civil P. C. within a period of one year as prescribed by Art. 11 of the First Schedule to the Limitation Act, 1908, that order has become conclusive now and it was not open to the learned Civil Judge to determine that the aeroscraps were the property of Rahmat Ali Fateh Ullah.

(4) The first question is whether the provisions of R. 63, O. 21, apply also to attachment before judgment. Rule 8 of O. 38, Civil P. C., provides:

"Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money."

(5) In the Full Bench case of — 'Mallikharjuna Prasada Naidu v. Virayya', AIR 1918 Mad 26 (FB) (A) it was held that O. 21, R. 63, Civil P. C., applies also to orders on claims preferred to property attached before judgment. In — 'Bisheshar Das v. Ambika Pershad', AIR 1915 All 275 at p. 276 (B) it was held that the effect of O. 38, R. 8 was to incorporate the provisions of O. 21, and amongst them the provisions of R. 63. We are bound by this decision and must hold accordingly.

(6) There is, however, one difference between an objection under R. 58 of O. 21 and that under R. 8 of O. 38. An objection under R. 58 can be made only by a person who is not a party to the decree. This is clear from the very language of the rule. On the other hand, the objection under R. 8 of O. 38 can be made even by a person who is a party to the suit. In — 'Hafiz Ahmad Ali Khan v. Anand Sarup', AIR 1937 All 635 (C), it was held:

"There is nothing in R. 8, O. 38 to indicate that the Legislature intended to confine the

operation of that rule only to claims preferred by persons who are not parties to the suit. Any objection raised by a defendant to attachment before judgment may also be investigated and decided by the Court in accordance with the provisions of R. 8, O. 38, Civil P. C. The decision of the Court as regards the claim preferred to property attached before judgment is however not final and can be assailed by means of a separate suit instituted within the period of limitation. The decision of a claim in accordance with R. 8 cannot be treated as a decision under S. 47, Civil P. C., for the simple reason that S. 47 comes into play only when there is an application for execution pending before the Court."

(7) Learned Civil Judge has distinguished AIR 1937 All 625 (C) on the ground that in the order by which Rahmat Ali's objection was dismissed, the points raised by him that he was not a guarantor and his property was not liable to be attached were not considered, and all what the Court then considered was as to whether or not a 'prima facie' case had been made out for attachment before judgment. He reproduced the following portion from that order :

"It was further suggested that the mention of the movables in the agreement was probably an interpolation by the Bank. The latter part of the contention is however one which cannot be considered at that stage. The agreement on the file makes out a 'prima facie' case for the plaintiff and that is all what can be said with regard to it at this stage."

He further pointed out that the bank's case was that Rahmat Ali was a guarantor and if this was ultimately accepted then the aeroscraps even if they belonged to him exclusively, could be sold in execution of the decree, but as the suit was dismissed as against him he saw no reason why the articles belonging to him should not be returned to him. It will be noted, however, that the bank's case was that the aeroscraps belonged both to the father and the son whereas Rahmat Ali's case was that they belonged to him exclusively. This point was not determined by the learned Civil Judge when disposing of the objection under O. 38, R. 8, Civil P. C. If a point is not determined in an objection under R. 8 it must be deemed to have been decided against the objector and the provisions of R. 63 are attracted. Reference may here be made to the Full Bench case of — Venkatarathnam v. Ranganayakamma', AIR 1919 Mad 738 (FB) (D), in which it was held that an order refusing to investigate a claim to attached property on the ground that there was delay in filing it is an order passed "against" the claimant within O. 21, R. 63, Civil P. C., and Art. 11, Limitation Act. A similar view was taken in — 'Ambika Prasad v. Messrs. Soorajmull Nagarmull Firm', AIR 1939 Cal 620 (E). It was held :

"In order to bring a case within the purview of O. 21, R. 63, Civil P. C., the question as to whether the claim was investigated or not is immaterial and if an adverse order is made against the plaintiff in the claim proceeding he is bound to institute a suit under O. 21, R. 63, Civil P. C., failing which the order becomes conclusive and final."

In the above case reliance was placed upon the earlier cases of the Calcutta High Court.

(8) In — 'Cannanore Bank Ltd. v. Pattarkandy Aryanveettil Madhavi', AIR 1942 Mad 41 (F), a Full Bench of the Madras High Court held that O. 21, R. 63 applies to all orders which are against claims preferred under R. 58. The test to see whether an order is under R. 63 is whether the order is against the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. Where a petition of objection is dismissed only with the remark that it was not pressed it was held to be an order "against" the objector and required him to file a suit within a year from the date of the order if he wished to re-open the matter.

(9) In this Court also, it was held that an order refusing to entertain an objection to the attachment of property in execution of a decree upon the ground that it was too late fell within the purview of O. 21, R. 63, Civil P. C., and the suit to recover possession of the attached property after the objection had been disallowed must be filed within a year from the date of such order vide — 'Gobardhan Das v. Makundi Lal', AIR 1923 All 435 (G). See also — 'Debi Das v. Rup Chand', AIR 1927 All 593 (H) and — 'Damodar Das v. Pearey Lal', 1930 All LJ 1322 (I).

(10) A Full Bench of the Avadh Chief Court also took the same view in — 'Ran Bahadur Singh v. Salig Ram', AIR 1931 Oudh 1 (FB) (J). It was held that an order passed by the executing Court on an objection filed under O. 21, R. 58, which was not pressed subsequently and was therefore dismissed was an order covered by O. 21, R. 63.

(11) The position in the present case thus is that Rahmat Ali made an objection under O. 38, R. 8, C. P. C. claiming the aeroscraps to be his exclusive property and not liable to attachment. The trial court did not determine the question of his title or of his liability, but dismissed the objection on the ground that there were good reasons for the attachment to continue. This attachment did not cease 'ipso facto' under O. 38, R. 9, Civil P. C., on the dismissal of the suit against Rahmat Ali because it had not been determined previously that the aeroscraps belonged to him only. The bank's case was that the aeroscraps belonged to both the defendants. It is only by the order under appeal that the title of Rahmat Ali in respect of the scraps has been determined. Never before was it so determined. The non-determination of Rahmat Ali's title in respect of the scraps and the dismissal of his objection on 10-12-1948, must, in view of the authorities referred to above, be treated as an order passed "against" him under R. 63 of O. 21, a rule which applies also to orders passed on objections filed under R. 8, O. 38. No suit having been brought by Rahmat Ali for a declaration of his title in respect of these scraps within the statutory period of one year, it is not open to him now to go behind the order by which his objection under R. 8, O. 38, was dismissed and claim the aeroscraps as his property.

(12) Learned counsel for the respondent contends that the observations in AIR 1937 All 635 (C) are obiter dicta. We have carefully gone through the judgment and are of the opinion that they are not obiter dicta. The contention on behalf of the appellant that Rahmat Ali cannot now ask the Court for the adjudication of his title in respect of aeroscraps must

prevail and on this ground the appeal must be allowed.

(13) On the question of fact whether or not the aeroscraps belong to Rahmat Ali alone, the sale account, dated 30-1-1947, Ex. A and the delivery orders, Exs. B and C coupled with the evidence of P. K. Sinha, Supervisor in the Ordnance Depot and Toorani Khan, a clerk in the Ordnance Depot, prima facie go to show that the aeroscraps were purchased by Rahmat Ali only. But it must be remembered that the matter is one between the father and the son. It is also to be noted that Rahmat Ali did not produce any account-books to show that he and his father had separate business. The aeroscraps were bought by him for about Rs. 74,000/-. He admits that he had only Rs. 25,000/-. He adds that he got the balance from his mother and maternal uncle. The mother and the maternal uncle were not produced. He admits further that he did not execute any deed in favour of his maternal uncle. It may be that the aeroscraps might have been purchased jointly by the father and the son but as the son alone went at the auction to make the bids so the sale account and the consignment note were made by the Defence Department in his name only. It is, however, not necessary to record any definite finding on this point as it has been held above that Rahmat Ali is barred from raising the plea of his title in respect of the aeroscraps.

(14) The appeal succeeds and it is hereby allowed with costs of both the courts. The order of the lower court dated 3-1-1952, is set aside. The aeroscraps shall not be delivered to Rahmat Ali Fateh Ullah. They will be sold in execution of the decree. The execution record will now be returned to the lower court to proceed with the execution in the light of the order passed in this appeal.

C/H.G.P. Appeal allowed.

A. I. R. 1953 ALL. 455 (Vol. 40, C. N. 210)

BRIJ MOHAN LALL J.

Vidya Ram, Applicant v. Ganga Sahai, Opposite Party.

Criminal Ref. No. 110 of 1951, D/- 2-11-1951.

(a) Criminal P.C. (1898), S. 145(1). 537 — Order under — Magistrate satisfied about dispute — Omission to state grounds does not vitiate the order. AIR 1933 All 264 (FB), Relied on. (Para 4)

Anno: Cr. P. C., S. 145 N. 15.

(b) Criminal P.C. (1898), S. 145 — Attachment by police on Magistrate's order is illegal; but has no effect on subsequent trial. AIR 1950 All 734 and 1951 All WR (HC) 58, Disting. (Para 4)

Anno: Cr. P. C., S. 145 N. 29.

P. N. Bakshi, for Opposite Party.

CASES CITED:

(A) ('33) AIR 1933 All 264: 1933 All LJ 188: 34 Cri LJ 414 (FB)

(B) ('50) AIR 1950 All 734: 1950 All WR 640

(C) ('51) 1951 All WR (HC) 58

ORDER: This is a reference under S. 438, Cr. P. C. by the learned Sessions Judge of Bulandshahr recommending that an order passed under S. 145, Cr. P. C. by the learned S. D. M. of Anupshahr be vacated.

(2) It appears that one Vidya Ram made a petition under S. 145, Cr. P. C., in the court of the S. D. M. Anupshahr. The S. D. M. appears to have been absent from the station and Sri Jagat Narain Beri, an Honorary Special Magistrate, was in-charge of his work. Sri Beri passed the following order, namely:

"S. O. Dabai.

Please report if there is an appprehension of breach of peace. If so, attach."

This order was passed on 23-12-49. The police report is dated 27-12-1949. It states inter alia, that there is an apprehension of a breach of the peace and that attachment has been made. This report was put up before the S. D. M. on 6-2-1950 who wrote out the following order immediately below the report, namely: "Accused to be summoned for 27-2-50." Thereafter, the parties put in appearance and filed written statements of their claims. The S. D. M. was transferred and his successor after recording the evidence came to the conclusion that the opposite party was in actual possession of the disputed land and crop. Thereupon he declared the opposite party to be in possession and forbade interference on the part of Vidya Ram.

(3) Vidya Ram went up in revision before the learned Sessions Judge and one of the points urged on his behalf was that Sri Jagat Narain Beri was not competent to pass an order in a case which was instituted in the court of S. D. M. Anupshahr. The learned Sessions Judge has repelled this contention and has pointed out that Sri Beri had been placed in charge of the work of S. D. M. Anupshahr and was competent to deal with the case. I agree with the learned Sessions Judge and it is not necessary for me, in view of the finding of fact recorded by him to say anything more on this point.

(4) The other contention put forward on behalf of Vidya Ram which has found favour with the learned Sessions Judge is that the order of attachment passed in this case was without jurisdiction and that this irregularity vitiated the entire proceedings. The learned Judge has pointed out that it was for the Magistrate to be satisfied about the existence of a dispute likely to cause a breach of the peace and thereafter he should have himself passed the order of attachment. The learned Judge is right in saying that the Magistrate could not delegate to the police authorities the power to make attachment nor could he make the question of attachment of property depend on the satisfaction of the police authorities. On this point, I am perfectly in agreement with the learned Judge & I have no hesitation in declaring that the order of attachment was not properly passed. But I am unable to agree that this irregularity or illegality (by whichever name it may be described) had the effect of vitiating all subsequent proceedings. It may be conceded that before passing the order dated 6-2-1950, the learned Magistrate had not assumed jurisdiction in the case. But on 6-2-1950 he, on reading the police report, was obviously satisfied that there existed a dispute which was likely to cause a breach of the peace and thereupon he passed a preliminary order summoning the parties before him. It is true that the aforesaid order (already quoted) is not a very elaborate one and does not state the grounds on which the learned Magistrate's satisfaction was based but written as it is immediately below the police report it is obvious that the learned Magistrate had accepted the police report and has been convinced by the said report that there was a dispute which was likely to cause a breach of the

peace. The learned Magistrate's omission to draw an elaborate order stating the grounds of his being satisfied is by no means fatal to the case. It is an irregularity which can be condoned under section 537, Cr. P. C. The Full Bench case of — 'Kapoor Chand v. Suraj Prasad', AIR 1933 All 264(A) is an authority for the proposition that if a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists he is seized of jurisdiction to take action and that it is immaterial if he, after being so invested with power to act under S. 145, Cr. P. C., commits an irregularity by not expressly stating in his order the grounds which satisfied him about the existence of a dispute of the aforesaid nature. This Full Bench case is binding on me and, therefore, the brief nature of the order dated the 6-2-1950, is, in my opinion, a mere irregularity which does not vitiate the order. The fact remains that the learned Magistrate was satisfied on 6-2-1950, about the existence of a dispute which gave rise to an apprehension of a breach of the peace, that he did acquire jurisdiction to act under S. 145, Cr. P. C. and that from that date onwards the proceedings were valid and legal. The previous illegal order of attachment did not invalidate the subsequent proceedings which were totally independent of that order. An order of attachment is not the basis of subsequent proceedings and in quite a large number of cases no occasion may arise for passing the attachment order at all. It is an order totally separate from the rest of the proceedings and any illegality in this order does not contaminate the rest of the proceedings. It is also significant that there is no suggestion whatsoever that the subsequent proceedings have in any way prejudiced any party or have occasioned a failure of justice. I am, therefore, of the opinion that the proceedings which consisted of filing of the written statements, recording of evidence, hearing of arguments & delivery of judgment were perfectly legal and valid proceedings.

(5) The learned Sessions Judge has relied on two recent decisions of this Court. One of them is reported in — 'Khangar v. Jhamman', AIR 1950 All 734(B). This is a decision by Harish Chandra, J. In that case the Magistrate had delegated to the police authorities not only the power to be satisfied about the existence of a breach of the peace and to make the attachment, if so satisfied, but had also entrusted to the said authorities the power to summon the parties and to direct them to appear before him. The summoning of parties and directing them to put forward their claims for possession is an intergral part of the preliminary order which it is the learned Magistrate's duty to pass under S. 145(1), Cr. P. C. Delegation of this power to the sub-inspector is a serious illegality. It will thus appear that in that case the parties had been summoned before the learned Magistrate without his having satisfied himself that there existed a dispute likely to cause a breach of the peace. In other words, the learned Magistrate had not acquired jurisdiction to act under S. 145, Cr. P. C., by the time the police authorities summoned the parties to appear before him. This circumstance distinguishes this case from the present case. As already stated, the learned Magistrate had, in the present case, himself summoned the parties after satisfying himself that a dispute likely to cause a breach of the peace really existed.

(6) The second case on which the learned Judge has taken stand is reported in — 'Babu Ram v. Ram Prasad', 1951 All W. R. (H.C.) 58 (C). In that case also the Magistrate had called for a report from the police authorities and had authorised the Station Officer to make an attachment if there was an apprehension of a breach of the peace. But there was also a finding that even after the receipt of the police report the Magistrate did not apply his mind as to whether or not there existed a dispute likely to cause a breach of the peace. Bhargava, J. observed as follows:

> "In the next place, he (Magistrate) acted without jurisdiction when he initiated the proceedings on a police report which did not make any reference to the existence of any dispute likely to cause breach of the peace without applying his mind at all."

In view of this circumstance this case is also distinguishable.

(7) There is nothing in either of the aforesaid two cases to indicate that mere invalid attachment is sufficient to vitiate all the subsequent proceedings which are taken after the passing of an order under S. 145(1), Cr. P. C. I am, therefore of the opinion that the learned Magistrate's order declaring the opposite party to be in possession and forbidding Vidya Ram to interfere with his possession should not be disturbed.

(8) There remains to see whether any order is needed to set aside the illegal attachment. In that connexion, I notice that the learned Magistrate himself put an end to that attachment by ordering the release of the property in favour of the opposite party. Therefore, no further order is called for in that respect.

(9) In the circumstances the reference is rejected.

B/D.R.R. Reference rejected.

A. I. R. 1953 ALL. 456 (Vol. 40, C. N. 211)

MALIK C. J. AND V. BHARGAVA J.

Sherwani Bros. Co. Ltd., Allahabad, Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Opposite Party.

Income Tax Misc. Case No. 212 of 1949, D/- 22-10-1952.

(a) Income-tax Act (1922), S. 10 (2) (XV) — Expenses incurred on staff maintained to pay off debts of defunct business are not allowable. (Para 2)

Anno: I. T. Act, S. 10 N. 13.

(b) Income-tax Act (1922), S. 10 (2) (XV) — Carrying on business — Prospecting for business or temporary lull in business is not cessation of business. (Para 2)

Anno: I. T. Act, S. 10 N. 13.

B. L. Gupta and Oman Singh, for Applicant; Sri S. C. Das, for Department.

MALIK, C. J.: The assessee, Sherwani Bros. Co., Ltd., Lucknow, was started in the year 1937. In the memorandum of association, the various objects for which the company was established were given. The company, however, in the same year, i.e., 1937, took on lease a sugar mill known as Sri Krishna Deshi Sugar Factory. This lease expired on 31-7-1942. It was admitted before the Appellate Tribunal that the only business carried on by the company consisted of manufacture and sale of sugar. This manufacture of sugar, it was again admitted, was stopped on the expiry of the lease on 31-7-1942. The sale, however, of the stock of sugar continued and the fact was admitted that this stock was sold off by 30-11-1942. The assessee company maintained its

accounts on the mercantile basis and each year in computing its profits it showed the price of the Sugarcane purchased as expenditure incurred and these figures were accepted by the Income-tax Department in assessing the profits of the company. It appears, however, that though accounts were maintained on the mercantile basis the sugarcane was purchased partly on credit and partly for cash and that even after the whole stock of sugar was sold off on 30-11-1942, payments to the cane-growers continued right upto 17-9-1944.

The assessee claimed that the expenses incurred after 30-11-1942, for maintaining the staff necessary for making deferred payments to the cane growers upto 17-9-1944, should be allowed as expenditure incurred wholly and exclusively for the purpose of their business. This contention did not find favour with the Appellate Tribunal, which on 19-11-1948, held as follows:

"It is admitted by the counsel before us that the price of cane as and when purchased was debited to the cane purchase account in the relevant years when the factory was working and it was duly allowed in working out the profits of the sugar factory in those years and so no further expenses in connection with such purchase can be allowed. The mere fact that the staff had to be maintained for making actual payment to them in the years in dispute cannot entitle the assessee company to a deduction of such expenses as admittedly the accounts are kept on the mercantile basis and not on the cash basis and admittedly no business in the manufacture and sale of sugar including the sale of old stock of sugar existed after 30-11-1942."

This position is not challanged by learned counsel but an attempt has been made to claim the amount as an allowable expenditure under section 10(2)(xv) of the Income-tax Act on two grounds: Firstly, that, as the company had not gone into liquidation and had not been wound up, it could not be said that it had ceased to carry on its business and the mere fact that it had no venture in hand would not matter and it must be deemed that this was a business expenditure. Secondly, that the company had incurred the expenditure in acquiring other business for which the company was negotiating and the mere fact that there was a period of lull between the termination of the old lease and the acquiring of the new lease would not matter.

(2) Neither of the two points urged by the learned counsel, however, appears to arise from the statement of the case. As we have already said, it was admitted by learned counsel that the company carried on only one business, that of manufacture and sale of sugar. Counsel also admitted that the manufacture and sale both were finished, one on 31-7-1942, and the other on 30-11-1942. In the year in question, therefore, the company was not carrying on any business whatsoever and no question of computing profits from that business could arise. Further, it is clear from the appellate order as well as from the statement of the case that the only expenditure which was claimed to have been incurred during this period was the expenditure made for maintaining the staff for making deferred payments. We may quote here the following passages from the order of the Appellate Tribunal which will explain what the Tribunal was called upon to decide:

"The counsel's contention is that though admittedly the sale of sugar did not continue throughout the previous year ended on 30-9-1943, and the last sale was effected on 30-11-1942, the expenses incurred thereafter for making deferred payment to the cane growers right upto 17-9-1944, should have been allowed as per profit and loss account for the years ended 30-9-1943 and 30-9-1944, because as long as such final payments had not been made it could not be said that the business of the assessee company had been closed".

And again,

"It has been contended that expenses after 30-11-1942, and right upto 17-9-1944, were incurred over staff maintained in making deferred payments of cane growers from whom cane had been purchased when the sugar factory was working and also other expenses identical (?) to that payment and so much expenses should have been allowed by the Income-tax Officer in the assessment year 1943-44 and 1944-45."

This being the only expense claimed, we fail to see why the Tribunal added in the last part of the reference

"and for looking after the affairs of such company during the period of its lull before any other business is started."

It does not appear from the order of the Appellate Tribunal or from the statement of the case that the assessee had claimed any expenses 'for looking after the affairs of such company during the period of its lull before any other business was started'. Omitting this part, the question reads as follows:

"Whether in the circumstances of the case a limited company which includes within its object the running of various kinds of business but actually starts only one business and is not under liquidation or in the process of winding up, is entitled to a deduction or allowance under S. 10 (2) (xv) for expenses incurred over the maintenance of the staff and its travelling and other expenses for making deferred payments in respect of purchases made in connection with the defunct business."

The question of computation of income from business arises only if there is a business that is being carried on of which income has to be computed and it is only if a business is being carried on that in computation of its income the Income-tax Officer has to make an allowance for the expenditure incurred wholly and exclusively for the purpose of such a business. Where no business is carried on at all and no expense is incurred wholly and exclusively for the purpose of such a business, S. 10(2)(xv) can have no application.

In some cases, a difficult question at times arises whether the assessee was or was not carrying on business and this had to be decided in accordance with the facts and circumstances of each case. A business concern may have a lull during the period of its activity, when it is waiting to acquire a new business, or when it is prospecting for business that is going to be started, and in such a case it may be possible to say, though it is not necessary for us to express any opinion on the point, that the assessee was still carrying on business. On the facts admitted by learned counsel, that question does not arise in this case. It was admitted that the business activities that the assessee was carrying on had ceased. The mere fact that he had maintained a staff to pay some of the cane growers from whom he had purchased cane on credit cannot be said to be an expenditure incurred wholly and exclusively for the purpose of the business.

(3) We have pointed out that the last part of the question does not arise in this case. The answer to the rest of the question can only be in the negative.

(4) The Department is entitled to its costs which we assess at Rs. 300/-.

B/M.K.S. Reference answered in negative.

A. I. R. 1953 ALL. 458 (Vol 40, C. N. 212)

AGARWALA AND CHATURVEDI JJ.

Lachhman Das, Applicant v. Rent Control and Eviction Officer, Bareilly and another, Opposite Party.

Civil Misc. Writ No. 304 of 1952, D/- 13-1-1953.

(a) Houses and Rents — U.P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7 — Owner in occupation of accommodation, for his own use, has power to transfer possession to purchaser of ownership rights, without an order of allotment to the purchaser by the Rent Control Officer. (Para 5)

(b) Houses and Rents — U.P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7 — Allotment of accommodation — Jurisdiction of Rent Control Officer — (Constitution of India (1950), Art. 226) — (Civil P.C. (1908), S. 9 — Special Tribunal) — (Evidence Act (1872), S. 115).

Rent Control Officer's jurisdiction to allot house arises only when it falls vacant according to S. 7 — Owner in occupation transferring possession to purchaser of ownership rights — Accommodation cannot be said to have been vacant at any point of time — Order allotting accommodation is without jurisdiction. (Para 6)

Fact purchaser also had applied for allotment to himself cannot give jurisdiction to Rent Control Officer on the ground of submission to jurisdiction — Such application made by him in ignorance of his rights cannot also estop him from challenging the allotment made to another person, on the ground of jurisdiction, in the proceedings under Art. 226 commenced by him for having the order of allotment quashed. (Para 8)

Anno: Civil P. C., S. 9 N. 53; App. III, Const. of India, Art. 226 N. 13; Evi. Act, S. 115 N. 1.

(c) Houses and Rents — U.P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7 — "Accommodation falling vacant."

What is contemplated by the words in the case of a landlord himself in occupation is that the accommodation is not intended to be used by him for his own purposes but is intended to be let out to a tenant; or if the occupier is a tenant that the tenant will cease to occupy it. (Para 6)

(d) Constitution of India (1950), Art. 226 — Another remedy open.

Suit against order of allotment of accommodation under U.P. Temporary Control of Rent and Eviction Act, 1947, asking for injunction restraining allottee from taking and Rent Control authority from giving possession — Application in suit for temporary injunction refused on ground that suit did not lie because notice under S. 80, Civil P. C., was not given — Withdrawal of suit by plaintiff — He cannot be said to have availed of another remedy and failed so as to be prevented from seeking remedy under Art. 226 — Decision on issue of temporary injunction leads to inference that he had no other such remedy open. (Para 7)

Anno: Civil P. C., Art. 226 N. 8.

S. C. Khare and S. B. Chaudhri, for Applicant; B. N. Sapru, for B. L. Gupta, for Opposite Party.

AGARWALA J.: This is an application praying that the order of allotment of a shop situate in Mohalla Shahamatganj in the city of Bareilly, made by the Rent Control and Eviction Officer on 12-9-1951, in favour of Krishna Kumar, opposite party 2, be quashed. The facts briefly stated are as follows:

The shop in dispute is a tin shed with wooden structures. It is on a plot of land which along with three other shops and a godown is owned by several persons. Two of these co-sharers, viz., Naqshe Ali and Mashooq Ali were admittedly occupying the disputed shop and were carrying on Kirana business. It appears that they suspended their business sometime in July or August 1951. Several persons came forward to get an allotment of the shop in the expectation that Naqshe Ali and Mashooq Ali would vacate it. The first person to come forward was one Kalloomal. He made an application for allotment with the concurrence of Naqshe Ali and Mashooq Ali on 4-8-1951. On 21-8-1951, Lachman Das applicant applied for its allotment. On 24-8-1951 Lachman Das made a second application for allotment. On 27-8-1951 Krishna Kumar made a similar application. This application was made with the consent of Naqshe Ali and Mashooq Ali.

(2) On 28-8-1951, however, Lachman Das secured a sale deed of the materials of the shop and the goods stored therein in his favour as also of the rights of Naqshe Ali and Mashooq Ali in the rest of the property which was 2½ anna share. On the same date he made an application for allotment of the shop in his favour with the consent of Naqshe Ali and Mashooq Ali.

(3) On 12-9-1951 the Rent Control and Eviction Officer made an order allotting the shop to Krishna Kumar opposite party. Against this order, the applicant filed a suit for the issue of an injunction restraining Krishna Kumar, from taking, and T. R. O. from giving, possession over the shop. He also made an application for a temporary injunction. His prayer was granted by the trial Court, but in appeal the temporary injunction was cancelled on the ground that the suit itself was not maintainable because no notice, as required by S. 80, C.P.C., had been given to the Rent Control and Eviction Officer. The applicant thereafter withdrew the suit and filed the present application under Art. 226 of the Constitution.

(4) In the affidavit which the applicant has filed in support of his application, it is mentioned that the shop in dispute was constructed by Naqshe Ali and Mashooq Ali who were co-sharers in the other shops, godown and the site of the building and in the land attached to those shops to the extent of 2½ anna share. In the counter-affidavit filed by Krishna Kumar it is alleged that Naqshe Ali and Mashooq Ali were merely tenants of the shop in dispute paying a rent of Rs. 60/-. It, however, appears that Krishna Kumar himself had men-

tioned in his application for allotment that the shop was owned by Naqshe Ali and Mashooq Ali and had not mentioned that any rent was paid by Naqshe Ali and Mashooq Ali. The Rent Control and Eviction Officer also in his order of allotment mentioned that Naqshe Ali and Mashooq Ali were the owners of the shop. It is true that the applicant in his application for allotment mentioned Rs. 60/- as the present rent of the shop. But he explains that he did not mean thereby that the rent was paid by Naqshe Ali and Mashooq Ali, but that the estimated rent of the shop was Rs. 60/-. Having regard to what was stated by the opposite party in his application for allotment, and by the Rent Control and Eviction Officer in his order of allotment, we hold for the purposes of the present application that Naqshe Ali and Mashooq Ali were not tenants of the shop but were owners thereof.

(5) The question then is whether Naqshe Ali and Mashooq Ali having suspended their business, but not having vacated the shop because their goods were still in the shop, had the power to transfer possession over the shop to the applicant without the shop being allotted to him by the Rent Control and Eviction Officer. We think that they had the power and the jurisdiction of the Rent Control and Eviction Officer did not come in.

(6) Under S. 7, Rent Control and Eviction Act, the District Magistrate is authorised to require a landlord to give intimation that any accommodation of which he is a landlord is or has fallen vacant and to let or not to let such accommodation to any person. The tenant is also bound to inform the Rent Control and Eviction Officer of his intention to vacate the premises he is occupying. It is only when an accommodation falls vacant (and now after the amendment of S. 7 by Act 24 of 1952, or is about to fall vacant) that the District Magistrate acquires the jurisdiction to make an order of allotment. When an owner of property, being in possession of it and actually occupying it, transfers the ownership and the possession thereof to a transferee, the ownership and possession vest in the transferee from the moment of transfer and the transferee steps into the shoes of the owner. In such a case, in our opinion, the accommodation cannot be said to have fallen vacant. What is contemplated by 'accommodation falling vacant' under S. 7 in the case of the landlord himself in occupation is that the accommodation is not intended to be used by the owner for his own purposes, but is intended to be let out to a tenant, or if the occupier is a tenant that the tenant will cease to occupy it. Where a person purchases the rights of ownership and gets into possession of the accommodation from the previous owner, who was in fact occupying the accommodation for his own purposes, it cannot be said that at any point of time the accommodation had fallen vacant. In the present case it appears that before the accommodation actually fell vacant, the accommodation was transferred to the applicant. In the circumstances the Rent Control and Eviction Officer, in our opinion, had no jurisdiction to make the allotment.

(7) It was urged that since the applicant availed of another remedy and failed therein, he ought not to be allowed to avail himself of the remedy under Art. 226 of the Constitution. We have already mentioned that the suit filed by the applicant was withdrawn by him because his application for temporary injunction was rejected on the ground of the suit not being maintainable. This is not a case in which the application has failed on the merits in the previous suit. We do not think that his failure to obtain redress in the suit is a bar, in the circumstances of the present case, to his seeking a relief from this Court under Art. 226. On the other hand, the decision made on the application for the issue of a temporary injunction leads to the inference that he had no other remedy except the one which he is now pursuing.

(8) It was next urged that the applicant had himself made an application for the allotment of the shop to him and, therefore, he had submitted to the jurisdiction of the Rent Control and Eviction Officer and could not now seek to have the order of the said Officer set aside by this Court. The applicant, no doubt, made an application for allotment to the Rent Control and Eviction Officer, but if it turns out that the Rent Control and Eviction Officer had no jurisdiction to make the order of allotment, the consent of the applicant would not confer jurisdiction on the Rent Control and Eviction Officer. It appears to us that the applicant was ignorant of his rights when he made the application for allotment. If he acted in ignorance of his rights there could be no question of estoppel operating against him.

(9) In the result we allow this application and quash the order of allotment. The applicant will have his costs from Krishna Kumar opposite party.

A/M.K.S. Application allowed.

A. I. R. 1953 ALL. 459 (Vol. 40, C. N. 213)

MALIK C. J. AND V. BHARGAVA J.

Messrs. Rameshwar Lal Radha Krishan, Applicant v. State of U. P. and others, Opposite Party.

Civil Misc. Writ No. 217 of 1952, D/- 11-12-1952.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 3 (2) — Notification of U. P. Food and Supplies D/- 5-10-1949 — Restriction in notification related not only to rock salt imported from Pakistan but also to sea-salt. **(Para 2)**

(b) U. P. Salt Control Order (1947), S. 2 (a) — Sea-salt comes under definition of salt and cannot be said to be exempt. **(Para 3)**

S. N. Misra, for Applicant; Standing Counsel, for the State.

MALIK C. J.: This is a writ application in which the applicant complains that the opposite party have wrongfully prevented him from taking delivery of 250 bags of sea-salt which he had imported to Basti from Bombay under a licence issued by the Bombay Government. The argument of learned counsel for the applicant is that the U. P. Salt Control Order, 1947, does not apply to sea-salt and he was, therefore, not required to take out a licence.

(2) The applicant has relied on Annexure A to his affidavit. That is a notification of the U. P. Food and Civil Supplies, dated 5-10-1949, published in the U. P. Government Gazette (Extraordinary). It is urged that that notification shows that the restriction related only to rock salt imported from Pakistan and not to sea-salt. This argument is misconceived.

'Salt' is defined in the U. P. Salt Control Order of 1947 as meaning:

"any salt except 'khari' and saltpetre duly certified as such by the District Magistrate and bitterns, denatured salt and black salt."

By an order of the Government dated 3-8-1948, the U. P. Salt Control Order of 1947 was made inapplicable to rock salt imported from Khewra, Warcha and Kalabagh. Later by the notification dated 5-10-1949, the previous notification dated 3-8-1948 was cancelled and the U. P. Salt Control Order thus again applied to rock salt imported from Khewra, Warcha and Kalabagh as it was included in the definition.

(3) The next contention of learned counsel is that sea-salt is 'khari', or bitterns, or denatured salt and thus excluded. We have looked into the meanings of the various words mentioned in the Order and we find that sea-salt does not come under the exception. 'Khari' in Fallon's Hindustani-English Dictionary means:

"an alkaline salt; a kind of sulphate of soda, used in medicine and for the adulteration of the common salt."

Saltpetre clearly is not sodium chloride and 'Khari' or saltpetre before it can be exempted has to be duly certified as such by the District Magistrate. As regards the other two terms, 'bitterns', according to Webster's Dictionary means:

"the bitter mother liquor that remains in saltworks after the salt has crystallised out and from it are obtained magnesium chloride and sulphate, sodium sulphate, and bromides and iodides."

'Denatured salt' according to the same dictionary is a salt which had been rendered unfit for human consumption. The meaning of the word 'denature' is given in the dictionary as follows:

"To deprive of natural qualities; to change the nature of; to render unfit for eating or drinking."

The compiler goes on to say that

"Spirits are denatured by the addition of small amounts of some substance that will render the liquid unwholesome or unpalatable."

Denatured salt, therefore, is a salt in which something has been mixed to make it not fit for human consumption. Sea-salt, therefore, clearly comes under the definition of salt and cannot be said to be exempt.

(4) In the rejoinder affidavit it is stated that several other persons had imported sea-salt and the District Supply Officer had not insisted on their taking out a licence. Even if that allegation be true, we cannot, in the exercise of our jurisdiction under Art. 226 of the Constitution, interfere unless we are satisfied that the applicant had a right to import sea-salt without a licence.

(5) The result, therefore, is that this application has no force and is dismissed with costs.

C/V.R.B. Application dismissed.

A. I. R. 1953 ALL. 460 (Vol. 40, C. N. 214)

MUKERJI J.

Ram Narain, Plaintiff-Applicant v. The Dominion of India, New Delhi and another, Defendants-Opposite Party.

Civil Revn. No. 595 of 1950, D/- 4-12-1952.

(a) Railways Act (1890), S. 77 — Notice.

Where in a suit for damages against a railway administration for non-delivery of a part of the consignment, the plaintiff establishes that the non-delivery was due to misconduct on the part of the railway administration and there is no finding that it was due to loss, destruction or deterioration, the suit cannot fail for want of notice under S. 77, Railways Act. AIR 1952 All 891 (FB) and AIR 1952 All 897 (FB), Foll. (Para 7)

Anno: Railways Act, S. 77 N. 1, 2.

(b) Railways Act (1890), S. 72 — Who can sue.

A consignee under a railway receipt is entitled to sue the railway administration for non-delivery of the consignment so long as he has not specifically endorsed the railway receipt in favour of any other person. The mere fact that the delivery of part of the consignment has been taken by his agent on his behalf would not destroy the right of the plaintiff if there is no endorsement in favour of the agent. AIR 1924 All 574, Dist. (Para 9)

Anno: Railways Act, S. 72 N. 33.

S. N. Kackar and Gopi Nath Kunzru, for Applicant; J. Swarup and Lalta Prasad, for Opposite Party.

CASES CITED:

(A) ('52) AIR 1952 All 891: 1952 All LJ 443 (FB)

(B) ('52) AIR 1952 All 897: 1952 All LJ 451 (FB)

(C) ('24) AIR 1924 All 574: 22 All LJ 663

ORDER: This is a plaintiff's application in revision arising out of a suit filed in the Court of Small Causes at Allahabad for the recovery of a sum of Rs. 285/13/6 as damages for the loss of seven packages of betel leaves which had been consigned from railway station Danton to Allahabad. The consignment was despatched on 5-5-1947, and the plaintiff was the consignee of ten packages, which were the number of packages, that had been despatched to him from Danton. In the usual course the packages were expected at Allahabad but when delivery was sought of the consignment only three packages out of a total of ten were delivered. Delivery of these three packages was taken by a person called Beni Prasad who happens to be a party to this revision also, as opposite party No. 2.

It appears that Beni Prasad was a sort of an agent on behalf of the plaintiff to take delivery of his consignments. It appears further that Beni Prasad deeming himself competent to lay a claim for the non-delivery of the seven packages laid a claim against the railway for damages. The Railway compromised the claim with Beni Prasad for a sum of Rs. 154/- and a "pay order" was actually drawn up bearing the date 29-11-1947, in favour of Beni Prasad. Fortunately, the plaintiff came to know of this unauthorised activity of Beni Prasad and he wrote to the Railway to say that they had no business to make payment to Beni Prasad in respect of the loss of a part of the consignment which had been booked in the plaintiff's name. On receipt of the plaintiff's letter which was dated 5-12-1947, the Railway stopped making payment to Beni Prasad and the amount of the pay order which had been drawn up in his name, on 29-11-1947, was not given to Beni Prasad.

(2) On 5-7-1947, the suit out of which this revision has arisen was instituted by the plain-

tiff against the Dominion of India, which under the Adaptation Order has to be read as the Union of India, for the recovery of the sum which I have already mentioned earlier.

(3) On behalf of the Railway, several defences were raised. One such defence, which I must notice at the outset, was that Beni Prasad was a necessary party to the suit. On this objection, on behalf of the Railway, which defended the case in place of the Union of India. Beni Prasad was added as a defendant to the suit. The other defence, which I need notice, was that the claim was barred because notice under the provisions of S. 77, Railways Act, had not been served on the Railway Administration.

(4) The Trial Judge gave effect to the plea that the suit could not succeed because notice under S. 77, Railways Act, had not been given. The suit was, therefore, dismissed by the learned Judge of Small Causes, Allahabad.

(5) The plaintiff has come up in revision and it has been contended on his behalf by Mr. Kackar that the view of the learned Judge of the Court below in regard to S. 77, Railways Act, is no more good law in view of two recent Full Bench decisions, in — 'Governor General in Council v. Mahabir Ram', reported in AIR 1952 All 891 (A) and — 'Mutsaddi Lal v. Governor General in Council', AIR 1952 All 897 (B). In the first noted Full Bench, it has been held that where non-delivery of goods is due to loss of goods by the Railway Administration or due to their destruction or deterioration, then only notice under S. 77, Railways Act, is necessary, but where non-delivery of goods is due to any other reason, then no such notice is required. The Full Bench further held that where the claim is not based upon the loss of the goods by the Railway Administration, but upon non-delivery for other causes and the evidence does not establish that there was loss of the goods by the Railway Administration, S. 77 does not apply and such a suit cannot fail for want of notice.

(6) The second Full Bench to which I have referred, namely the Full Bench in 'Musaddi Lal's case', it was held that non-delivery of goods may be due to a variety of causes and where non-delivery is due to loss, destruction or deterioration of goods, there a notice under S. 77 is required, but where non-delivery is due to any other cause, namely conversion, detention, misconduct, mis-delivery, wrongful sale or such other capricious acts by the Railway, then a notice under S. 77 is not necessary.

(7) In this case there is no finding that the non-delivery was due to loss, destruction or deterioration. As a matter of fact, the finding in the case is that non-delivery was due to the misconduct on the part of the Railway. On the authority of the two Full Bench decisions, therefore, this suit could not fail because notice under S. 77, Railways Act, had not been given within the time prescribed by the plaintiff.

(8) There was another important defence taken, namely that the plaintiff had no right to sue in respect of this consignment; it was contended on behalf of the opposite party that the plaintiff having "endorsed" the railway receipt in favour of Beni Prasad could not any more claim anything in respect of the non-delivery of the consignment from the Railway Administration. Reliance was placed on the decision of — 'Piarey Lal Gopi Nath v. East India Rly. Co.', reported in AIR 1924 All 574 (C), where a learned single Judge held that on an endorsement of the railway receipt the title to the goods passed to the endorsee.

(9) In the present case, the finding of the learned trial Judge is that although delivery of the goods was taken by Beni Prasad yet there was no specific endorsement by the plaintiff who was the consignee of the goods covered by the Railway receipt in favour of Beni Prasad. That being the position, the mere fact that Beni Prasad obtained delivery from the Railway Administration would not destroy the plaintiff's right in respect of these consignments. It appears further that the Railway Administration itself stayed its hands in respect of making payment by their "pay order" of which I have made a reference earlier to Beni Prasad when the plaintiff wrote to them on 5th of December countermanding payment to Beni Prasad. If there had been a valid endorsement by the plaintiff in favour of Beni Prasad, then, in my judgment, the Railway Administration would have faced the plaintiff with that legal position and would have told him that he had no right or title to interfere with any arrangement that was being made by the Railway Administration in respect of this consignment with Beni Prasad. In my judgment, therefore, there is no substance in this plea as well and it must be rejected.

(10) In the result I allow this application in revision by setting aside the decision of the trial Court and decreeing the plaintiff's suit for the sum claimed. I may here state that the finding of the trial Judge is that the amount claimed represents the amount of damages sustained by the plaintiff. The plaintiff will have the costs of this suit throughout.

B/K.S. Revision allowed.

A. I. R. 1953 ALL. 461 (Vol. 40, C. N. 215)
(LUCKNOW BENCH)

MALIK C. J. AND MUKERJI J.

Ramji Das and others, Decree-holders-Appellants v. S. Mohammad Laiq and others, Judgment-debtors-Respondents.

Appeals Nos. 11 and 12 of 1949, D/- 19-1-1953.

Civil P. C. (1908), O. 21, R. 12 — "Belonging to a judgment-debtor but not in his possession."

Where the judgment-debtor is dead and the property is in the possession of his legal representative the latter cannot be treated as a third party in possession of the judgment-debtor's property. 1892 All WN 70 and AIR 1915 All 320, Disting. (Para 8)

Anno: C.P.C., O. 21 R. 12 N. 1.

S. C. Das, for Appellants; Akhtar Husain, for Respondent (No. 7).

CASES CITED:
(A) ('92) 1892 All WN 70
(B) ('15) AIR 1915 All 320: 37 All 527

MALIK C. J.: These two appeals have been filed on behalf of the decree-holders against the order of the learned Single Judge by which he allowed two execution appeals pending in this Court.

(2) In the year 1929, one Mir Muzaffar Husain had borrowed some money on the basis of a promissory note. A suit for the recovery of the money was filed and a decree obtained on 17-11-1931 for a sum of

Rs. 765/4/- plus costs and interest. On 21-1-1932 Mir Muzaffar Husain died leaving 12 persons as heirs and legal representatives. In August 1932, the decree-holders filed an application for execution and for bringing the names of the legal representatives of the deceased judgment-debtor on the record. This application was granted but ultimately the execution application was not proceeded with and it was consigned to the record room. This order is dated 22-12-1932. On 13-7-1935 a second application for execution was filed but as the judgment-debtors were agriculturists, this application also could not be proceeded with and was consigned to the record room. A third application filed on 13-7-1938 met with the same fate on the same ground and the papers were consigned to the record room on 11-2-1939. On 8-5-1941 a fourth application for execution was filed and this time a prayer was made for the attachment and sale of a house No. 86. There was, however, a litigation pending in respect of this house and the execution proceedings remained stayed till the decision of that suit. The suit was decided in 1943, and on 12-7-1943 the decree-holders filed an application for amendment of the execution application by excluding a portion of the property.

(3) Objections were filed on behalf of the legal representatives to the application for execution dated 8-5-1941, and the application for amendment dated 12-7-1943, and the two objections were disposed of by separate orders of the trial Court and by the lower appellate Court. It is against those orders that execution of decree appeals were filed in this Court which were allowed by the learned single Judge.

(4) In the objections taken on behalf of the legal representatives of the judgment-debtors various pleas were raised, but it is not necessary for us to go into them as only one plea has survived and remains to be decided and that is whether the second application for execution was defective inasmuch as the inventory of the property sought to be attached was not furnished under O. 21, R. 12, Civil P. C. It is admitted that if that application was defective, then the third application and the fourth application would be barred by time.

(5) Order 21, R. 11, Civil P. C. sets out what an application for execution should contain. It is not contended that any provision of O. 21, R. 11 was not complied with. The arguments in the lower Courts and in this Court were confined to the provisions of O. 21, R. 12, Civil P. C. Those provisions are as follows:

> "Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same."

The objections were decided by the trial Court and by the lower appellate Court in favour of the decree-holders. It is not necessary for us to set out the grounds on which the two Courts decided that matter. On appeal the learned single Judge of this Court took the view in deciding this objection in favour of the legal representatives that the word "judgment-debtor" in O. 21, R. 12 means the original judgment-debtor and not his legal representatives. So that if the judgment-debtor is dead and the property is in the possession of his legal representatives, the decree-holder must furnish an inventory of the property to be attached as required by the above rule and if he has not done so, then the application for execution is defective and not in accordance with law. It is not necessary for us to consider the larger question whether the execution application was in accordance with the provisions of O. 21, R. 11 and whether it was capable of execution.

(6) The learned single Judge has given reference to one or two cases which really are not in point as they deal with the larger question whether, when an application is so framed that it gives no details of the property against which execution can be sought, then such an application can be deemed to be an application in accordance with law. The first case mentioned by the learned single Judge, — 'Mangal Sen v. Baldeo Prasad', 1892 All WN 70 (A), decided by Mahmood J., did not relate to the provision equivalent to O. 21, R. 12 of the Code of 1908. In that case no list of property had been given and the learned Judge came to the conclusion that it was not a bona fide application by which execution was sought but was an application put in merely for the purpose of saving limitation. The other case mentioned by the learned Judge — 'Abdul Rafi Khan' v. Maula Bakhsh', AIR 1915 All 320 (B), is also not really relevant to the point for decision. In that case the application contained a prayer that by means of attachment and sale of the property of the judgment-debtor the balance of the decree might be recovered and it was mentioned that the list would be filed afterwards; but no list was ever furnished and the learned Judges relying on the decision of Mahmood J. quoted above, held that the application was not an application in accordance with law as no relief could be granted to the decree-holder on the basis of such an application.

(7) We had the application read out to us and we find that it was mentioned in the application that the decree money might be realised by sale of the property left by Mir Muzaffar Husain situated in Qaziara Sitapur except the cattle which it was said was exempt as the deceased was an agriculturist. In any case the larger question not having been raised it was not necessary as we have already said, to go into it, whether the application was so defective that it could not be proceeded with.

(8) Coming back to O. 21, R. 12, Civil P. C., in our view the scope of that rule is a very narrow one and it is not necessary in this case to go into the more important question whether the word "judgment-debtor" in the Code means the person against whom the decree was originally passed or it is wide enough to include his legal representatives also. The learned single Judge has held that in the rules mentioned by him the word "judgment-debtor" must mean the original judgment-debtor while in certain other rules the word "judgment-debtor" includes legal representatives also. If the various provisions of O. 21 are carefully considered, probably it would not be necessary to draw that distinction. The provisions of O. 21 must be read subject to the rights conferred on the decree-holder by the decree and the extent of the liability of the judgment-debtor or his legal representatives is also determined by the terms of the decree and the various provisions of the Code. If it is kept in mind that the

decree-holder cannot get anything more than what the decree gives him and the judgment-debtor or his legal representatives cannot be liable for anything more than what the decree has made them liable for and the extent of the rights of the decree-nolder and the liability of the judgment-debtor or his legal representatives are determined by law and the various provisions of the Code then it becomes unnecessary to draw the distinction between a judgment-debtor and his legal representatives and the word "judgment-debtor" in O. 21, Civil P. C. can be interpreted to include not only a person against whom the decree was originally passed but also the legal representatives.

But as we have already said, it does not appear necessary to discuss this matter further as the provisions of O. 21, R. 12 clearly indicate that they apply only to cases where the application is made for the attachment of any moveable property "belonging to the judgment-debtor, but not in his possession". If the word "judgment-debtor" means the original judgment-debtor only, then after his death this rule will not apply as the property can no longer be said to belong to him. In interpreting this rule it will not be right to omit to take into consideration the words "belonging to a judgment-debtor". The point of time indicated is the time of the application when the property which belongs to a judgment-debtor is not in his possession. If the judgment-debtor by reason of his death has ceased to be in possession of the property he has also ceased to be its owner. If the word "judgment-debtor" is interpreted to mean the person against whom the decree was passed and also his legal representatives after his death, this rule would apply only to a case where the decree-holder alleges that a part of the property belonging to his judgment-debtor (including his legal representatives if he is dead) is in the possession of a third party and wants to proceed against that property. In such a case he has to specify what is that property which he says is in the possession of a third party.

This obviously is for the protection of the third party and is not for the protection of the judgment-debtor or his legal representatives. It is true that a legal representative is liable only for the property that has come into his possession from the original judgment-debtor, but that does not mean that he can for the purposes of O. 21, R. 12 be treated as a third party in possession of the judgment-debtor's property. The following illustration will show that there is no real reason why such a narrow interpretation should be placed on the word "judgment-debtor" in O. 21, R. 12, Civil P. C. If the decree had been passed against Mir Musaffar Husain's legal representatives and he had died before 17-11-1931, the decree having been passed against the legal representatives of Mir Muzaffar Husain, they would be the judgment-debtors even if a judgment-debtor meant a person against whom a decree was passed and as they were in possession of the property of the deceased no list of properties would be necessary under O. 21. R. 12, Civil P. C. There seems to be no good reason why a difference should be made between a case where the debtor has died before the decree and a case where he has died after the decree.

(9) We are therefore not satisfied that the view taken by the learned single Judge that the second application for execution dated 13-7-1935, was not in accordance with law is correct. We set aside his order and restore the order of the lower Courts with costs in all the Courts.

B/D.H. Appeals allowed.

A. I. R. 1953 ALL. 463 (Vol. 40, C. N. 216)

(LUCKNOW BENCH)

BEG J.

Madan Mohan Lal, Applicant v. The State.. Criminal Ref. No. 59 of 1951, D/- 7-1-1952..

Public Gambling Act (1867), S. 8 — Accused acquitted — No order of forfeiture.

Before the court can exercise its jurisdiction to pass order of forfeiture of money or destruction of property under S. 8, it is necessary that the accused must be convicted of the offence with which he is charged. (Para 2)

Anno: P. G. Act, S. 8 N. 1.

L. B. Mathur, for Applicant; P. N. Chaudhry, for the State.

ORDER: This is a reference by the learned Sessions Judge of Lucknow recommending that the order of forfeiture of the alleged "nal" and "phar" money and the destruction of other articles recovered during the search passed by the Sub-Divisional Magistrate, Mohanlalganj, Lucknow (Sri D. D. Joshi) on April 2, 1951, be set aside. One Madan Mohan Lal was prosecuted under Ss. 3 & 4 of the Public Gambling Act. The learned Sub-Divisional Magistrate, Mohanlalganj, Lucknow tried the case and acquitted him of the offences with which he was charged. In spite of the order of acquittal he directed the forfeiture of the alleged "nal" money kept in a cigarette tin & "phar" money found on the spot as well as the destruction of the articles recovered during the search by the police. The accused Madan Mohan Lal went up in revision before the learned Sessions Judge of Lucknow, who has made this reference with the above mentioned recommendation.

(2) I have read the order of reference as well as the explanation submitted by the learned Magistrate and am of opinion that this reference must be accepted. The order of forfeiture of the money and the destruction of the articles is passed under S. 8 of the Public Gambling Act (III of 1867). The said section reads as follows:

"On conviction of any person for keeping or using any such common gaming house, or being present therein for the purpose of gaming, the convicting Magistrate may order all the instruments of gaming found therein to be destroyed, and may also order all or any of the securities for money and other articles seized, not being instruments of gaming, to be sold and converted into money, and the proceeds thereof with all moneys seized therein to be forfeited; or, in his discretion, may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled."

A perusal of the above section clearly indicates that before the Court can exercise its jurisdiction to pass order of forfeiture of money or destruction of property it is necessary that the accused must be convicted of the offence with which he is charged. His conviction is therefore, a condition precedent to any such order. This being a penal enactment must be construed strictly and in the case of acquittal of the accused the Court has no power to pass an order of forfeiture or destruction as mentioned in

S. 8. I accordingly accept the recommendation in the reference and set aside the order of the trial Court directing the forfeiture of the alleged "nal" and "phar" money and the destruction of articles recovered during the search.
C/D.R.R. Reference accepted.

A. I. R. 1953 ALL. 464 (Vol. 40, C. N. 217)

AGARWALA J.

Raj Kishore, Appellant v. The State.

Criminal Appeal No. 21 of 1951, D/- 27-1-53.

(a) Penal Code (1860), Ss. 300 Excep. I and 304 Part 1 — Applicability.

Accused seeing his wife committing act of adultery with deceased — It amounts to grave and sudden provocation within S. 300 Excep. 1 — Offence is one under S. 304 Part 1. (Paras 4, 7)

Anno: Penal Code, S. 300 N. 12; S. 304 N. 1.

(b) Penal Code (1860), S. 304 Part 1 — Sentence — (Criminal P. C. (1898), S. 32).

Sentence in such cases should be so low as is commensurate with nature of offence as the facts would justify it. But at the same time it should not be so low as to encourage commission of homicide. Sentence of four years reduced to half. (Para 7)

Anno: Penal Code, S. 304 N. 6, 7; Cr. P. C., S. 32 N. 3.

Suresh Narain Mulla, for Appellant; A. G. A., for the State.

CASES CITED:

(A) ('39) AIR 1939 Lah 471: 41 Cri LJ 15

(B) ('41) AIR 1941 All 310: 42 Cri LJ 755

JUDGMENT: This is an appeal by Raj Kishore who has been convicted under Ss. 304 and 326, I. P. C. and sentenced to four years' R. I. under the former and two years' R. I. under the latter section. The facts of the case are not disputed by the appellant.

(2) The appellant was employed in Railway loco at Tundla. On 21-9-1949 he was on duty from 4 P. M. to 12 midnight. After finishing his work he went to his house, took his meal and lay in bed outside the house in the lane. He had not yet fallen into sleep when he saw his wife Smt. Sri Devi coming out of the house. She had a liaison with a neighbour Chandra Kishore who was then sleeping nearby with a friend of his. Smt. Sri Devi and Chandra Kishore went inside the house. The appellant got suspicious and followed them stealthily and heard his wife and Chandra Kishore whispering to each other in the courtyard of a dilapidated house adjacent to his own house. He stood there quietly. A little later, peeping over the wall of the dilapidated house he saw to his astonishment that Chandra Kishore was having illicit intercourse with his wife. He lost his self-control and immediately attacked Chandra Kishore with a danda from behind while he was having intercourse. Chandra Kishore became unconscious on receiving danda blows. The appellant then assaulted his wife with the danda. She also became unconscious. Then he rushed inside his house and getting hold of a razor cut the nose of his wife and again beat both of them with the danda. Several villagers came up on the scene. The appellant himself went to the police station, lodged the first information report and deposited the chopped off nose, the razor and the danda at the police station.

(3) Chandra Kishore did not regain consciousness and died four days later. The post-mortem report on his body revealed that he had received 12 injuries on all parts of his body. His skull was fractured and death, in the opinion of the doctor, was due to coma on account of head injuries. The wife recovered.

(4) The appellant made a confession before a Magistrate admitting the circumstances narrated by him in the first information report and he stuck to his statement before the enquiring Magistrate as well as in the Court of Session. There can be no doubt that the appellant committed the murder of the deceased under grave and sudden provocation. His case fell within Excep. I to S. 300, I. P. C. and he was rightly convicted under S. 304, Part I, I.P.C.

(5) The only question before me is whether the sentence requires modification. In this connection learned counsel has urged that a lenient view of the matter should be taken. He has relied upon a Lahore case: — 'Hussain v. Emperor', AIR 1939 Lah 471 (A). In that case the accused killed the deceased on seeing him lying in a bed with his wife. The deceased had previously adulterous intercourse with his wife while the accused was in jail and the wife had given birth to a child on account of this intercourse. The accused bore all this patiently. But he could not bear it any longer when he found the deceased in bed with his wife again. Young J. awarded a sentence of three months' R. I.

(6) In another case of this Court — 'Emperor v. Mendi Ali', AIR 1941 All 310 (B), however, Braund J. awarded five years' R. I. when the learned Sessions Judge had awarded 10 years' R. I. In this case also the accused had seen with his own eyes his wife in the act of adultery with the deceased.

(7) There can be no hard and fast rule as to the sentence which should be imposed in such cases. Every case has to be decided on its own facts. Where the husband sees his wife in adultery with another man, there can be no doubt that grave and sudden provocation is caused to him and the law recognises that if he kills the man committing the adultery in such circumstances, he does not commit murder but that he commits a lesser offence, namely, culpable homicide not amounting to murder. No doubt, the law provides that the sentence for an offence of culpable homicide not amounting to murder may be transportation for life or ten years' R. I. when the case is covered by Part I of S. 304, I. P. C., as it is generally covered by that part in all such cases, yet since the act was, one may say, almost natural in the circumstances, one must award a sentence as low as is commensurate with the nature of the offence and as the facts would justify. At the same time the sentence should not be so low as to encourage the commission of homicide.

(8) I consider a sentence of two years' R. I. under S. 304, I. P. C. to be just in such cases, and a sentence of one year's R. I. would meet the ends of justice in case an offence under S. 326, I. P. C. is also committed.

(9) I, therefore, dismiss the appeal with this modification that I reduce the sentence of rigorous imprisonment under S. 304, Part I, I. P. C. to two years' R. I. and that under S. 326, I. P. C. to one year's R. I. Both the sentences would run concurrently as ordered by the Court below.

(10) The appellant is on bail. He shall surrender to his bail and serve out the sentence.
C/K.S. Sentence reduced.

A.I.R. 1953 ALL. 465 (Vol. 40, C.N. 218)

BIND BASNI PRASAD
AND V. BHARGAVA JJ.

Damodar Das, Applicant v. Co-Operative Seeds Store, Sakit and others, Opposite Party.

Civil Misc. Writ No. 204 of 1952, D/- 16-12-52.

Co-operative Societies Act (1912), S. 43 (2) — Rules under — Rules 115, Explanation 3 and 116 — Applicant borrowing grain from Co-operative Society and agreeing to return it by certain date — According to applicant time for returning grain extended — Applicant sending grain within extended time but society refusing to accept it — District Co-operative Officer informing applicant that he had incurred penalty provided in agreement — Applicant applying to Registrar to refer his case to arbitration — Application refused — Dispute held was one touching business of society and Registrar's refusal was against law. (Para 8)

Anno: Co-operative Societies Act, S. 43, N. 2.

Shambhu Prasad. for Applicant; G. Mehrotra, for Opposite Party.

ORDER: This is an application under Art. 226 of the Constitution by a member of the Co-operative Seeds Store, Sakit, District Etah, in which the prayer is as follows:

"A writ of mandamus or other suitable writ, order or direction be issued to the opposite parties restraining them from taking any steps to recover the amount of Rs. 6,289/9/6; or a suitable writ or direction be issued referring the matter for decision to the Registrar or the arbitrators to be named by him."

(2) The opposite parties in the application are: (1) The Co-operative Seeds Store, Sakit, District Etah; (2) The District Co-operative Officer, Etah; (3) The Registrar Co-operative Societies, Lucknow; (4) The Collector of Etah, and; (5) The State of Uttar Pradesh.

(3) The relevant facts are these: The applicant is a member of the Co-operative Seeds Store, Sakit, and in his capacity as such he borrowed 200 maunds of wheat and 10 maunds of barley on 7-11-1950. The main terms of the agreement of loan were that the applicant was to return the quantity of grain borrowed together with 25 per cent. by the 31-5-1951. If this total quantity of the grain was not returned by the 31-5-1951, or within such period as might be extended the applicant was to be liable to pay the price of the grain with a penalty up to 50 per cent. per annum till the date of recovery of the amount. The actual amount of the penalty was to be determined by the Provincial Marketing Federation.

Before the expiry of the period fixed for the return of the grain, the applicant made an application to the District Co-operative Officer, Etah, for extension of time till the 30th June, 1951. The applicant states that such extension was granted to him. He goes on to say that within this extended period he sent 250 maunds of wheat and 12 maunds and 20 seers of barley to the Co-operative Seeds Store, Sakit, but when the grain reached the Seeds Store the person in charge of it refused to accept it saying that the godown had been closed owing to the rainy season, and so the wheat and barley came back to the applicant. It is alleged that on 12-12-1951, the applicant received a letter from the District Co-operative Officer, Etah, informing him that the applicant had incurred the penalty provided for in the agreement and should pay the price of the grain with the penalty. He was told that in default the money would be realised through the Collector as arrears of land revenue.

Subsequently, a requisition was sent by the District Co-operative Officer to the Collector for the recovery of Rs. 6,289/9/6 from the applicant as arrears of land revenue and in compliance with this requisition the Collector attached the amount in the hands of the Superintending Engineer, P. W. D. out of a sum of about Rs. 40,000/- which the Superintending Engineer had to pay to the applicant in lieu of certain work done by the applicant for the State Government as a contractor. This attachment took place on 10-3-1952.

The applicant offers to deposit in the godowns of the Co-operative Seeds Store the quantity of the grain borrowed by him with an additional 25 per cent. or to pay its price. But he disputes his liability to pay any penalty or interest on the ground that he had sent the grain to the Co-operative Seeds Store within the extended time allowed to him. According to him it was the fault of the Seeds Store that it did not accept the grain offered by the applicant. It is also stated that the amount of the penalty has not been determined by the Provincial Marketing Federation. He disputes the power of the District Co-operative Officer to determine the amount of penalty.

(4) On 21-3-1952, the applicant applied to the Registrar, Co-operative Societies, to refer the applicant's case to arbitration or to act as an arbitrator himself. In reply the Registrar informed the applicant that the seed which the latter had borrowed belonged to the Government and the Co-operative Development Union, Sakit, had been looking after the distribution. It was stated that the Seeds Store was acting only as an agent of the Government and it was not necessary to obtain awards in respect of Government dues as such dues could be recovered by the Collector. The Registrar did not refer the dispute to arbitration as required by R. 116 of the Rules framed under the Co-operative Societies Act, 1912. On these allegations the applicant makes the prayer as stated above.

(5) A counter-affidavit has been filed by the Head Assistant of Co-operative Societies, U.P., Lucknow. Neither the District Co-operative Officer, Etah, nor any office bearer of the Co-operative Seeds Store, Sakit, has filed a counter-affidavit. Sri S. B. Lal, the Head Assistant has no personal knowledge of the extension of time which the applicant alleges in his affidavit. In the counter-affidavit all what is stated about this alleged extension of time is that there was nothing on the record to show that the petitioner applied for extension of time upto 30-6-1951.

Further the counter-affidavit goes on to say that no grain was ever sent to the Seeds Store by the applicant within the extended time. This implies that there was an extension of time. The allegation that the officer in charge of the Seeds Store refused to accept the grain on the ground that the Seeds Store was closed on 26-6-1951, is also denied. Further, it is asserted that the matter could not have been referred to arbitration under the Co-operative Societies Act and the Rules framed thereunder as the dues were those of the Government and were recoverable as arrears of land revenue.

(6) We have before us a copy of the bye-laws of the Sakit Co-operative Society. Sub-clause (2) of clause (4) of the said bye-laws shows that one of the objects of the society is to arrange for the supply of improved seeds.

(7) Learned Standing Counsel has produced before us a certified copy of the deed of agreement which was entered into between the petitioner and the Seeds Store, Sakit, at the time that he borrowed the grain in dispute. The important point to be noted is that this deed of agreement is between the petitioner and the Co-operative Society, Sakit. The lender is the Co-operative Society and not the Government. The contention on behalf of the opposite parties that the Government was the lender to the petitioner is completely negatived by this deed of agreement. The Government may have lent the seeds to the Co-operative Society, but qua the petitioner it was the Co-operative Society which was the lender. The dispute which has arisen in the present case is thus between the petitioner as a member and the Co-operative Seeds Store at Sakit. Rule 116 provides:

> "The Registrar on receipt of a reference shall either decide the dispute himself, or refer it for decision to an arbitrator or to two joint arbitrators appointed by him or to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who shall also appoint one of the arbitrators to act as Chairman."

The duty cast upon the Registrar by R. 116 is a mandatory one. Rule 115 provides:

> "Any dispute touching the business of a registered society (i) between members or past members of a society or persons claiming through a member or past member, (ii) or between a member or a past member or persons so claiming and the society or its committee or any officer of the society, (iii) between the society or its committee and any officer of the society, and (iv) between two or more registered societies, shall be decided either by the Registrar or by arbitration and shall for that purpose be referred in writing to the Registrar."

Explanation 3 to Rule 115 provides:

> "The business of a society includes all matters relating to the objects of the society mentioned in the bye-laws as also those relating to the election of office-bearers of a society."

(8) Having regard to the terms of Rule 115 and specially to those of Explanation 3 thereof, there is no room for any doubt that the dispute which has now arisen between the applicant and the Co-operative Seeds Store, Sakit, is a dispute touching the business of the society. We express no opinion as to the merits of the case, the allegations and the counter allegations, but we are clear in our mind that the Registrar did not comply with the statutory obligation cast upon him by Rules 115 and 116. As a result of this the applicant is not able to get an adjudication of his claim. As the recovery is being made from him as arrears of land revenue in accordance with S. 44, Co-operative Societies Act, it is not possible for him to seek his redress in a civil Court. His only remedy was to have the matter adjudicated by means of an arbitration, but the Registrar has declined this. His refusal to refer the matter to arbitration was against law.

(9) The proper order in the above circumstances to pass is to require the Registrar to decide or refer the matter to arbitration in accordance with Rules 115 and 116.

(10) The application is allowed and we direct the Registrar, Co-operative Societies, U. P. Lucknow, to act in accordance with Rule 116 of the Rules framed under the Co-operative Societies Act 1912, in respect of the dispute referred to him by the petitioner, Damodar Das Attra, by his letter, dated the 21st March 1952, by which he requested the Registrar either to arbitrate in the dispute or to appoint some other person for the purpose. The applicant shall get his costs from the opposite party.

C/V.R.B. Application allowed.

A.I.R. 1953 ALL. 466 (Vol. 40, C.N. 219)

AGARWALA J.

Rekhai Singh, Applicant v. The State through Ram Narayan Singh, Complainant Opposite Party.

Criminal Revn. No. 175 of 1951, D/-17-9-1951.

Criminal P. C. (1898), Ss. 139A and 133 — Application for removal of obstruction on public way — Opposite parties denying public right of way — Proper procedure is to proceed under S. 139A. Cri Revn. No. 1497 of 1949, D/- 24-1-1950 (All) Rel. on. (Para 4)

Anno. Cr. P. C., S. 139A. N. 1.

A. P. Pandey for Applicant; P. C. Chaturvedi, for Opposite-Party.

CASE CITED:

(A) ('50) Cri. Revn. No. 1497 of 1949, D/- 24-1-1950 (All)

ORDER : This is an application in revision against an order of a Magistrate of Faizabad making a conditional order under S. 133, Cr. P. C. absolute and ordering the applicant to remove certain constructions made by him upon an alleged passage.

(2) Ram Narain Singh, opposite party, made an application under S. 133, Cr. P. C. against the applicant Rikhai Singh and one Srimati Dulhin Kuar on the allegation that Rikhai Singh and Dulhin Kuar had made certain constructions on a public road in village Chachikpur. The learned Magistrate called for a report from Sadar Kanungo, Minjhaura. In his report the Kanungo stated that both Rikhai Singh and Dulhin Kuar had extended their houses which were on the two sides of the public road and had thereby narrowed the width of the passage with the result that great inconvenience had been caused to the public. A conditional order was made by the learned Magistrate calling upon Rikhai Singh and Dulhin Kuar to remove the construction and encroachments from the public way & to show cause if they had any objection against the order by a certain date. Rikhai Singh and Dulhin Kuar filed written statements. Rikhai Singh's case was that he had merely put a thatch on the Osara which had been in existence for a long time and that the new constructions had been made by the other opposite party. Dulhin Kuar, on the other side of the road, Dulhin Kuar pleaded that she had erected only mud walls on her own land and that it was Rikhai Singh who had made the constructions and narrowed the passage.

(3) From these pleadings it was clear that Rikhai Singh denied the existence of right of way over the portion of land in his possession while Dulhin Kuar denied the existence of a right of way over

the portion of land in her possession. This was, therefore, a denial of a right of way on the portions of land alleged to have been encroached upon by these two parties and the case fell within the purview of S. 139 (139A ?), Criminal P. C., vide —'Mohammad Jan v. State', Cri. Revn. No. 1497 of 1949 (All) (A), decided by a Bench of this Court on 24-1-1950.

(4) The learned Magistrate instead of proceeding under Sec. 139A, Cr. P. C. took the statement of Rikhai Singh's son and made the order absolute upon the finding that both Rikhai Singh and Dulhin Kuar had made encroachments on the public road. This procedure was clearly erroneous. The learned Magistrate should have first proceeded to find whether there was reliable evidence in support of the denial of the right of way, and then, if he found that there was no such reliable evidence, he should have proceeded further to find if any encroachment had been made on the public way. It is conceded by learned counsel for the complainant that the Magistrate did not follow the proper procedure.

(5) I, therefore, set aside the order of the learned Magistrate dated 20-11-1950, and direct the learned Magistrate to decide the case afresh in accordance with law.

C/R.G.D. Order set aside.

A.I.R 1953 ALL. 467 (Vol. 40, C.N. 220)
(LUCKNOW BENCH)
(FULL BENCH)

SAPRU, KIDWAI AND CHATURVEDI JJ.

Ram Lal and others, Plaintiffs-Appellants v. Ram Narain and others, Defendants-Respondents.

Second Appeal No. 343 of 1945. D/- 3-2-1953.

(a) Civil P. C. (1908), S. 151 — Inherent power — (Tenancy Laws — U. P. Tenancy Act (17 of 1939), Sch. II).

Schedule II, U. P. Tenancy Act does not exclude S. 151, Civil P. C. from application to proceedings in the Revenue Courts under that Act. The Sale Officer who has dismissed for default the execution application pending on his file has, therefore, power to restore it also if justice so demanded. AIR 1921 Lah 67; AIR 1933 All 783 (FB) and AIR 1945 Oudh 210, Ref. (Para 11)

Anno: Civil P. C., S. 151 N. 1.

(b) Tenancy Laws — U. P. Tenancy Act (17 of 1939), Sch. II, List II, Item 11 — 'Collector', interpretation of — (Interpretation of Statutes — Harmonious construction) — (Civil P. C. (1908), Pre.).

The provision made at Item 11 of List II of Sch. II is a rule of procedure and should be construed liberally, that is in such a way as will lead to the smooth working of the scheme of the Statute. The word 'Collector' should be interpreted to mean and include all Assistant Collectors, who have been invested with the powers of a Collector for the purposes of entry 11, list II of Sch. 2. (Para 16)

Anno: Civil P. C., Pre. N. 7.

(c) Evidence Act (1872), S. 114 — Judicial and official acts — (Tenancy Laws — U. P. Tenancy Act (17 of 1939), Sch. II list II, Item 11).

The High Court can safely presume that the official act of the transferor Court, in sending the case direct to the Sale Officer instead of sending it to the Collector of the District was done in a regular manner and that the Court of the Sale Officer was seised of the jurisdiction to proceed with the execution of that case.

At worst, sending the execution application might be an irregularity which could not oust the inherent jurisdiction of the Sale Officer especially when the sale held in those proceedings was confirmed by the Collector himself. (Para 18)

Anno: Evidence Act, S. 114 N. 29.

R. B. Lal, Raj Bahadur and Rajeshwari Prasad, for Appellants; Mahabir Prasad Srivastava, for Respondent (No. 3).

CASES CITED:
(A) ('21) AIR 1921 Lah 67: 2 Lah 66
(B) ('33) AIR 1933 All 783: 55 All 891 (FB)
(C) ('45) AIR 1945 Oudh 210: 20 Luck 317

CHATURVEDI J.: This second appeal arises out of a suit for possession brought by the appellants against the respondents for possession of certain share situate in mahal Gaya Din village Bitwa Gadan Khera in the district of Unnao.

(2) The facts which gave rise to this suit are briefly narrated below:

Ram Narain, respondent 1, obtained a decree for profits against the three appellants and one Din Dayal from the Court of the Sub-Divisional Officer, Hasanganj, on 26-10-1936. An application for execution of the decree was presented to that Court in August 1939. The execution case was ultimately transferred to the Court of the Sale Officer on 27-3-1940, and all the papers relating to the execution were sent to that officer.

(3) On 13-10-1941, the application for execution was dismissed for default by the Sale Officer, who then returned the papers to the Sub-Divisional Officer, Hasanganj. An application was made by the decree-holders for restoration of the execution case and the Sale Officer restored the case on 1-11-1941. The proceedings for sale then commenced and the sale was finally confirmed on 6-3-1943. Raja Ram, respondent 2, was the auction purchaser and possession was delivered to him on 18-4-1943.

(4) The plaintiffs then brought the present suit on 2-11-1943, challenging the sale on various grounds. The main question raised in the suit with which we are concerned was that the Sale Officer had no jurisdiction to sell the property involved in the suit. It was also alleged that even if the Sale Officer was competent to execute the decree, his jurisdiction was ousted when the execution case was dismissed for default. It was averred that the Sale Officer had no power to restore the execution application, which had been dismissed for default, and the proceedings that commenced after restoration were devoid of jurisdiction.

(5) The suit was contested by the respondents, who traversed the allegations made in the plaint. Their main plea was that S. 47 was a bar to the maintenance of the suit.

(6) The learned Munsif, who tried this case, held the sale to be void on the ground that the Sale Officer had no jurisdiction to sell the property and to restore the execution application after it had been dismissed by him for default. He further held that the suit was barred by the provisions of S. 47, Civil P. C., and dismissed the suit.

(7) The matter was taken in appeal to the Civil Judge, who held that the Sale Officer Sri Nazir Hasan, Assistant Collector, first class, had no jurisdiction to execute the decree and also to restore the application, which had been dismissed by him for default. His finding was that the sale was not void and therefore the plaintiffs could not succeed. He further held that the suit was barred by S. 47 and O. 21, R. 92, Civil P. C.

(8) The plaintiffs then filed this second appeal, which came up for hearing before one of us, who, in view of the importance of the matters involved in the appeal thought it fit to refer the case to a Full Bench for decision.

(9) The learned Counsel for the appellants had raised three points before us:

1. The bar under S. 47 and O. 21, R. 92, Civil P. C. does not apply inasmuch as the sale was without jurisdiction and a nullity.
2. The Sale Officer to whose Court the execution of the decree was transferred had no jurisdiction to entertain the application.
3. The Sale Officer had no power to restore the execution application which had been dismissed by him for default.

(10) The learned Counsel for the appellants at first proceeded to argue the case on the points whether S. 47 was a bar to the suit. He, however, conceded that the question about the bar under S. 47 was dependent upon the question whether the sale was without jurisdiction and that the consideration about the applicability of S. 47, Civil P. C. will not arise in case it was found that there was no defect in the jurisdiction of the Sale Officer conducting the sale. We therefore thought it proper to hear the learned counsel for the appellants on the question whether the sale was a nullity for want of inherent jurisdiction and also because the Sale Officer had no power to restore the application, which had been dismissed for default.

(11) The question whether the Sale Officer acted illegally in restoring the execution application need not detain us long. The power vested in Courts under S. 151, Civil P. C., is applicable to the proceedings in execution before the revenue Court as well. Schedule II, U. P. Tenancy Act does not exclude S. 151, Civil P. C. from application to proceedings in the Revenue Courts under that Act. Section 151 gives inherent power to Courts to make "such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." If the Sale Officer had power to dismiss the execution application pending on his file, then surely he had power to restore it also if justice so demanded. In — 'Bholu v. Ram Lal', AIR 1921 Lah 67 (A), a Division Bench of the Lahore High Court made the following observation:

> "Now, if the Court has an inherent power to pass an order of dismissal, there is absolutely no reason why it should not possess a similar power to set aside the dismissal if the ends of justice render it necessary to do so."

The inherent power given to all the Courts to restore cases dismissed for default has been recognised in a number of cases and it is needless for me to refer to them in detail. It was held by a Full Bench of the Allahabad High Court in — 'Mahomed Hanif v. Ali Raza', AIR 1933 All 783 (FB) (B), that the Court under its inherent jurisdiction under S. 151 could set aside an 'ex parte' order in execution proceedings. The same view was taken in — 'Bajrang Bahadur v. Suraj Narain', AIR 1945 Oudh 210 (C). It is, therefore, idle to contend that the Sale Officer had no power to restore the execution case.

(12) The second and the main point relating to jurisdiction was argued at length by the learned Counsel for the appellants. For a proper appreciation of the question of jurisdiction, it is necessary to consider the provisions of the U. P. Tenancy Act, relating to the execution of decrees. Before the U. P. Tenancy Act came into force, the provisions laid down in the Civil P. C. relating to execution of decrees were followed by the revenue Courts in Oudh. The U. P. Tenancy Act has, however, modified the provisions of O. 21 to the extent noted down in Sch. II as mentioned below:

"THE SECOND SCHEDULE.

List II.

Serial No.	Sections.	Modifications
11	21	"(2) If the property against which execution is applied for is a mahal or a share of a mahal or the holding of a permanent tenure-holder, or the fixed rate tenant or an under-proprietor *the decree shall be sent to the Collector*, who shall execute the same as if it had been a decree of his own Court."

It is not disputed that the property in suit is of the description mentioned in Sch. II. For its sale the provision is that the decree shall be sent to the Collector for execution.

(13) In this case, the Court which passed the decree was the Court of the Sub-Divisional Officer of Hasanganj. And the Court to which the decree was transferred for execution was the Court of the Sale Officer, Sri Nazir Hasan. Under S. 261, Tenancy Act, the State Government is authorised to confer on an Assistant Collector of the first class 'all' or any of the powers of a Collector under the Act. It was in exercise of this authority that on 2-3-1940, the following notification was issued:

> "The Governor is pleased to confer on all Assistant Collectors of the first class who had hitherto exercised, or may hereafter exercise, such first class powers for a period exceeding seven years, the 'powers of a Collector exercisable under serial No. 11 of List II of Sch. 2' of the said Act for so long as they hold the office of an Assistant Collector of the first class." (Vide notification No. 329/I-33 dated 2-3-1940, published in Part I of the U. P. Gazette of 9-3-1940).

(14) It is admitted that Sri Nazir Hasan, Sale Officer, fulfilled the necessary qualifications, & that under the above notification the State Government had invested him with "the powers of a Collector" exercisable under serial No. 11 of list II of Sch. 2. He was, therefore, competent to exercise the powers of a Collector in matters relating to execution of decrees, and the learned Counsel for the appellant does not question it.

(15) The contention of the learned Counsel for the appellants however, is that although Sri Nazir Hasan, Sale Officer, had the power to execute decrees, yet he could not exercise that power independently, that is to say Sri Nazir Hasan could not receive execution

applications directly from the Court which passed the decree. In other words, the contention is that the sending Court (i.e. the Court of the Sub-Divisional Officr, Hasanganj) had no option but to comply with the directions given at serial No. 11 that

> "the decree shall be sent to the Collector who shall execute the same as if it has been a decree of his own Court."

Stress has been laid on the word 'Collector' and it is argued that the word 'Collector' means only the Collector of the district. It is pointed out that the sending Court should have first sent the case to the Collector, and it was then open to the Collector to pass it on to the Sale Officer. The question relating to jurisdiction, therefore, narrows down to this: Whether the Court which passed the decree could send the case directly to the Sale Officer or whether it was incumbent on the Court of the Sub-Divisional Officer to send it to the Collector only.

(16) The crux of the whole question is whether the word 'Collector' used at serial No. 11 of List II of Sch. 2 can be construed to mean not only the Collector of the district but also the Assistant Collector, who has been invested with the powers of a Collector, in the matter of execution of decrees. The question is one of construction. The provision made at Item No. 11 of List II of Sch. II is a rule of procedure and should be construed liberally, that is in such a way as will lead to the smooth working of the scheme of the Statute. In matters relating to execution of decrees it is of primary importance that cases are disposed of expeditiously; and it was perhaps with that object in view that the Government issued a notification already mentioned to confer on all Assistant Collectors of the first class the powers of a Collector exercisable under serial No. 11 of list II of Sch. 2. The vesting of the powers of 'a Collector' in the Assistant Collector could not but mean that the Assistant Collector in whom those powers were vested was to act as a Collector for cases under serial No. 11 of list II. In my view the word 'Collector' means not only the Collector of the district but also includes within its fold the Assistant Collector who has been specially invested with the powers of a Collector. In construing the word 'Collector' in this manner the intention of the Legislature will be better effectuated than if we were to limit the word 'Collector' to only the Collector of a district. I am, therefore, of opinion that the word 'Collector' should be interpreted to mean and include all Assistant Collectors, who have been invested with the powers of a Collector for the purposes of entry No. 11, list II of Sch. 2. In view of the interpretation put by me, the Sub-Divisional Officer, Hasanganj, was competent to transfer the case directly to the Court of the Sale Officer.

(17) There is one more aspect of the question. Assuming that the word 'Collector' in entry No. 11 refers only to the Collector of the district, it cannot be disputed that the Collector had authority to pass a special or general order to the effect that all execution applications relating to properties of the nature described in entry No. 11 should be sent direct to the Court of the Sale Officer by the Courts which passed the decrees. It is a matter of common knowledge that thousands of such cases arise, and for better administration it is always necessary to pass general orders to avoid unnecessary delay in the disposal of the cases. If all the cases are first transferred to the Collector and then the Collector retransfers them to the Sale Officer appointed for conducting sales in the district, it will lead to unnecessary waste of public time and money. To avoid it the easiest way was to make a general order that all cases arising in the district will be sent by the respective Courts direct to the Sale Officer. The very fact that Sri Nazir Hasan was working as a Sale Officer for the whole district leads one to infer that there must have been some such general order authorising Sri Nazir Hasan to receive execution cases from the various Courts in the district. The act of the sending Court (Sub-Divisional Officer, Hasanganj) in sending the case direct to the Sale Officer will be presumed to have been done legally unless it is demonstratively not so. A presumption of this type can be raised under S. 114, Evidence Act, which runs thus:

> "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The illustration (a) says that "the Court may presume that judicial and official acts have been regularly performed."

(18) We can, therefore, safely presume that the official act of the Sub-Divisional Officer, Hasanganj, in sending the case direct to the Sale Officer was done in a regular manner and that the Court of the Sale Officer was seised of the jurisdiction to proceed with the execution of that case.

(19) As pointed out earlier, the authority of the Sale Officer, Sri Nazir Hasan, to conduct the sales in cases transferred to him cannot be disputed. At worst, we can only say that although he had jurisdiction to proceed with the sale in question, there was irregular exercise of the jurisdiction inasmuch as the case did not reach him through the proper channel of the Collector. Such a defect does not oust the inherent jurisdiction of the Court of the Sale Officer which he undoubtedly had. This mere irregularity on the part of the sending Court in sending the case directly to the Sale Officer, if such an irregularity existed at all, loses its force as we find that the sale was confirmed by the Collector himself.

(20) For reasons given above, the Sale Officer (Sri Nazir Hasan) had jurisdiction to entertain the execution of the case transferred to him by the Sub-Divisional Officer, Hasanganj. The sale of the property in suit was effected by a Court of competent jurisdiction. In this view of the matter, the appellants have no case and the Courts below were justified in dismissing the suit.

(21) It is unnecessary to go into the question about the bar under S. 47, Civil P. C. and I make no comment upon it.

(22) I, therefore, direct that the appeal be dismissed with costs.

(23) KIDWAI J.: I agree.

(24) SAPRU J.: I agree.

(25) BY COURT: The appeal is dismissed with costs.

A/H.G.P. Appeal dismissed.

A.I.R. 1953 ALL. 470 (Vol. 40, C.N. 221)

AGARWALA AND CHATURVEDI JJ.

Ram Dhyan Singh, Applicant v. State.

Criminal Revn. No. 1243 of 1950, D/- 13-1-1953.

(a) Master and servant — Government servant — Dismissal — Salary — (Constitution of India, Art. 311).

Temporary servant suspended on 26-1-1948 — Services automatically terminating on 31-3-1948 — Prosecution for bribery on 30-4-1948 and conviction on 30-6-1949 — Order of dismissal passed on 23-7-1949, dismissing him with effect from date of suspension i.e. 26-1-48 — Effect of order held was that servant was deprived of his pay from 26-1-1948 to 31-3-1948. (Para 4)

(b) Prevention of Corruption Act (1947), S. 6 — Prosecution of person after termination of his services and when he is not in employ of Government — No sanction is required. AIR 1932 Sind 177, Dissented from. AIR 1937 Nag 293, held overruled by AIR 1952 Nag 12. (Para 5)

B. C. Saxena, for Applicant; A. G. A., for the State.

CASES CITED:

(A) ('38) AIR 1938 All 513: 39 Cri LJ 925
(B) ('43) AIR 1943 Cal 527: 44 Cri LJ 633
(C) ('48) AIR 1948 Bom 248: 49 Cri LJ 357
(D) ('32) AIR 1932 Sind 177: 34 Cri LJ 171
(E) ('37) AIR 1937 Nag 293: 39 Cri LJ 146
(F) ('52) AIR 1952 Nag 12: 1952 Cri LJ 98

AGARWALA J.: This is a revision application against the conviction of the applicant under S. 161, I.P.C., and a sentence of one year's rigorous imprisonment and a fine of Rs. 200/-. The facts, briefly stated, are as follows:

(2) The applicant was a cloth Inspector in the Supply Department at Basti towards the end of 1947. He was a temporary hand whose services were to terminate on 31-3-1948. The case for the prosecution was that certain persons applied for licenses for salt shops and the applications were sent to the applicant for report. The people applying for licenses went to the applicant for licenses, but the applicant demanded a bribe of Rs. 25/- from each one of the persons who wanted a license. Certain persons resolved among themselves not to pay the bribe, but one of them, later, backed out, paid the bribe and got the license. On learning this, the others consulted a vakil and approached the District Magistrate who initialled currency notes worth Rs. 75/- and sent them to the Tehsildar, directing him to lay a trap and if bribe be accepted by the applicant, to arrest him red-handed.

(3) On 3-1-1948, at about noon, the Tehsildar of Domariaganj went with two persons who wanted licenses to the house of the applicant. Those persons were sent into the room which Ram Dhayan Singh applicant was occupying, while the Tehsildar stood outside and sent for the Sub-Inspector. A bribe of Rs. 40/- was paid to the applicant by the two persons and thereafter one of them came out and signalled to the Tehsildar, who came with the Sub-Inspector and searched the accused's person. The initialled notes of Rs. 40/- were found on the person of the applicant. The Tehsildar then reported the matter to the District Magistrate.

(4) The applicant was suspended on 26-1-1948. As he was a temporary hand, his service automatically terminated on 31-3-1948. But the question of his pay from 26-1-1948 on which date he was suspended till 31-3-1948, remained to be considered. Before this could be considered, however, the applicant was prosecuted. The charge-sheet was submitted in Court on 30-4-1948, after he had ceased to be in Government service. The Magistrate convicted the applicant on June 30, 1949. After this, the order of his dismissal was passed on 23-7-1949, and he was dismissed from service with effect from the date of his suspension. The effect of this order was not that the applicant was dismissed on 23-7-1948, because his services had already come to an end on 31-3-1948; the effect of the order was that he was deprived of his pay from 26-1-1948, up to the 31-3-1948. Thus, on the date on which he was prosecuted he was no longer in Government employ. The applicant's conviction was upheld by the lower appellate Court.

(5) No sanction for the prosecution of the applicant was obtained. In this revision, the only question for determination is whether sanction was required for the prosecution of the applicant. Section 6 of the Prevention of Corruption Act, No. II of 1947, under which the applicant was prosecuted, runs as follows:

> "No Court shall take cognisance of an offence punishable under Section 161 or Section 165 of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction, — (of)
> (a) in the case of a person who is employed in connection with the affairs of the Federation and is not removable from his office save by or with the sanction of the Central Government or some higher authority, (of the) Central Government; **
> (c) In the case of any other person, of the authority competent to remove him from his office."

It is quite clear that the section applies to an offence being committed by a person who was a public servant at the time when he committed the offence. It is, in our opinion, further clear that the sanction to prosecute a person is required only when he happens to be a public servant on the date on which he is prosecuted, because the crucial date on which the sanction for the prosecution is required is the date on which a Court is asked to take cognisance of an offence mentioned in the section. The section, in an abbreviated form, may be read like this:

> "No Court shall take cognisance of an offence ..... except with the previous sanction ..... (of a particular authority) ..... in the case of a person who is"

a Government servant. The verb 'is', in the above sentence, refers to the date on which the Court is called upon to take cognisance. If the accused is not a Government servant on that date, the Court cannot refuse to take cognisance of the offence. The object of the Legislature seems to be that persons who are in public service should not be unnecessarily harassed. Where a person is not a public servant at all on the date of the prosecution, no question of unnecessary harassment has to be considered by the Government and no question of sanction should arise in his case.

The view that we are inclined to take is supported by a number of authorities, vide: — 'Suraj Narain v. Emperor', AIR 1938 All 513 (A); — 'Prosad Chandra v. Emperor', AIR 1943 Cal 527 (B), and — 'Emperor v. P. A.

Joshi', AIR 1948 Bom 248 (C). Against this view there are only two decisions which were brought to our notice, viz., — 'Suganchand v. Naraindas', AIR 1932 Sind 177 (D) and — 'In Re S. Y. Patil', AIR 1937 Nag 293 (E). Both these decisions were referred to in the Calcutta case and were disapproved. The Nagpur case was overruled by a later decision of that Court: — 'State Govt., M.P. v. Hifzul Rahman', AIR 1952 Nag 12 (F).

(6) As the applicant was not a public servant on the date on which the charge-sheet was submitted against him, sanction to prosecute was not necessary. There is no force in this application; it is dismissed. The applicant is on bail; he shall surrender to his bail and serve out the sentence.

(7) Leave to appeal to the Supreme Court is refused.

B/R.G.D. Application dismissed.

A.I.R. 1953 ALL. 471 (Vol. 40, C.N. 222)
(LUCKNOW BENCH)
BEG J.

Nageshwar Singh and others, Applicants v. State through Sitala Bux Singh and others, Opposite Party.

Criminal Revn. No. 21 of 1951, D/- 18-2-1952.

(a) Criminal P. C. (1898), S. 145 — Finding that there was danger of breach of peace — Sufficiency of material cannot be agitated in revision. (Para 2)

Anno: Cr. P. C., S. 145 N. 7, 12.

(b) Criminal P. C. (1898), S. 145 — Finding that there was apprehension of breach of peace given not on receipt of police report but subsequently but before taking evidence — It is procedural irregularity — Defect is curable — (Criminal P. C. (1898), S. 537). AIR 1933 All 264; AIR 1935 Oudh 316; AIR 1949 All 230, Rel. on; AIR 1927 PC 44, Ref. (Para 3)

Anno: Cr. P. C., S. 145 N. 12, 15.

B. N. Mula and R. B. Chaudhri, for Applicants; H. K. Ghose, for Opposite Party.

CASES CITED:

(A) ('33) AIR 1933 All 264: 55 All 301: 34 Cri LJ 414 (FB)
(B) ('27) AIR 1927 PC 44: 54 Ind App 96: 28 Cri LJ 259 (PC)
(C) ('35) AIR 1935 Oudh 316: 36 Cri LJ 656
(D) ('49) AIR 1949 All 230: 50 Cri LJ 345
(E) ('50) AIR 1950 All 734: 1950 All WR 640
(F) ('51) 1951 All WR 58
(G) ('49) AIR 1949 All 402: 50 Cri LJ 655

ORDER: These are two applications in revision arising out of two connected cases relating to S. 145, Criminal P. C. It would appear that on 28-2-1940, Sitala Bakhsh Singh and Mata Prasad Singh gave two applications under S. 145, Criminal P. C. The first application was against three persons, Ram Sunder Singh, Nageshwar Singh and Indra Singh. The second application was against the said three persons and two more, Shambhu Singh and Kamta Singh. In both the applications the applicants made a clear statement that there was a danger of a breach of the peace. Two applications were given because the dispute in the two cases related to different plots of land. On the same date, the learned Magistrate before whom the applications were given called for a report from the police by the following order:

"Please report if there is an apprehension of breach of such a nature which you are unable to prevent. How many applications have been filed about this in your police station? If there is an apprehension, the land in suit may be attached."

On 6-3-1950 a report was received by the Station Officer stating that the applicant Sitla Bakhsh Singh had obtained a decree against the opposite party Nageshwar Bakhsh Singh. It was also said that Nageshwar Bakhsh Singh was a turbulent person and that it was necessary to bind him down. The report further mentioned the fact that the police had attached the property in dispute. On receipt of this report, the learned Magistrate did not pass the usual order under S. 145 (1), Criminal P. C. stating that he was satisfied that a dispute likely to cause a breach of the peace existed. On 27-3-1950, written statements were filed by the parties and 3-5-1950 was fixed for evidence. Before taking evidence, however, on 3-5-1950 the learned Magistrate passed a formal order which runs thus:

"Whereas I am satisfied that there is an apprehension of a breach of peace between the contending parties, I hereby call upon both of them to file their respective claims and give evidence for possession of the land in suit under S. 145, Cr. P. C. Land to remain attached."

After passing the said order, he took the evidence of the parties and finally came to the conclusion that the applicants were in possession of the property in dispute in both the cases and passed an order under S. 145, restraining the opposite parties from obstructing the applicants' peaceful possession of the property in dispute. He also withdrew the order of attachment made in favour of the applicants and forbade the opposite parties from interfering with the possession of the applicants.

(2) The opposite parties went in revision before the learned Temporary Civil and Sessions Judge, Partabgarh, who upheld the findings of the learned trial Court and dismissed the application. The opposite parties aggrieved with the said order have filed two revision applications in this Court. The learned Counsel appearing on their behalf has argued three points in favour of the contention that the order passed by the lower Courts should be upset.

(3) The first argument of the learned Counsel for the applicants is that there was no material before the trial Court for coming to the conclusion that there was an apprehension of a breach of the peace. I find myself unable to accept this argument as a clear statement that there was a danger of a breach of peace between the parties was made by the applicants in the application. Further there was ample material for such conclusion in the police report which stated that as Nageshwar Bakhsh Singh was a turbulent person, and that it was necessary that he should be bound down. The question whether there was sufficient material for the trial Court to come to the conclusion that there was danger of a breach of the peace is not for the Court at this stage to determine. It is for the Magistrate concerned to come to a conclusion on the material before it whether such a dispute exists. However scanty the material might be, the trial court is the proper forum for the purpose of determining this fact. I am accordingly of opinion that this question

should not be allowed to be agitated at this stage.

In this connection, the learned Counsel for the applicants has further argued that as soon as the police submitted its report the Magistrate did not give the necessary finding under S. 145 (1), Criminal P. C. that there was an apprehension that a dispute likely to cause a breach of the peace existed. It is true that strictly speaking it would have been better if the Magistrate came to a finding at that stage, but in my opinion the fact that he gave the finding subsequently before the evidence began would not vitiate the entire proceedings provided that the opposite party was not prejudiced thereby and provided further that there was material on record indicating that there were sufficient grounds for the Magistrate to pass the order in question. As the order was passed by the Magistrate before the evidence started in the case, there could be no question of prejudice. At the most, it can only be treated as a procedural defect which in my opinion would be curable under the provisions of S. 537, Criminal P. C. In a Full Bench case of the Allahabad High Court reported in — 'Kapoor Chand v. Suraj Prasad', AIR 1933 All 264 (FB) (A) it was laid down that the jurisdiction of a Magistrate to take action under S. 145, Criminal P. C. arises from the fact that he has received certain information from which he is satisfied that there is a dispute likely to cause a breach of the peace. The jurisdiction of the Magistrate does not depend on how he proceeds. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. His omission to follow certain directions contained in the Code cannot be said to deprive him of jurisdiction. Reference in this case was also made to the Privy Council case reported in — 'Abdul Rahman v. Emperor', AIR 1927 P C 44 (B). In — 'Bibi Asghari Khanam v. Emperor', AIR 1935 Oudh 316 (C) on a difference between two Judges of the late Chief Court of Oudh the question was referred to a third Judge —King C. J., who agreeing with Srivastava J., held that when a Magistrate has ample ground for apprehending a breach of the peace and he issues an order under S. 145, sub-s. (i) the mere omission to frame his order in accordance with law is cured by S. 537 as no failure of justice is caused. Reliance in this case was also placed on the Full Bench decision of the Allahabad High Court as well as on the Privy Council case mentioned above. In — 'Mrs. V. E. Argles v. Chhail Behari', AIR 1949 All 230 (D) it was held that where the Magistrate has substantially complied with S. 145 (1) and the order shows that the parties have in no way been prejudiced, the omission to draw up a formal order in terms of sub-s. (1) of S. 145 would not invalidate the order.

In this particular case, it may be mentioned that it has not been argued on behalf of the applicants that they have been prejudiced in any manner nor could such an argument have been advanced in view of the circumstances of the case. Further the grievance of the applicants is not that there is no order of the Magistrate that dispute likely to cause a breach of the peace existed but the only grievance is that the order should have been passed at an earlier stage. It appears to me that a defect of this kind in the absence of any prejudice does not go to the root of the matter and would not vitiate the entire proceedings.

(3a) The learned counsel for the applicant has relied on — 'Khangar v. Jhamman', AIR 1950 All 734 (E). In this case, the Magistrate's order was that if the police was satisfied it should direct the parties to appear before him in person, it was, therefore held that the Magistrate had delegated his jurisdiction to the police officer a procedure which was not permissible under law. In the present case it cannot be said that on this essential matter there was any delegation of its function by the Court to the police. The learned Counsel further relied on — 'Babu Ram v. Ram Prasad', 1951 All W R 58 (F). The judgment in this case does not show that there was any order by the Magistrate to the effect that there was in existence any dispute likely to cause a breach of the peace. It was also found that there was no material upon which such a finding could be based and the Court had not applied its mind to this aspect of the matter. The circumstances of the present case are quite different from the circumstances of that case. Lastly reliance has been placed upon a case reported in — 'Mt. Ram Piari v. Dankua', AIR 1949 All 402 (G) in which it was laid down that a Magistrate acquires jurisdiction to proceed under S. 145 only when there is a likelihood of a breach of peace. If there is material before a Magistrate upon which he feels satisfied that there is likelihood of a breach of peace, an omission to record a formal order as required by S. 145 (a) may be treated as a mere irregularity which can be cured under S. 537, Cr. P. C. In the present case I am of opinion that there was material on record before the trial Court to enable it to arrive at the finding at which it arrived, and this ruling therefore, instead of helping the applicants go against them.

(4) The third argument of the learned Counsel for the applicants is that the finding of possession given by the trial Court is not justified. The trial Court in coming to its finding relied on the oral evidence adduced on behalf of the applicants, entries in the khasra of 1356, the decree passed by the revenue Court in favour of the applicant and other pieces of evidence. This finding has been upheld by the appellate Court. I see nothing perverse or erroneous in their finding. At any rate there is nothing so wrong in their finding as to attract the jurisdiction of this Court at the stage of revision and to persuade it to reverse the concurrent finding of both the lower Courts.

(5) Having heard the learned Counsel for the parties I am of opinion that there is no substance in these revision applications which are accordingly dismissed.

C/R.G.D. Applications dismissed.

A.I.R. 1953 ALL. 472 (Vol. 40, C.N. 223)

(LUCKNOW BENCH)

SAPRU AND MUKERJI JJ.

Sm. Ram Piari and others, Plaintiffs-Applicants v. Ram Adhin and others, Defendants-Opposite Party.

Civil Revn. No. 6 of 1950, D/- 16-1-1953.

Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 12 — Suit under, for redemption of usufructuary mortgage — Civil Court can consider the question whether the mortgagee has put up a fictitious person as tenant to

prevent mortgagor from obtaining possession over mortgaged property — Section has not changed the substantive law found in T. P. Act — (T. P. Act(1882), Ss. 60, 83 and 76). AIR 1949 All 380, Approved; AIR 1949 All 589 and Civil Revn. No. 544 of 1945, D/- 1-10-1948 (All), Overruled. (Paras 4, 5, 6)

Anno: T. P. Act, S. 60 N. 17; S. 83 N. 2; S. 76 N. 6.

B. K. Dhaon, for Applicants; Hyder Husain, for Opposite Party No. 1.

CASES CITED:

(A) ('49) AIR 1949 All 589: 1949 All LJ 125
(B) ('49) AIR 1949 All 380: 1949 All LJ 122
(C) ('49) AIR 1949 All 120: 1947 All LJ 665
(D) ('48) Civil Revn. No. 544 of 1945, D/- 1-10-1948 (All)
(E) ('07) 4 All LJ 273: 29 All 385
(F) ('52) AIR 1952 All 446: 1950 All LJ 878
(G) ('06) 1906 All WN 241: 3 All LJ 517
(H) ('30) AIR 1930 All 413(2): 126 Ind Cas 829
(I) ('30) AIR 1930 Cal 738: 127 Ind Cas 69

SAPRU J.: This application in revision has been referred to this Bench by a learned single Judge of this Court because, as we shall show hereinafter, this case raises a question on which there is a conflict of opinion in this Court.

(2) This revision arises in the following circumstances. The plaintiffs presented an application under S. 12, Agriculturists' Relief Act for redemption of certain zamindari property mortgaged by their predecessor-in-interest. They impleaded in this application one, Ram Adhin, who is now dead and is represented in this revision by his heirs and legal representatives, as a person who they alleged had been put up fictitiously by the mortgagee and who pleaded that he was a tenant of the land in his own right and not a person put up fictitiously by the mortgagee. The trial Court framed four issues and decreed the suit holding that a sum of Rs. 1660/- was due from the mortgagors to the mortgagee & that, on payment of that sum, the mortgagors would be entitled to redeem the property. It further found that the patta in favour of Ram Adhin was not a genuine one. According to the learned Munsif, it was a farzi document. He further found that Ram Adhin had not acquired any adverse possession and was, indeed, not in adverse possession of the property at all. From that decree of the trial Court, defendant 4 went in appeal to the learned District Judge.

The learned District Judge allowed the appeal, holding that the decree against defendant 4 should be set aside. In doing so, he stated that he was following the case of — 'Jagannath Sahu v. Srikant Dube', AIR 1949 All 589 (A). He found that there was a difference of opinion between the former and the later view of this Court and, quite rightly, he followed the later decision of this Court. Having regard to the view that he was taking, he felt it was neither necessary for him to go into the question whether the tenancy of the appellant before him was genuine or fictitious, nor to consider whether a reference to the revenue Court was permissible or not on the ground that a question of tenancy right was involved. From that decree of the learned District Judge the plaintiffs have come up in revision to this Court.

(3) When the case came up before a learned single Judge of this Court, he found that the view of the learned District Judge that the decisions of this Court were not unanimous on the point which had been raised before the learned District Judge was correct. As the question, in the opinion of the learned single Judge, was of some importance, he decided to refer it to a Division Bench.

(4) The question for our consideration is whether, in a suit for redemption under S. 12, Agriculturists' Relief Act, it is open to the civil Court to determine the question whether the mortgagee has put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property. We shall now proceed to consider this question. The application has been argued with commendable thoroughness by learned counsel for both the parties and the relevant law has been placed before us for our consideration.

The first case to which our attention has been invited is that of — 'Ram Kirpal v. Bhagwati Saran', AIR 1949 All 380 (B). In this case it was observed by Bhargava J. that in a suit for redemption under S. 12, Agriculturists' Relief Act, the civil Court could determine the question whether the mortgagee had put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property. The learned Judge pointed out that proceedings under S. 12, Agriculturists' Relief Act were in the nature of a suit it having been so held in the case of — 'Jawahir v. Jadu', AIR 1949 All 120 (C). The paramount consideration with Bhargava J. appears to have been, though it is not stated by him explicitly, that it was desirable to avoid multiplicity of proceedings. He was of the opinion that the cause of action against the mortgagee was not different from the cause of action against the person who had been put fictitiously into possession of the mortgaged property. For these reasons, he thought that the question could be gone into by the Court in an application under S. 12, Agriculturists' Relief Act.

(5) This decision was dissented from in a later case decided by Seth J. who, indeed, had committed himself to a different view from that of Bhargava J. in an earlier but unreported case. In another case namely, — 'Jagannath Sahu v. Srikant Dube', reported in AIR 1949 All 589 (A), a judgment marked by his usual lucidity. Seth J. held that the jurisdiction of a Court in deciding an application under S. 12, Agriculturists' Relief Act, whether as a Court of original jurisdiction or as a Court of appeal, was a special jurisdiction conferred upon it by a special provision of the statute and was limited within the four corners of that section. His view was that the only jurisdiction that the Court possessed in an application under S. 12, Agriculturists' Relief Act was to adjudicate upon the question of redemption and no more. According to the view of that learned Judge, it was not open to the Court to determine an adverse claim to tenancy rights by a third person whom the mortgagor alleged to have been put forward fictitiously by the mortgagee. In this case, there is a reference to an earlier but unreported decision of this Court, namely, — 'Bhagwati Misir v. Ram Ugrah Misir', Civil Revn. No. 544 of 1945, D/- 1-10-1948 (All) (D). The learned Judge admitted that it was a part of the duty of the Court in ordering redemption to put the mortgagor in possession of the mortgaged property. But he referred to a Full Bench decision of this Court in — 'Ram Shankar Lal v. Ganesh Prasad', 29 All 385 (E) in which it was held that the words "mortgaged

property" meant that interest in specific immovable property which the mortgagor professed to transfer, whatever that interest might be. After considering that case and the definition of the "mortgaged property" in the Transfer of Property Act, he came to the conclusion that the delivery of possession of proprietary rights in zamindari property, did not require the dispossession of the tenants in actual cultivatory occupation.

Seth J. also referred to the judgment of Bhargava J. and did not agree with the view of the latter that the question of adverse claim to tenancy rights by a third person whom the mortgagor alleged to have been fictitiously put up by the mortgagee could be entertained by the Court in proceedings under S. 12, Agriculturists' Relief Act. This decision of Seth J. was followed in the case of 'Ram Datt Singh v. Ajodhia Singh', AIR 1952 All 446 (F), by Ghulam Hasan J. That learned Judge placed reliance upon the reasoning indicated by Seth J. in his judgment referred to above.

(6) The question, in our opinion, is also capable of being looked at from a somewhat different angle. We are not prepared to commit ourselves to the view that any substantive change has been introduced in the law relating to redemption by S. 12, Agriculturists' Relief Act. That Act no doubt provides a speedy and efficacious remedy for redemption of usufructuary mortgages in a certain class of cases. But, as we read S. 12, we find that no change in the substantive law relating to redemption has been introduced by it. The question, therefore, is whether under S. 60, Transfer of Property Act defendant 4 was a necessary party to the suit, whose rights must be adjudicated upon by the Court. Section 60, Transfer of Property Act provides:

"At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgage property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption."

Section 83 directs that —

"Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amounts so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished."

(7) The question, therefore, in our opinion, really turns upon what is meant by this right to obtain possession. We have been invited to a number of authorities on this point by learned counsel for both the parties. But it is unnecessary to go into them as, in the cases cited, this point does not seem to have been specifically raised and decided. The nearest case to our mind on this point is that of — 'Ram Chand v. Raj Hans', 3 All LJ 517 (G), where a learned Judge of this Court observed:

"It is, of course, conceivable that during the term of the mortgage a right of occupancy might have been acquired by lapse of time, in which case the tenants would have been entitled to retain possession of the land....."

In the particular case before him that was not, however, the case.

(8) Another case to which attention may be invited is that — 'Sheo Shankar v. Bhup Singh', AIR 1930 All 413 (2) (H). In this case the learned single Judge held:

"The redemption of the mortgage by the plaintiffs does not put an end to the tenancy created in favour of defendants 3 and 4. It is not necessary for me to consider as to whether the position of defendants 3 and 4 is that of a statutory tenant under Section 19 of Act 3 of 1926 (local)."

(9) Reference may be made in this connection to the provisions of S. 76, Transfer of Property Act. They enable the mortgagee in possession, or as he is generally called the usufructuary mortgagee, to manage the mortgaged property as a person of ordinary prudence would manage his own property. In the course of this prudent management, it is open to a mortgagee to create leases or give the land for cultivation to tenants.

The mortgage deed in this case expressly gives the widest possible powers to the mortgagee in this respect. According to the mortgage deed, it was open to the mortgagee to let out the land for management or do whatever he liked with it. In these circumstances, handing over possession, in our opinion, can only mean such possession as the property is capable of at the time when the redemption takes place.

(10) We may also refer to the observations of a single Judge of the Calcutta High Court in — 'Rajendra Nath v. Dinu Prodhan', AIR 1930 Cal 738 (I). The learned Judge deciding that case observes that though the mortgagor is entitled to possession under the law, there is nothing contained in any of the provisions of Ss. 60 and 62 which in any way militates against the position that he was only entitled to such possession as the land was capable of in accordance with the terms of the mortgage. That being so, we do not think that in a redemption suit it is actually necessary for the Court to put the mortgagor into actual physical possession of the mortgaged property in dispute. The nature of the possession can well depend in each case upon the rights conferred by the instrument relating to the mortgage. For this reason we think it was not necessary to enquire into the question whether the transaction in this case was genuine one or not. That, of course, is a matter which can be fought out in a regular suit between the parties. What

the Court was concerned with was to enable the mortgagor to have his property redeemed on payment of the amount found due to the mortgagee.

(11) Learned counsel for the applicants contends that in this particular case a specific issue was raised as regards the 'farzi' character or otherwise of the patta in favour of defendant 4 opposite party 1. The learned Judge did not record a finding on the issue raised as he felt — and in our opinion rightly — that he was bound by a later decision of this Court which had laid down that in a suit for redemption under S. 12, Agriculturists' Relief Act the Court could not go into such a question. In these circumstances, the learned Judge cannot be said to have set aside the finding of the learned Munsif that the transaction was a 'farzi' one and that the defendant did not complete his title to it by adverse possession and that, indeed, he could not do so, having derived his title from the mortgagee. Having regard to this finding, we think it is possible for the applicants, on the assumption that they wish to pursue the matter further, to institute a regular suit and fight the matter out in a regular Court. In this view of the case, we are not disposed in this particular case to exercise the discretionary powers which we possess under S. 115, Civil P. C. in favour of the applicants.

(12) For the reasons given above, this application in revision is dismissed. But in all the circumstances of the case we think it undesirable to make any order as to costs.

(13) The stay order is discharged.

A/R.G.D. Revision dismissed.

A.I.R. 1953 ALL. 475 (Vol. 40, C.N. 224)

AGARWALA AND CHATURVEDI JJ.

Ratan Lal, Accused-Applicant v. State.

Criminal Revn. No. 1100 of 1950, D/- 30-1-1953.

† **U. P. Foodgrains Procurement Order (1949), Para 1 — Validity of order — (Essential Supplies (Temporary Powers) Act (1946), S. 3(2)(f)).**

The Order goes beyond the powers conferred by the Central Government on the Provincial Government under S. 3(2)(f), Essential Supplies (Temporary Powers) Act and, as such, is ultra vires. (Para 8)

S. N. Dwivedi and P. C. Chaturvedi, for Applicant; A. G. A., for the State.

AGARWALA J.: This is an application in revision by Ratan Lal against his conviction under S. 7, Essential Supplies (Temporary Powers) Act, 1946, for contravention of Para 3, U. P. Foodgrains Procurement Order, 1949, and sentence of three months' rigorous imprisonment and Rs. 200/- fine.

(2) The applicant is a cultivator in villages Purqazi and Bhoraheri and pays rent and canal dues. Under the Foodgrains Procurement Order, 1949, he was asked to deliver to the Government in 1949 scheduled foodgrains of the value of Rs. 1139/9/-, which would roughly amount to 100 maunds of foodgrains. He failed to do so and was consequently prosecuted for contravening Para 3 of the said Order. His defence was that he had grown only 60 maunds of foodgrains which he had distributed to labourers and to the Cane Co-operative Society which had advanced to him seeds for growing foodgrains. He further raised a plea that the U. P. Foodgrains Procurement Order was invalid because it went beyond the powers of the U. P. Government as delegated to it by the Central Government under S. 3(2)(f), Essential Supplies (Temporary Powers) Act.

There was no evidence to show that the applicant held stocks more than 60 maunds in weight. Evidence was led by the applicant of respectable persons to show that the produce in the year in question was lean and that many cultivators had perforce to satisfy the Government demand by purchasing foodgrains from other sources. The contention of the applicant that the Foodgrains Procurement Order was 'ultra vires' was rejected by the Magistrate and by the learned Sessions Judge in appeal and he was convicted by the Magistrate as aforesaid and his conviction was upheld by the learned Sessions Judge. The only point for our consideration is whether the U. P. Foodgrains Procurement Order, 1949, is 'ultra vires' or not.

(3) The U. P. Foodgrains Procurement Order, 1949, was made in exercise of the powers conferred by cl. (f) of sub-s. (2) of S. 3, Essential Supplies (Temporary Powers) Act 1946, No. 24 of 1946, and by virtue of the authority delegated to the Provincial Government under the Government of India, late Food Department's Notification No. PY-503(2)I, dated 21-10-1946, as continued in force under S. 17 of said Act. Sec. 3(2)(f), Essential Supplies (Temporary Powers) Act authorises the Central Government to make an order to provide

> "for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order."

The words "holding stock" should be specifically noted. The order could require a person who actually held stocks of essential commodity to sell the whole or part of it. The Order could not require a person not holding such stocks to procure it from somewhere and to sell it to the specified person. Para 3, U. P. Foodgrains Procurement Order, 1949, however, did not observe this essential feature of cl. (f) of the said Act. Para 3 of the Order runs as follows:

> " 'Liability of cultivator to deliver grain". Every cultivator shall sell and deliver to such person, in such manner, and by such date as the Collector may specify, such quantity of scheduled foodgrains as shall be equivalent in value, calculated in accordance with the prices prescribed by the Provincial Government under cl. 14, to the total of his 'rabi' rent, 'rabi' assumed rent and canal dues:
>
> Provided that the quantity of scheduled foodgrains which he shall be required to deliver, shall be equivalent in value to his canal dues and....."

(4) It will be clear that Para 3 compels every cultivator, whether he has got the stock of scheduled foodgrains or not, to sell and deliver it to specified persons certain quantity of foodgrains, which are calculated according to certain multiples of the 'rabi' rent and canal dues, actual or assumed.

(5) "Cultivator" is defined in Para 2 of the Order as a person recorded in the 'Khatauni' as holding land in some of the classes mentioned in the Land Records Manual and also includes persons who are not so recorded but to whom land is let by the Collector. "Rent" means the rent of a holding recorded in the 'Khatauni'.

"Assumed rent" means the amount which the Collector may declare to be the assumed rent of holding or any part thereof in respect of which no cash rent is recorded in the 'Khatauni'.

(6) In para 7 a demand list is prepared showing an area of a cultivator's holding as well as its 'rabi' rent, 'rabi' assumed rent, canal dues and the amount the equivalent of which in scheduled foodgrains he is to deliver to the Collector. It is to be published for objections. What objections can be taken is described in Para. 8. These refer merely to the amount of cash rent entered in the list and the area of the land other than cash rent entered therein. The objection has nothing to do with the actual amount or estimated amount of foodgrains grown on the land. No provision is made in the Order for estimating the actual produce of the cultivator before a demand is made from him or before the demand list is prepared.

(7) Para 21 prescribes the penalty

"If any person contravenes any of the provisions of this Order, he shall be liable to the punishment provided under S. 7, Essential Supplies (Temporary Powers) Act, 1946 (No. 24 of 1946), as amended from time to time."

(8) It is clear from a perusal of the Order that it does not concern itself with the actual stock which a cultivator may have in his possession. It is quite true that ordinarily a cultivator, who has a certain amount of land, will produce some foodgrains thereon. But it is quite possible, and it does happen, that in a particular year or season a particular cultivator may be so unfortunate as not to grow the expected amount of foodgrains. The Order makes no exception in his case. He is bound to deliver the required foodgrains only because he possesses the land and pays canal dues of the land. The Order takes no account of the fact whether a particular cultivator has in fact grown a particular amount of foodgrains or not. In our judgment, the Order goes beyond the powers conferred by the Central Government on the Provincial Government under S. 3(2)(f), Essential Supplies (Temporary Powers) Act and, as such, is 'ultra vires'.

(9) The question whether in this particular case the applicant did have the required amount of foodgrains in his stock is really immaterial when the Order itself is invalid. If the Order goes beyond the powers under which it could be made and is 'ultra vires' on that account, the question of fact, whether the applicant possessed the foodgrains which he could have delivered could not arise for consideration. But as we have already observed, the prosecution led no evidence to show that the applicant was possessed of the required amount of foodgrains. Indeed, there was evidence to show that he was not and this evidence remained uncontradicted.

(10) It seems that the Government itself recognised that it had gone beyond the powers conferred upon it under S. 3(2) of the said Act as the Order was superseded by another Order in 1950 under which the demand from a cultivator was based upon the actual amount of foodgrains held by him in his stock. Section 3, U. P. Foodgrains (Requisitioning) Order says;

"The requisitioning authority may by order in writing, require any person ..... holding stock of any foodgrains ..... to sell the whole or a specified part of it to such person as he may appoint in this behalf."

(11) We, therefore, allow this application and set aside the conviction of the applicant. He is on bail. He need not surrender to his bail. His bail bonds are cancelled. He has not paid the fine. He need not pay it.

A/V.R.B. Application allowed.

A.I.R. 1953 ALL. 476 (Vol. 40, C.N. 225)

AGARWALA AND MUKERJI JJ.

Beni Chand, Applicant v. The District Magistrate, Banda and another, Respondents.

Criminal Misc. No. 1660 of 1952, D/- 2-2-1953.

(a) Arms Act (1878), S. 18(a) — Non-compliance with — Effect.

Section 18(a) requires that the authority suspending or cancelling a licence must himself record the reasons why the order has been passed; and further it should appear from the order that it was passed because it was necessary for the security of the public peace to do so. Where none of these two essential ingredients mentioned in the section is to be found in the order, it is without jurisdiction and must be quashed. (Paras 6, 7)

(b) Constitution of India, Art. 226 — Writ of mandamus — Order complained against quashed — Mandamus directing authority not to give effect to it not necessary. (Para 7)

V. K. S. Choudhary, for Applicant; A. G. A., for Respondents.

AGARWALA J.: This is a petition under Art. 226 of the Constitution praying that the order of suspension of the licences for holding fire-arms passed by the District Magistrate of Banda be quashed and the District Magistrate of Banda may be directed to refrain from giving effect to the order. The facts shortly stated are these.

(2) The petitioner belongs to a well-known family of Banda, his ancestors having served as treasurers to the Nawab of Banda and later as the first treasurer to the British Government. He was the senior Vice-Chairman of the Banda District Board and also of the Banda Municipal Board. He was also a Special Magistrate and Extra Assistant Recruiting Officer of the district of Banda during the two world wars and was also one of the premier landlords of Banda. As a reward of the services rendered by him, he was awarded a revolver as a "sword of honour" in the Durbar of 1918. Originally he was exempted from the operation of the Arms Act, but after the enforcement of new Rules under the Arms Act, a life licence had been granted to him in respect of the revolver and a D. B. B. L. gun. On 6-11-1951 one Deonath is alleged to have thrown acid over Dr. Shyam Lal. The petitioner and another person, namely, Sri Shyama Charan Bajpai, M.L.A., were also considered to have been in conspiracy with Deonath in the throwing of the acid over Dr. Shyam Lal. They were prosecuted under S. 120B read with S. 324, Penal Code. The case against Deonath as well as against the petitioner and Sri Shyama Charan Bajpai is still pending in the Court of a Magistrate of Banda.

(3) The applicant's case is that he has been falsely implicated in that case on account of the political rivalry between him and Dr. Shyam Lal.

(4) On 14-2-1952 the police reported that as the petitioner was involved in a "heinous" offence, it was neither safe nor proper to leave the firearms with the petitioner and Shyama

Charan Bajpai and hence it was requested that the firearms licences of the petitioner and Shyama Charan Bajpai may be suspended during the pendency of the case. This report was forwarded by the Superintendent of Police to the District Magistrate with the following note:

"I agree with the S. O. Kotwali. There seems to be no justification in leaving the firearms with the accused when they are being prosecuted in such a callous and heinous offence."

The District Magistrate thereupon passed the following order:

"Licences are suspended pending disposal of the cases. They should be deposited."

It is this order which is questioned as having been made by the District Magistrate without jurisdiction and liable to be quashed. The order seems to have been passed under S. 18, Arms Act which runs as follows:

"18. Any licence may be cancelled or suspended—

(a) by the officer by whom the same was granted, or by any authority to which he may be subordinate or by any Magistrate of a district, or Commissioner of Police in a presidency-town, within the local limits of whose jurisdiction the holder of such licence may be, when, for reasons to be recorded in writing, such officer, authority, Magistrate or Commissioner deems it necessary for the security of the public peace to cancel or suspend such licence; or

(b) by any Judge or Magistrate before whom the holder of such licence is convicted of an offence against this Act, or against the rules made under this Act; and

the Central Government may by a notification in the Official Gazette cancel or suspend all or any licenses throughout the State or any part thereof."

(5) The petitioner not having been convicted of any offence as yet, cl. (b) of S. 18 obviously does not apply in his case. The only clause under which his firearms could be suspended was cl. (a). Under cl. (a) the conditions upon which the authorities mentioned in that section can exercise the power of suspending firearms are (a) that they must give reasons in writing and (b) that the order must be necessary for the security of the public peace. In the present case the order passed by the District Magistrate does not disclose any reasons whatsoever; much less does it disclose that the order was necessitated by reasons of the security of the public peace.

(6) It was urged by learned counsel for the State that the report of the Station Officer, Kotwali, and the note of the Superintendent of Police gave reasons and that it must be deemed that the District Magistrate approved of those reasons and that it should be assumed that they formed part of the District Magistrate's order. We are not prepared to accept this contention. The statute requires that the authority suspending or cancelling a licence must himself record the reasons why the order has been passed: and further it should appear from the order that it was passed because it was necessary for the security of the public peace to do so. None of these two essential ingredients mentioned in S. 18 is to be found in the order under question.

(7) We, therefore, think that in this case the order was passed without jurisdiction. We accordingly quash it. It is not necessary to issue a writ of mandamus directing the District Magistrate not to give effect to his order because the order having been quashed it cannot be given effect to.

A/D.R.R. Petition allowed.

A.I.R. 1953 ALL. 477 (Vol. 40, C.N. 226)
(LUCKNOW BENCH)
(FULL BENCH)

SAPRU, MUKERJI AND CHATURVEDI JJ.

Maqbulunissa and others, Applicants v. Union of India and another, Opposite Party.

Misc. Appln. No. 848 of 1951, D/- 14-1-1953.

(a) Constitution of India, Art. 226 (1) — "Any Government".

The Union of India can be said to be within the territorial jurisdiction of the Allahabad High Court as it has been given authority throughout the length and breadth of the country. (Para 9)

Anno: C.P.C., Appendix III, Constitution of India, Art. 226 N. 7.

(b) Constitution of India, Arts. 32 and 226 — Distinction.

There is a distinction between Art. 32 of the Constitution which gives power to the Supreme Court to intervene where there is an allegation that fundamental rights have been violated and Art. 226 where the Court can give relief not only in such cases but also in those where, for any other reason, it may be just and expedient for the Court to interfere. (Para 7)

Anno: C.P.C., Appendix III; Constitution of India, Art. 226 N. 3.

(c) Constitution of India, Art. 226 — Declaratory relief.

The powers of issuing writs, orders or directions should not be utilized for giving what is in essence a declaratory relief. (Para 10)

Anno: C.P.C., Appendix III, Constitution of India, Art. 226 N. 5.

Kalbe Mustafa, for Applicant; B. K. Dhaon, and B. N. Roy, for Opposite Party Nos. 1 and 2.

CASES CITED:

(A) ('51) Lloyds Bank Ltd. v. Lloyds Bank Staff Association, D/- 17-1-1951 (Cal)
(B) ('52) AIR 1952 Punj 9: ILR (1952) Punj 11
(C) ('51) Cri. Misc. Appln. No. 2281 of 1951, D/- 22-11-1951 (All)
(D) ('52) AIR 1952 All 257: 1952 Cri LJ 553: (Misc. Case No. 1519 of 1950)

SAPRU J.: This application which has been presented to this Court under Art. 226 of the Constitution, has been referred to the Full Bench by two learned Judges of this Court by their reference order dated 15th September 1952.

(2) The applicants who number four persons, namely, Shrimati Maqbul-un-nisa, Razia Begum, Iqbal Ahmad and Sarkar Ali have applied to this Court for a writ in the nature of 'mandamus' or alternatively for directions or orders directing the opposite parties to forbear from giving effect to the order asking the petitioners to leave India or getting their order executed by their subordinate officers. The question is whether the relief of the nature claimed by the applicants should be granted in this case.

(3) A few facts may be given shortly. Akhtar Ali left India for Pakistan in 1947. He wanted his wife, Razia Begum, who is applicant no. 2 before us, to accompany him to that country. After some hesitation, she decided to go with her husband to Pakistan. Maqbul-un-nisa is the mother of Razia Begum. She was also eventually prevailed upon to accompany Akhtar Ali. The adopted son of Maqbal-un-nisa, Iqbal Ahmad as also the son Sarkar Ali, who is about 6 years old, and who is under the guardianship of Razia Begum, also accompanied Akhtar Ali. On reaching Pakistan, Akhtar Ali decided to leave for England and left the petitioners unprovided for. The petitioners wanted to return as early as possible, but in the meantime the permit system was introduced. Having failed to obtain a permit for permanent re-settlement, the petitioners came back to India in September 1949 on a three months' temporary permit.

(4) In 1949 the Deputy Commissioner of Unnao was moved by the petitioner for permission to live permanently in India as Indian nationals. The Deputy Commissioner recommended their application for a permanent re-settlement to the State Government; but, in view of the fact that their temporary permit was to expire shortly, they had to go back to Pakistan. Thereafter, they came back to India in the early part of 1949 on a regular permit issued by the High Commissioner's office and their case is that since then they had been living in their village when quite suddenly on 17-5-1951 the petitioners 1, 3 and 4 received a letter intimating that their permit had been cancelled and ordering them to leave India within a fortnight. Later Petitioner No. 2 received a communication from the State Government on 10-1-1951 directing her to proceed to Pakistan. They have now come up to this Court for a writ of 'mandamus', direction or order, directing the Union of India and the State Government not to carry out their order.

(5) The first point that we have to consider is a preliminary objection which has been raised to the hearing of this application by the learned Additional Standing Counsel, Shri B. K. Dhaon, In an argument characterised by considerable ability Shri Dhaon has contended that this Court has, under Article 226 of the Constitution, no power or authority to issue a writ, direction or order against the Union Govt. as that Govt. is not situate within the jurisdiction of this Court. He has further contended that an order or direction against the State Government will be ineffective as the State Government is, under the Constitution, bound to give effect to the direction of the Union Government. His contention is that the State Government should not be placed in a position where it has to choose between the orders of this Court and that of the Union Government.

(6) The argument which has been advanced by Mr. Dhaon rests upon the interpretation that he has placed upon Art. 226(1) of the Constitution which we reproduce below:

"Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs including writs in the nature of 'habeas corpus, mandamus', prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

(7) His contention is that this Court has power only to issue writs to any person or authority, including in appropriate cases any government, only if that government is situate within the jurisdiction of this Court. This argument completely ignores the words "any government". They indicate that the founding fathers knew that more than one government would function within the same territory. The assumption on which Mr. Dhaon's argument proceeds is that the Union Government is situate only in Delhi which is the capital of this country and where the President and the Union Government function. This argument is based, in our opinion, upon a misapprehension of the nature of the Constitution under which this country functions.

The Constitution, is, as is well-known, of a 'quasi' federal nature. In the constitutional arrangements embodied in the Constitution, as a perusal of the three lists show, there is a distribution of powers among the various State Governments and the Union Government, though on certain occasions and for certain purposes the Union Government has been given certain rights of interference. We may point out that the Union Government has been given under the arrangement embodied in the Constitution exclusive powers with regard to the subjects comprised in list I. It has been given concurrent powers of legislation in regard to List III and the State Government have, normally speaking, full powers in regard to Lists II and III.

The executive power of the Union Government is co-extensive with the Union legislative powers and that of the State Government with the State legislative powers. The executive power of the Union Government is indicated in Article 73 and that of the State in Article 162 of the Constitution. It is thus clear that both the executive and the legislative powers of the Union Government extend throughout the territory of India in respect of matters which are to be found in Lists I and III. Even in regard to List II, it can in certain conceivable circumstances extend throughout the whole of India. In these circumstances, we do not think that it can be said that the Union Government functions only in Delhi merely because its capital is situate at Delhi.

The analogy between a government and a corporation or a joint stock company which has its domicile in the place where its head office is situate is misleading. To hold that the jurisdiction of this Court does not extend to the Union Government as it has its capital at Delhi and must be deemed to have its domicile at Delhi would be to place the Union Govt. not only in respect of the rights conceded in Part III but for any other purpose, also, beyond the jurisdiction of all State High Courts except the Punjab High Court. This could not have been the intention of the founding fathers. A perusal of the Constitution will show that there is no provision in the Constitution for the location of the Capital. In a quasi federal state with the vast powers which the Union Government possesses, it cannot be said that it functions only at a particular place.

It must be borne in mind that the power of this Court under Art. 226 of the Constitution is not limited to only that class of cases where a fundamental right has been infringed. There is in that sense a distinction between Art. 32 of the Constitution which gives power to the Supreme Court to intervene where there is an allegation that fundamental rights have been violated and Art. 226 where the Court can give relief not only in cases where fundamental rights have been violated but also in those where, for any other reason, it may be just and expedient for this

Court to interfere. It is well-known that in exercising the powers which have been vested in this Court under Art. 226 of the Constitution this Court takes into account the historic background of those writs mentioned in Art. 226.

In our opinion, the jurisdiction of this Court to intervene under Art. 226 depends not upon where the Headquarters or the Capital of the Government is situate but upon the fact of the effect of the act done by Government, whether Union or State being within the territorial limits of this Court. For this reason, we think that the observations of Harries C. J. and Banerjee J. in the case of —'Lloyds Bank Ltd. v. Lloyds Bank Staff Association', unreported D/- 17-1-1951 (Cal) (A) can have no reference to a case like the present one. They are to the following effect:

> "It was faintly suggested at the outset that a 'Mandamus' could issue against the Government of India which is a respondent in this matter restraining that Government from giving effect to the award. Article 226 of the Constitution expressly allows Writs in the nature of prerogative writs to issue against Government which is a departure from English practice. That Government must, however, be located in the territory over which the Court exercises jurisdiction and in my view the Government of India cannot be said to be located in the State of West Bengal and therefore Writs under Article 226 cannot issue against it at the instance of this Court."

If the reasoning of the learned Judges is correct and the interpretation placed upon it by Mr. Dhaon, then the only High Court which can issue writs against the Union Government is the Punjab High Court. For even the Supreme Court can only issue writs where some fundamental right has been infringed. To go thus far would be to infer an intention on the part of the founding fathers to endow only the Punjab High Court with the power of issuing writs, directions or orders calculated to control the administrative vagaries of the Union Government.

Obviously, therefore, the reasonable interpretation to place upon Art. 226 of the Constitution is to make the test of residence of the applicants and the effect of the order on the applicants the supreme test in deciding whether the Court has or has no jurisdiction in dealing with the writ application. Reference was made by Shri Dhaon to one other case of the Calcutta High Court where this case was followed. On a careful reading of the observation of Harries C. J. and Banerjee J., we find that the cases in which this observation has been relied upon were all cases in which the effects of the orders of the Union Government were not operative within the jurisdiction of the Court.

(8) We may also refer to the observations of Harnam Singh J. in the case of —'Jupiter General Insurance Co. Ltd. v. Rajagopalan', AIR 1952 Punj 9(B). That learned Judge says :

> "In exercising jurisdiction under Article 226 the High Court acts in 'personam' and looks to the fulfilment of its order to the person of the respondent. Hence the mere fact that the acts sought to be restrained under Art. 226 are to be done by the respondent outside the territorial jurisdiction of the High Court cannot deprive the High Court of its jurisdiction to issue writ under Art. 226, when the respondent himself is within its territorial jurisdiction."

(9) In our opinion, it cannot be said that the opposite-party no. 1, the Union of India, is not within our territorial jurisdiction as it has been given authority throughout the length and breadth of this country. For this reason we do not look upon this case as laying down a principle which is not in harmony with the one which has commended itself to us. On a consideration of the various arguments which have been advanced by Shri Dhaon, we are clear, in our opinion, that this Court has jurisdiction to entertain this application. This point does not appear to have been raised before the Bench, but we have allowed it to be heard as the whole case has been sent to us for disposal.

(10) We now come to the merits of the application. What the applicants are seeking by this application is to secure from this Court in effect a declaration of their legal status as citizens of India. This court has consistently taken the view that the powers of issuing writs, orders or directions should not be utilized for giving what is in essence a declaratory relief. For it is well-known that writ proceedings are in the nature of summary proceedings where issues are decided on affidavits.

(11) Learned counsel for the State has invited our attention to the order of Government directing the prosecution of the applicants, if they refuse to obey the order directing them to leave this country. He has given us an assurance on behalf of Government that no order of actual deportation will be made against them unless proceedings have been taken under S. 5 of the Influx from Pakistan (Control) Act, 1949. There is in these circumstances, no immediate apprehension of the applicants being deported. In view of this assurance, we consider it unnecessary to go into the question whether the applicants have established their claim that they are citizens of India. That will be a matter which will have to be gone into by the criminal court in the proceedings instituted against them.

(12) It may be that there are other remedies also open to the applicants, but certainly what is not open to them is to seek relief under Art. 226 of the Constitution.

(13) Our attention has been drawn to the remarks of the Bench referring this case in regard to a decision dated 22-11-1951 given in 'Criminal Misc. Appln. No. 2281 of 1951 (C)', to which one of us was a party. That application proceeded upon the basis that the applicant was the holder of a permit for permanent return and he could not, in view of the case of —'Shabbir Husain v. State of Uttar Pradesh', AIR 1952 All 257(D)', be deported from India. The learned Judges merely said that the judgment was binding on them. They did not go into any further question as learned counsel for the State stated that in view of the finding of the Court that the applicant was, having regard to that judgment, a citizen of India, the state authorities would, so long as that finding stood, take no steps to deport the applicant. It may be remarked that the question whether the applicant migrated to Pakistan within the meaning of Art. 7 of the Constitution was a question which had not been argued before that Bench and upon that question the Bench did not give any opinion.

(14) Mr. Mustafa, who appears for the applicants and who has argued the case with ability, prays that this Court may be pleased to direct the authorities to grant some time to the petitioners to make arrangements, if they so desire, to go back to Pakistan. We have no doubt that, if any such request is made by the applicants to the proper authorities, it will be considered by them on its merits.

(15) For the reasons given above, we dismiss this application. In all the circumstances of the case we make no order as to costs.

(16) The stay order is discharged.

A/V.R.B. Application dismissed.

A.I.R. 1953 ALL. 480 (Vol. 40, C.N. 227)

AGARWALA AND CHATURVEDI JJ.

Baldiwakar Misir and another, judgment-debtors Appellants v. Mahatma Singh and others, Decree-holders Respondents.

Exn. Second Appeal No. 910 of 1950, D/- 30-1-1953.

Debt Laws — U. P. Encumbered Estates Act (25 of 1939), Ss. 7, 24 and 44—Decree in favour of landlord applicant.

There is nothing in the Encumbered Estates Act which prevents a landlord applicant from executing a decree in his own favour against a judgment-debtor. Under S. 7 there is no stay of a decree or proceedings relating to decree in favour of the landlord applicant. The Collector can sell the decree in favour of the landlord applicant under S. 24, but this power of the Collector does not imply that the decree cannot be executed by the landlord applicant. Nor has S. 44 anything to do with the matter. (Para 3)

N. R. Sharma, for Appellants; K. L. Misra, for Respondents.

AGARWALA J.: This is a judgment-debtors' appeal arising out of an objection to the execution of a decree. The facts of the case may briefly be stated as follows: Mahatam Singh, Daleep Singh and Rajdeo Singh, respondents, sold their proprietary interest in village Bhilevana to one Mangla Prasad Misir, brother of the appellants, Baldiwakar Misir and Balmukund Misir, for Rs. 1,500/- leaving a sum of Rs. 1295/- with the vendee for payment to one Bharat Singh in liquidation of a debt due from the vendors. Mangla Prasad Misir vendee did not pay the amount left with him under the sale deed with the result that the respondents vendors sued Mangla Prasad for recovery of Rs. 1752/12/-, the unpaid sale consideration with interest. A decree was passed in this suit in favour of the respondents for Rs. 1606/- with costs and future interest. This was on 11-12-1935. Then the respondents-decree-holders applied under the Encumbered Estates Act and disclosed this decree as one of the items of property belonging to them. In due course the debts against the respondents were investigated and simple money decrees were passed against them and were sent to the Collector. The Collector liquidated all the debts due from the respondents without touching the decree which they had obtained against Mangla Prasad vendee. The award under the Encumbered Estates Act proceedings was made on 10-4-45, on which date the entire Encumbered Estates Act proceedings came to an end. During all this period from 1935 to 1945 the respondents did not take any steps to execute their decree against Mangla Prasad, probably under the impression that since they had shown this decree as one of the items of property belonging to them in the Encumbered Estates Act proceedings, they had no power to execute it.

(2) Then on 2-4-1948, they applied for execution of the decree against Baldiwakar Misir and Balmukund Misir appellants brothers of Mangla Prasad Misir who appears to have died in the meanwhile leaving the appellants as his legal representatives. To this execution application the appellants filed objections under S. 47, Civil P. C. on two grounds, first, that S. 24, Encumbered Estates Act barred the execution of the decree, and second, that the decree-holders, having been discharged from the judgment of the decretal amount on the basis of which the decree was passed, had no right to realise the amount. The execution Court held that the second point had no force, but that the decree was barred under S. 24, Encumbered Estates Act. It held that the decree was still under attachment and it was only the Collector who could exclude it. In the result it allowed the objection of the appellants. The decree-holders-respondents appealed to the lower appellate Court. The learned Civil Judge held that S. 24, Encumbered Estates Act was no bar to the execution of the decree, because there was nothing in S. 24, Encumbered Estates Act which prevented the respondents from executing their decree. He further held that the execution of the decree was not barred by limitation as the application for execution had been made within three years of the date of the award made in the Encumbered Estates Act proceedings. In the result the appeal was allowed and the execution was ordered to proceed. Against this decree the judgment-debtors have come up in appeal to this Court.

(3) There seems to be a misapprehension about the correct legal position in the case. There is nothing in the Encumbered Estates Act which prevents a landlord applicant from executing a decree in his own favour against a judgment-debtor. Under S. 7, Encumbered Estates Act all decrees or execution proceedings in respect of a 'debt due from the landlord' are stayed. There is no stay of a decree or proceedings relating to decrees 'in favour of the landlord applicant'. The prohibition against the landlord applicant himself relates to the exercise by him of the power of transferring his property. Clauses (2) and (3) of S. 7 refer to the disability of the landlord applicant. He cannot make any exchange or gift of, or sell, mortgage or lease any of his property. This provision does not debar the landlord applicant from 'executing' his own decree. There is no other provision which prevents him from executing his decree. Section 24 which has been referred to in this connection merely prescribes the procedure which shall be followed by the Collector in liquidating the debts due from the landlord applicant. It is provided that the Collector shall first realise the value of such of the debtor's property other than proprietary rights in land as shall have been reported by the Special Judge under the provisions of sub-s. (2) of S. 19 to be liable to attachment or sale. The Collector could have sold the decree in favour of the landlord applicant under S. 24, but this power of the Collector does not imply that the decree could not be executed by the landlord applicant. It does not further imply that the decree is under attachment. No disability has been cast upon the landlord applicant for executing a decree in his favour. It may be that the landlord applicant after realising the decretal amount has to deposit it in Court for the benefit of the creditors and the Collector may have the right to dispose of the proceeds of the decree. Nor has S. 44, Encumbered Estates Act anything to do with the matter. It merely lays down that

when the debts due from the landlord applicant are liquidated the disabilities from which the landlord suffered would cease. The decree was executable from the very beginning, and the application for execution having been made more than three years after the passing of the decree, was barred by limitation.

(4) In the result the appeal is allowed, the order of the Court below is set aside and that of the Munsif restored. The execution application is dismissed. In the circumstances of the case, however, we order that costs of all the proceedings of all the Courts shall be borne by the parties.

B/V.S.B. Appeal allowed.

A. I. R. 1953 ALL. 481 (Vol. 40, C. N. 228)

AGARWALA AND CHATURVEDI JJ.

Mewa Ram and another, Applicants v. State.

Criminal Revn. No. 1496 of 1950, D/- 22-1-1953.

Criminal P. C. (1898), Ss. 499 and 514 and Sch. V Form No. 42 — Bond by surety only, forfeiture of. AIR 1939 All 682; AIR 1947 Pat 58; AIR 1928 Lah 318 and AIR 1951 Orissa 18, Dissented from.

A bond executed by a surety under S. 499, even when no bond has been executed by an accused under that section is a valid bond which can be forfeited under S. 514. AIR 1934 All 1046; AIR 1945 All 389; AIR 1946 All 116 and AIR 1940 Lah 339, Rel. on. (Paras 4, 5)

(Difference between surety bond under Criminal P. C. and one under civil law pointed out). (Para 5)

Anno: Cr. P. C., S. 499 N. 1; N. 4 Pts. 1 and 2, N. 6; S. 514 N. 4, 5.

B. S. Darbari, for Applicants; A. G. A., for the State.

CASES CITED:

(A) ('34) AIR 1934 All 1046: 36 Cri LJ 297
(B) ('45) AIR 1945 All 389: 47 Cri LJ 209
(C) ('46) AIR 1946 All 116: 47 Cri LJ 528
(D) ('39) AIR 1939 All 682: 41 Cri LJ 85
(E) ('28) AIR 1928 Lah 318: 29 Cri LJ 491
(F) ('47) AIR 1947 Pat 58: 48 Cri LJ 324
(G) ('51) AIR 1951 Orissa 18: 52 Cri LJ 97
(H) ('40) AIR 1940 Lah 339: 41 Cri LJ 958

AGARWALA J.: This is a revision application on behalf of two sureties against an order forfeiting their bonds. One Debi Dayal was prosecuted under S. 411, I.P.C. When he was brought in Court he appears to have applied for being released on bail. A bond was taken from the applicants as sureties for securing the presence of Debi Dayal on the next date of hearing and on subsequent dates. Debi Dayal appeared to subsequent dates but no bond was taken from Debi Dayal himself. Later on he absconded and did not appear on 23-2-1950, the date fixed in the case and thereafter could not be found. The bonds filed by the applicants were forfeited in the amount of Rs. 750/- each which was the amount of the bond. They filed an appeal against the order of forfeiture. Their appeal was dismissed.

(2) The revision application of the applicants first came up for hearing before our learned brother Desai J. who was of the opinion that unless there was a bond executed by the accused himself a bond taken from the sureties was not a bond taken under the Code and therefore could not be forfeited under S. 514, Criminal P. C. But as there were three decisions of our Court against the view which our learned brother was inclined to take, he referred the case to a Bench for decision.

(3) The sole point for determination in this application is whether the bond can be validly forfeited by the Court below. The bond was in the form mentioned in Form No. 42, Sch. V. The applicants executed one joint bond agreeing to produce the accused Debi Dayal on all the dates of the preliminary enquiry against him as also in the Court of Session, and covenanted that in case of failure to do so they would forfeit the amount of Rs. 750/- and in default of non-appearance of the accused on any of the dates fixed for his appearance each of them would be liable to pay a sum of Rs. 750/- as penalty. On the back of the surety bond there was a form to be filled in by the accused which was, however, not filled in and remained blank. The bond was in the same terms as are mentioned in form No. 42 of Sch. 5 to the Criminal Procedure Code. In this form the bond executed by the sureties under reference is below the bond meant to be executed by the accused. The bond intended to be executed by the accused and that intended to be executed by the sureties are wholly independent of each other and one of them is not affected by anything said in the other. It is not in dispute that forfeiture of the bond has been incurred.

The question is whether the non-execution of a bond by the accused vitiates the bond executed by the applicants. The answer depends on a correct interpretation of Ss. 499 and 514, Criminal P. C. Section 499 provides:

"(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be. (2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge."

(4) The section does not make it necessary that only one bond shall be taken which will be executed both by the accused as well as by the sureties. There is nothing to prevent two bonds being taken, one by the accused and one by the sureties. The form of the bond in the form No. 42 of Sch. 5, indicates that the bonds are to be separate. Again, the section does not lay down that the bond or bonds which are to be executed by the sureties shall have any reference to the bond executed by the accused. The phrase "time and place" mentioned in the section must, in our opinion, refer to the time and place mentioned in the particular bond executed by the accused or the sureties, as the case may be. The bond executed by the sureties is not intended to have rerefence to the date and place mentioned in the bond executed by the accused. It is clear that a bond which is taken from the sureties and which has no reference to any of the terms mentioned in a bond executed by the accused himself is one taken in pursuance of the provisions of S. 499. Such a bond does not cease to be taken under that section merely because no bond has been taken from the accused. It is true

that S. 499 requires a bond to be taken from the accused but there is nothing in S. 499 which makes the execution of the bond by the surety or sureties to be dependent upon the execution of a bond by the accused. When the terms of the bond executed by the sureties are contravened S. 514 comes into play. The phrase "under this Code" in S. 514, is fully applicable to the bond executed by the sureties even when no bond has been executed by the accused.

(5) A surety under the Code of Criminal Procedure is not an ordinary surety under the civil law. A surety under the civil law guarantees the payment of a certain sum of money by a debtor, and guarantees that a certain sum of money shall be paid in the first instance by the debtor and if he does not pay it, the same amount shall be paid by the sureties themselves. In such a case, in order that a surety may be bound to pay the amount, it is necessary that the debtor must be bound to pay the amount. If the debtor was not liable to pay the amount, the sureties are not liable to pay, either. Under the Criminal Procedure Code, however, a surety is for the appearance in Court of an accused person on a particular date or dates. When a Court orders an accused person to appear on any date, the accused is bound to appear on that date whether the accused has executed a bond to that effect or not. The effect of a bond executed by an accused is merely to make him liable in a certain sum of money if he does not appear on the date on which he is ordered to appear. The agreement of the surety to produce an accused on a particular date or dates is wholly independent of any agreement by the accused to pay a certain sum of money in case he does not appear on a certain date. In our judgment, a bond executed by a surety under S. 499, even when no bond has been executed by an accused under that section is a valid bond which can be forfeited under S. 514. This view finds support from several decisions of our Court: vide — 'Reoti Prasad v. Emperor', AIR 1934 All 1046 (A), —'Nisar Ahmad v. Emperor', AIR 1945 All 389 (B) and — 'Abdul Aziz v. Emperor', AIR 1946 All 116 (C). We respectfully agree with the view expressed in these cases.

(6) A contrary view was expressed by a single Judge of this Court in —'Brahma Nand Misra v. Emperor', AIR 1939 All 682 (D). We respectfully disagree with that view.

(7) Our attention was drawn to — 'Wadhawa Singh v. Emperor', AIR 1928 Lah 318 (E), —'Baidyanath Misra v. Emperor', AIR 1947 Pat 58 (F) and — 'Govinda Chandra v. State', AIR 1951 Orissa 18 (G).

(8) In 'AIR 1928 Lah 318 (E)' the bond did not mention the Court or officer before whom the executant was to appear. The bond was not taken under S. 499 but appears to have been taken under S. 496. The bond was not in the form mentioned in form No. 42 of Sch. 5. It was held that the surety had incurred no legal liability by executing it. It was, however, observed that there could be no surety without a principal and that no undertaking having been given by the accused to appear when called upon to do so, it was not possible for any person to declare himself surety for his appearance. As already observed, even if no bond is taken from an accused, the order of the Court that he should appear on a particular date is enough to bind him to appear on that date and it is not necessary in order to create a liability on an accused to appear on a particular date that this liability must appear from a bond.

(9) A contrary view was taken in a later decision of the same Court: vide —'Indar v. Emperor', AIR 1940 Lah 339 (H).

(10) In AIR 1947 Pat 58 (F) it was observed that for the enforcement of the liability of a surety, it was incumbent upon the Court to take a bond from the accused himself and that unless such a bond was taken, there was no obligation on the part of the person released so to attend. With respect we do not agree with this observation. The obligation to attend a Court on a fixed date in the case arises by virtue of the order of the Court itself. If the order of the Court is communicated to the accused and he does not appear on the date fixed in the order, the accused is liable for disobedience of the Court's order, & if the accused intentionally omits to attend in accordance with the order he is guilty of offence under S. 174, Penal Code. It cannot, therefore, be said that the surety is not bound by his undertaking because the accused himself is not bound to appear in Court.

(11) In AIR 1951 Orissa 18 (G) it was held:

"The very conception behind the word 'surety' and the liability implied in that status as recognised by law is to reimburse the loss sustained by the principal on account of failure of performance on the part of the obliger."

As already observed by us, a surety under the Code of Criminal Procedure is not a surety for the payment of money at all. He is a surety for securing the attendance of an accused. The amounts mentioned in the bond of the accused & the surety may be different. Further, when the accused is a minor the bond of a surety alone is taken vide S. 514B. It is obvious, therefore, that the word 'surety'. is not used in the Criminal Procedure Code in the sense of a person guaranteeing the payment of money by another. Again, it was observed:

"Not taking a bond from the accused person to appear on the dates fixed amounts to leaving him to act at his own option. If the accused is not bound to appear, there is no meaning requiring the surety to make him appear.

(12) This also, as we have already pointed out, is not correct.

(13) We, therefore, hold that the bail bond was liable to be forfeited under S. 514 of the Code. No other point was urged.

(14) The application is, therefore, dismissed.

A/K.S. Application dismissed.

A. I. R. 1953 ALL. 482 (Vol. 40, C. N. 229)

MALIK C. J. AND V. BHARGAVA J.

Deo Sharma, Applicant v. Commr. of Income-tax, U. P., Lucknow, Respondent.

Misc. Case No. 202 of 1950, D/- 9-1-1953.

Income-tax Act, Ss. 66, 33(1), 18A (6), 30 (1) — Order by Income-tax Officer under S. 18A (6).

No appeal lies under S. 30(1) — Appeals, however, entertained and dismissed on merits by Appellate Assistant Commissioner and Appellate Tribunal — Order of Tribunal being without jurisdiction does not amount to order under S. 33 (1) — No reference can be made under S. 66 — Had there been variation by Tribunal to disadvantage of assessee, reference questioning tribunal's jurisdiction would have been possible. (Para 1)

Anno: I. T. Act, S. 30 N. 1; S. 33 N. 1; S. 66 N. 2.

Brijlal Gupta, for Assessee; S. C. Dass, for Defendant.

MALIK C. J.: Mr. Das on behalf of the opposite party has raised a preliminary objection and has pointed out that the order passed by the Income-tax Officer was under S. 18-A (6), Income-tax Act. The assessee having paid in advance less than eighty per cent. of the tax determined on the basis of the regular assessment he was made liable to pay simple interest at the rate of six per cent. per annum. Learned counsel has drawn our attention to the provisions of S. 30 (1), Income-tax Act and has pointed out that the order under S. 18-A (6) was not appealable. An appeal was, however, filed by the assessee before the Appellate Assistant Commissioner but no objection was raised to the maintainability of the appeal and the Appellate Assistant Commissioner dismissed the appeal on the merits. Then there was a further appeal filed under S. 33 (1) before the Appellate Tribunal which also dismissed the appeal on the merits. Learned counsel has pointed out that the order of the Appellate Assistant Commissioner and the Tribunal being completely without jurisdiction, the order of the Appellate Tribunal cannot be deemed to be an order under S. 33. In case the Appellate Assistant Commissioner or the Appellate Tribunal, in the wrongful assumption of jurisdiction, had varied that order to the disadvantage of the assessee, it may have been possible to ask for a reference for the decision of the question whether they had any jurisdiction to do so; but, they having merely dismissed the appeals, the effect of the order of the Income-tax Officer remained and, as there was no appeal provided for against that order, the order of the Appellate Tribunal cannot be treated as an order under S. 33 against which a reference is provided for under S. 66. This reference cannot be entertained and is rejected.

(2) We make no order as to costs.

B/D.R.R. Reference rejected.

A. I. R. 1953 ALL. 483 (Vol. 40, C. N. 230)

AGARWALA AND CHATURVEDI JJ.

State v. Gulab Singh and others, Respondents.

Criminal Appeal No. 2 and Cri. Ref. No. 317 of 1951, D/- 16-1-1953.

(a) U.P. Removal of Social Disabilities Act (14 of 1947), S. 3(iv) — 'Make a bridegroom alight.'

In S. 3(iv) of the Act, the phrase "make a bridegroom alight from a dola-palki" implies that the bridegroom has been made to alight from the dola-palki against his wishes. The phrase imports an element of compulsion. Where the bridegroom himself alights from the dola-palki because he wishes to observe the custom of the village, the action of a person, who tells him of the custom and persuades him in observing it but does not impose any restriction in the way of the bridegroom proceeding in a dola-palki if he so wished, does not make him liable for the punishment of an offence under the section. (Para 4)

(b) U. P. Removal of Social Disabilities Act (14 of 1947), S. 3(iv) — Custom as defence.

Where an accused compels the bridegroom to alight from the dola-palki against his wishes, it would be no justification for him to urge that there was a custom disallowing going through the village in dola-palki, which equally applied to the upper as well as to the Scheduled Caste. Though S. 3(iv) of the Act refers to a Scheduled Caste alone, it is not confined to a custom restricted to Scheduled Caste only and hence the mere fact that the custom applied both to the higher as well as to the Scheduled Caste is immaterial. (Para 5)

(c) U.P. Removal of Social Disabilities Act (14 of 1947), S. 3(iv) — Mere attempt to stop dola-palki — No offence under S. 3(iv). (Para 6)

†(d) Constitution of India, Arts. 35, 13, 17, 372 — U.P. Removal of Social Disabilities Act, 1947 not void — (U.P. Removal of Social Disabilities Act (14 of 1947), S. 1).

Article 35 which is not retrospective in operation withdraws from the States the power of making any enactment relating to acts which are declared to be offences under the Constitution after the commencement of the Constitution. It does not render null and void any legislation which had already been passed before the commencement of the Constitution. Hence, even assuming that the U.P. Removal of Social Disabilities Act, 1947, deals with disability arising out of untouchability, it is not invalid as it is an Act which was already on the statute book before the Constitution came into force. (Para 7)

Further, it cannot be said that anything in the U.P. Removal of Social Disabilities Act which was already on the statute book is inconsistent with the provisions of Part 3 of the Constitution and is thus affected by Art. 13. The U.P. Act, therefore, still remains in force under Art. 372 and has not become void by anything contained in the Constitution. (Para 8)

Assistant Govt. Advocate, J. R. Bhatt, for the State; G. C. Ghildial, for Respondents.

AGARWALA J.: These are two cases, one is an appeal by the Government against the acquittal of the respondents who were prosecuted under S. 3(iv), U.P. Removal of Social Disabilities Act, 1947, and the other is a reference by the District Magistrate, Garhwal, for the enhancement of the sentence imposed on one Bhajan Singh under S. 3(iv) of the said Act. Section 3 referred to above lays down:

"No person shall, notwithstanding anything contained in any instrument or any custom or usage to the contrary ..... (iv) make a bride or bridegroom belonging to a scheduled caste, alight from a dola-palki at any public place, road or pathway or prevent such dola-palki from passing through any such place, road or pathway ....."

(2) One Gopal Singh, a shilpkar, belonging to a scheduled caste, resident of village Rain, was to be married to Smt. Darshani, sister of Thep Lal, in village Gwar, Patti Chalansyun, in the Garhwal district, on 7-5-1950. On 3-5-1950, Gopal Singh's brother, Bharosey Lal, who was a clerk in the P. W. D. office, in Pauri-Garhwal, made an application to the Pradhan of the Group Panchayat of village Gwar requesting him to see that there should be no dispute about their carrying the bridegroom in dola-palki. Another application was made by Gopal Singh himself to the Ilaqa Officer, Barahsyun, with the same object. The

Ilaqa Officer ordered the Sub-Inspector of police station Srinagar to send a constable with the Barat party so that there may not be any disturbance. Accordingly on the date of the marriage, the Barat party proceeded from village Rain to village Gwar with constable Bachi Singh as also with the Patwari Ghananand Dhandyal. When the marriage party was at a distance of one mile from village Gwar, they were stopped by one Bhajan Singh who said that the dola-palki could not be taken any further. The constable and the Patwari explained the matter to him and he kept quiet. The Barat proceeded further to the village. When they were near the village habitation one Belam Singh told them that his own Barat was coming and that it might be allowed to pass before the Barat of Gopal Singh was to be taken by that route. According to the prosecution, certain villagers collected at the place and stopped the Barat from proceeding further unless the bridegroom got down from the 'palki'. Brickbats were thrown at the Baratis and some damage to property was also done. The prosecution case was that the bridegroom had to alight from the dola-palki and go on foot to the house of the bride leaving the dola-palki outside the village. Consequently, Bhajan Singh and ten other persons were prosecuted. The Magistrate held that so far as the damage to the articles belonging to the Baratis and throwing of stones at them were concerned, nobody had been recognised and, therefore, nobody was guilty for those acts. He found that there was a custom in the village Gwar under which no one, whether belonging to a high caste or to a scheduled caste, could go through the village habitation in a dola-palki. He further found that Bhajan Singh did interfere with the Barat party a mile away from the village which he had no right to do, but that the other accused did not do anything except that they told the Barat party about the custom, whereupon the Baratis themselves agreed to observe the custom and the bridegroom alighted from the dola-palki of his own accord and proceeded to the house of the bride on foot. The Magistrate, therefore, convicted Bhajan Singh for having unnecessarily interfered with the Barat party and sentenced him to pay a fine of Rs. 10/-, and acquitted the other accused. Bhajan Singh appealed but his appeal was dismissed.

(3) The complainant, however, applied in revision both against Bhajan Singh and the other accused. He prayed for enhancement of sentence imposed on Bhajan Singh and for recommendation to the State Government to file an appeal against the order of acquittal of the other accused. The District Magistrate of Garhwal rejected the prayer for a recommendation that an appeal be filed against the order of acquittal but made a reference to this Court for enhancement of sentence imposed on Bhajan Singh. The Government has, however, filed an appeal against the acquittal of the respondents. Both these cases are before us for disposal.

(4) We have gone through the evidence on the record and have come to the conclusion that the learned Magistrate was right in holding that no offence was committed by the respondents. Kalam Singh brother of the bridegroom, Buchi Singh constable and Ghana Nand Dhandyal Patwari admit that the villagers merely explained the custom and did not force any one to get down from the dola-palki and that the Baratis themselves agreed to abide by the custom. The question then is whether the mere fact that the respondents told the Baratis about the custom amounts to an offence in the circumstances of the case. We are of opinion that it does not. In S. 3(iv) of the Act, the phrase "make a bridegroom alight from a dola-palki" implies that the bridegroom has been made to alight from the dola-palki against his wishes. The phrase imports an element of compulsion. Where the bridegroom himself alights from the dola-palki because he wishes to observe the custom of the village, the action of a person, who tells him of the custom and pursuades him in observing it but does not impose any restriction in the way of the bridegroom proceeding in a dola-palki if he so wished, does not make him liable for the punishment of an offence under the section. As already stated, the respondent merely brought to the notice of the Baratis the custom prevailing in the village and entreated them to follow it, whereupon the Baratis including the bridegroom agreed to follow the custom. In the circumstances, no offence can be said to have been committed.

(5) It may be mentioned that the mere fact that the custom applied both to the higher as well as to the scheduled caste is immaterial. If we were of opinion that the respondents had compelled the bridegroom to alight from the dola-palki against his wishes, it would have been no justification for the respondent to urge that the custom was one which equally applied to the upper as well as to the scheduled caste. Though S. 3(iv) of the Act refers to a scheduled caste alone, it is not confined to a custom restricted to scheduled castes alone. The reason apparently is that the Legislature thought that the upper castes can take care of themselves and it was not necessary to protect them. For that reason the Legislature enacted a protection for the scheduled castes alone.

(6) The conviction of Bhajan Singh also appears to us to be unjustified. He merely attempted to stop the dola-palki but acquiesced when the Patwari and the constable explained matters to him under the new law. The action of Bhajan Singh at the most amounted to an attempt to commit an offence punishable under the U.P. Removal of Social Disabilities Act. His attempt did not bear fruit and he was not able to make the bridegroom alight from the dola-palki. A mere attempt has not been made punishable under the Act. Not having committed any offence under S. 3(iv), we are unable to hold that Bhajan Singh committed any offence.

(7) We may, however, note an argument which was addressed to us on behalf of Bhajan Singh. It was urged that the U.P. Removal of Social Disabilities Act, 1947, has become void after the commencement of the Constitution by virtue of Art. 13 read with Arts. 17 and 35 of the Constitution. This argument has no force. Article 17 prohibits untouchability and practice in any form and lays down that

> "the enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law."

Article 35 lays down that

> "Parliament and not the Legislature of a State shall have power to make laws with respect to prescribing punishment for acts which are declared to be offences under the Constitution."

It follows, therefore, that after the commencement of the Constitution it is the Parliament alone and not any State which can prescribe punishment for the enforcement of any disability arising out of untouchability. Assuming, without deciding, that the U.P. Removal of Social Disabilities Act deals with disability arising out of untouchability, it may be observed that the Act is an Act which was already on the statute book before the Constitution came into force. Article 35 withdraws from the States the power of making any enactment relating to acts which are declared to be offences under the Constitution after the commencement of the Constitution. Article 35 is not retrospective in operation.

(8) Article 13 renders void past legislation in so far as it is inconsistent with the provisions of Part 3. Inasmuch as Art. 35 refers to future legislation, it cannot be said that anything in the U.P. Removal of Social Disabilities Act which was already on the statute book is inconsistent with the provisions of Part 3 of the Constitution. It may be noted that Art. 372 declares that all laws immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent legislature or other competent authority. The U.P. Removal of Social Disabilities Act, therefore, still remains in force and has not become void by anything contained in the Constitution.

(9) Instead of accepting the reference we must, in the exercise of our revisional jurisdiction, acquit Bhajan Singh. We are seized of the whole case and we have power to make an order of acquittal. We accordingly quash the conviction of Bhajan Singh and acquit him. The fine, if paid, shall be refunded to him.

(10) We dismiss the Government appeal and reject the reference.

A/D.R.R. Order accordingly.

A. I. R. 1953 ALL. 485 (Vol. 40, C. N. 231)

(LUCKNOW BENCH)

AGARWALA J.

Beché Lal and others, Applicants v. Hem Singh and others, Opposite Party.

Revn. Appln. No. 41 of 1947, D/- 6-11-1952.

(a) Civil P. C. (1908), S. 152 and O. 20, R. 6 — Decree not in accordance with judgment.

An error in a decree arising from any accident, slip or omission may at any time be corrected without appeal. The only limitation upon this power of the Court is to be found in cases where third parties have acquired rights under the erroneous judgment in the interval. Thus, where the decree does not agree with express terms of the judgment, this power of correction can be exercised even when the decree is executed and ostensibly fully satisfied. The Court may be 'functus officio' with respect to execution of decree but not with respect to its power of correction. (1892) AC 547, Foll.; Case law referred. (Paras 7, 8)

Anno : C.P.C., S. 152 N. 8 Pt 4; O. 20 R 6 N. 7

(b) Evidence Act (1872), S. 115 — It is well settled that when the truth is known to a party, he cannot plead estoppel against his opponent. (Para 11)

Anno Evid. Act, S. 115 N. 53.

(c) Civil P. C. (1908), S. 152 and O. 21, R. 92 — Amendment of decree.

The bar to the setting aside of a sale as laid down in O. 21, R. 92 relates to a suit to set aside an order confirming a sale and does not refer to an application for amendment under S. 152. (Para 12)

Anno: C.P.C., S. 152 N. 6; O. 21, R. 92 N. 5.

(d) Civil P. C. (1908), S. 152 — Mistake of Court.

The principle that wherever one of two innocent persons must suffer by the acts of a third person, he, who had enabled such third person to occasion the loss, must sustain it, is not applicable when the mistake is of the Court. The Court is not a person and the third person in the principle enunciated is a person other than the Court. (Para 15)

Anno: C.P.C., S. 152 N. 6.

R. N. Shukla and K. N. Tandon, for Applicants; B. P. Misra, for Opposite Parties (Nos. 1 to 4).

CASES CITED:

(A) (1871) 40 LJPC 1: LR 3 PC 465
(B) ('50) 54 Cal WN 568: 1950 All LJ 587 (PC)
(C) (1892) 62 LJPC 24: 1892 AC 547
(D) ('33) AIR 1933 Cal 627: 60 Cal 753
(E) ('23) AIR 1923 Mad 57: 69 Ind Cas 977
(F) ('40) 44 Cal WN 708
(G) ('41) AIR 1941 Oudh 344: 1941 Oudh W N 474
(H) ('42) AIR 1942 Oudh 226: 17 Luck 739
(I) ('19) AIR 1919 Pat 141: 49 Ind Cas 948
(J) ('29) AIR 1929 Mad 830: 123 Ind Cas 355
(K) ('50) AIR 1950 Pat 183
(L) ('46) AIR 1946 Oudh 210: 223 Ind Cas 250
(M) ('25) AIR 1925 All 556: 88 Ind Cas 396
(N) ('29) AIR 1929 Lah 121: 113 Ind Cas 778
(O) ('26) AIR 1926 Mad 516: 94 Ind Cas 453
(P) ('25) AIR 1925 Bom 389: 89 Ind Cas 569
(Q) (1787) 2 TR 64: 100 ER 35

JUDGMENT: This is an application in revision against an order allowing an application for amendment of a decree under Ss. 151, 152 and 153, Civil P. C. The facts briefly stated are as follows :

(2) One Bhudher Singh executed a usufructuary mortgage on 18-8-1893 in favour of one Balwant Singh mortgaging 7 biswas, 2 kachwansis and 10 nanwansis in village Bijgawan for a consideration of Rs. 400/-. A deed of further charge was executed about a year later on 15-8-1894, securing a sum of Rs. 200/-. Bhudher Singh died leaving Khanzade Singh as his legal representative. Balwant Singh mortgagee submortgaged his mortgagee rights by a deed, dated 31-5-1915, in favour of one Kunj Behari Lal for a consideration of Rs. 200/-. Khanzade Singh, the representative of the mortgagor, purchased the mortgagee rights of Balwant Singh at an auction sale in execution of a decree and stepped into Balwant Singh's shoes. This would be, however, subject to the right of the sub-mortgagee, Kunj Behari Lal. In 1927, Kunj Behari Lal, the sub-mortgagee, sued upon his sub-mortgagee, impleading Balwant Singh and Khanzade Singh as defendants and claiming a sum of Rs. 1,582/10/-. He prayed that this sum may be recovered by sale of either the proprietary rights in 7 biswas, 2 kachwansis and 10 nanwansis or, if that was not possible, by sale of the mortgagee rights therein. The suit was decreed on 4-11-1927. The Court ordered a decree for sale of the mortgagee rights to be prepared under O. 34 R.

4, Civil P. C. Inspite of the express terms of the judgment that the decree for sale was to be in respect of the mortgagee rights, a decree was prepared mentioning the proprietary rights in the property mortgaged to be sold. Nobody, however, noticed this discrepancy between the judgment and the decree.

(3) It appears that Kunj Behari Lal had an undisclosed partner with him in the transaction of the sub-mortgage and also in the transaction of the suit. Kunj Behari Lal and this undisclosed partner executed a deed of sale in respect of the half share in the sub-mortgage and the preliminary decree to one Kanhaiya Lal. In the sale deed it was expressly mentioned that the sub-mortgage was with respect to the mortgagee right in 7 biswas and odd share & that a suit on the basis of the sub-mortgage 'for the sale of the mortgagee rights had been instituted by Kanhaiyalal. Thereafter, Kanhaiyalal and Kunj Behari Lal jointly made an application for the preparation of a final decree. On 10-8-1929, a final decree was prepared and the description of the property to be sold was copied from the preliminary decree. No money having been paid under the decree, an execution application was made for sale of the property. Notices were served on Khanzade Singh. Under O. 21, R. 66, Civil P. C. an order for sale was passed. On 20-7-1933 Khanzade Singh applied for postponement of the sale for a week. The sale was postponed to 28-7-1933. The property was ultimately sold on that date by the Collector and was purchased by the decree-holders themselves in lieu of the decretal amount and they certified full satisfaction of the decree and possession was delivered to them on 10-8-1934.

(4) Kunj Behari Lal and Khanzade Singh died and the heir of Kunj Beharilal sold their half share of the property, purchased by them at the aforesaid auction sale, to the heirs of Khanzade Singh by means of two documents dated 21-7-1942, and 30-9-1943. It was after the execution of these sale-deeds that the discrepancy between the judgment and the decree of 4-9-1927, was discovered. An application for amendment of the decree as also of all subsequent proceedings including the sale certificate was made by the heirs of Khanzade Singh on 5-8-1946. It may be noted that this application was within 12 years of the date on which possession was delivered over the property to Kanhaiyalal and Kunj Behari Lal on 10-8-1934. In the application for amendment, it was alleged that the decree-holders had knowledge of the mistake in the decree and the fact had been fraudulently suppressed by them from the Court.

(5) The opposite-party contested the application on several grounds, namely, that there was no mistake in the decree, that after the satisfaction of the decree the Court became 'functus officio' and had no jurisdiction to amend the decree, that Kanhaiyalal purchased half the decree in good faith believing that it was a sale of the Zamindari property, that Khanzade Singh and his heirs were estopped from making the application because they had knowledge of what was being sold, that the application was barred by the principle of constructive 'res judicata' and also by O. 21, R. 92, Civil P. C. and that on equitable grounds, the amendment sought for ought not to be made after a long lapse of time. The learned Judge of the Court below rejected these contentions and ordered the amendment of the decree though not of the sale certificate or other proceedings. On behalf of the heirs of Kanhaiyalal the same contentions have been urged before me in this revision application. On the other hand, on behalf of the heirs of Khanzade Singh it has been urged that the lower Court having allowed the application for amendment this Court will not interfere with the exercise of that discretion, as no question of jurisdiction is involved. In my opinion none of the contentions raised by the learned counsel for the applicant has force.

(6) There can be no doubt that the decrees, both preliminary as well as final, were wrongly prepared.

(7) As regards the contention that, after a decree is satisfied, the Court becomes 'functus officio', it may be conceded that, after a decree has been executed and satisfied, there is an end of the decree in the sense that nothing more remains to be done by way of execution and the Court is 'functus officio' in the sense that having executed the decree, it has nothing more to do and its authority is at an end. But the authority, which is so terminated is the authority to execute the decree and not the authority to correct accidental slips and errors or to review its own orders. A Court is not in the same position, as for example, an arbitrator. An arbitrator having given his award may not have the power to modify or correct it but a Court has inherent power to correct accidental slips or errors. The power to correct its errors which have been occasioned by inadvertence or accident is based upon two principles. One was referred to by Lord Cairns in —'Rodger v. The Comptoir D'Escompte De Paris', (1871) L. R. 3 P. C. 465(A):

> "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors."

and the other was mentioned by the Privy Council in —'Piyaratana Unnanse v. Wahareke Sonuttara Unnanse', 1950 All LJ 587(B), (a case from Ceylon). Sir John Beaumont delivering the judgment of the Board stated the law on the subject in the following words :

> "The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is 'functus officio' and cannot set aside or alter the order, however wrong it may appear to be. That can only be done on appeal. Section 189, Civil P. C. of Ceylon which embodies the provisions of O. 28, R. 11, English Rules of the Supreme Court (same as S. 152, Civil P. C. of India) and the inherent jurisdiction vested in every Court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass."

In S. 152, Civil P. C. no time limit is fixed for making an amendment in a judgment or decree which has been occasioned by an accidental slip or error. Such an amendment may be made at any time subject, of course, to equities which may have arisen in favour of the party against whose interest the amendment is to be made.

(8) In —'Hatton v. Harris', (1892) AC 547(C), Lord Macnaghten observed that an error in a decree arising from any accident, slip or omission may at any time be corrected without appeal, and that the only limitation upon this power of the Court is to be found in cases where third parties have acquired rights under the erroneous judgment in the interval. Said Lord Watson in the above case :

> "When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so,

to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce."

Lord Herschell further explained the limitation upon the rule :

"There is one observation which I ought to make and it is this, that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to show that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made."

The application for correction in that case was taken to have been made upon the hearing of the appeal which came up about thirty-nine years after the decree had been made. This case has been followed in India, vide —'Midnapur Zamindari Co Ltd. v. Abdul Jalil Miya AIR 1933 Cal 627 (D); —'Narayana Iyer v. Biyari Bibi', AIR 1923 Mad 57 (E); —'Joy Chandra Das v. Govinda Chandra Dhar', 44 Cal WN 108 (F); —Sanwaley Rai v. Sant Rai', AIR 1941 Oudh 344(G); —'Raj Bahadur Singh v. Shatranjai', AIR 1942 Oudh 226(H). For the proposition that a decree can be amended even after it has ostensibly been fully satisfied reference may be made to —'Sheo Prasad v. Dharam Sen', AIR 1919 Pat 141(I); —'Munuswami Mudali v. Jagannadha Reddi', AIR 1929 Mad 830 (J); —'Khudu Mahto v. Bhim Mahto', AIR 1950 Pat 183(K) and —'Samal Singh v. Jnunkoo Singh', AIR 1946 Oudh 210 (L).

(9) The learned counsel for the applicants relied upon an observation of Daniels J. in —'Pitamlal v. Balwant Singh', AIR 1925 All 556(M). The facts of the case are not sufficiently reported. No reason or authority was cited by the learned Judge in support of his view. Obviously it was an 'obiter dictum', and respectfully I am unable to agree with it.

(10) Reliance was also placed on the decision in —'Kartar Singh v. Zorawar Singh', AIR 1929 Lah 121(N). The facts of that case were entirely different. The facts of —'Munuswami Pillai v. Husain Khan', AIR 1926 Mad 516(O), were also quite different. In —'Pandurang v. Narhar', AIR 1925 Bom 389(P), the interests of a third party had intervened and the exception laid down in —'(1892) A.C. 547(C), was applied.

(11) The learned counsel for the applicants urged that the present case fell within the exception laid down in —'Hatton's case (C). I do not think that this contention is correct. Kanhaiya Lal, father of the applicants, acquired half the rights in the sub-mortgage and the decree for Rs. 575/- under a sale-deed of 1929 in which specific reference was made to the fact that the mortgage was of a mortgagee rights in 7 biswas and odd share in the Zamindari property, and that in the suit filed on the basis of the sub-mortgage, the 'mortgagee rights' in the property had been claimed to be sold. Though this was not quite correct inasmuch as in the plaint a prayer, in the alternative, was made — the sale of the Zamindari property and in the alternative, of the mortgagee rights in that property — yet it indicated to Kanhaiya Lal, what property was expected to be sold under the decree. The original mortgage in favour of Balwant Singh not being sued upon in Kunj Beharilal's suit, the Zamindari property could not have been ordered to be sold and the relief asking for the sale of mortgagee rights alone could have been granted to Kunj Behari Lal. It was, in fact, so granted by the judgment. Kannaiyalal was, therefore, affected with notice of the contents of the judgment. By his purchase he could not be assumed to have paid the price of the property because at that time what he purchased was the sub-mortgagee rights and the rights to have the mortgagee rights sold under the decree and not the property itself. The mistake in the decree was not due to any act of the judgment-debtors but was a mistake made by the office of the Court. No question of any estoppel against Kunj Behari Lal or his heirs could arise in the case so far as the purchase by Kanhaiyalal of the interests in the decree was concerned. Even Kanhaiyalal's purchase of the property in execution of the decree could not be said to have invested him with any greater equity. It is true that the decree did not mention the mortgagee rights but mentioned the zamindari property itself as the property to be sold. It is also true that in all subsequent proceedings right up to the grant of the sale certificate, the property proclaimed to be sold was the zamindari property and not the mortgagee rights therein. Further, it is true that the judgment-debtors did not raise any objection to the description of the property to be sold. Indeed in the sale made by Kunj Behari Lal's heirs to the heirs of Khanzade Singh, the property sold was described not as mortgagee rights but as zamindari property. But, as the Court below has found, this was entirely due to ignorance on the part of Khanzade Singh as to the discrepancy between the judgment and the decree in regard to the property ordered to be sold and since Kanhaiyalal must be deemed to have had notice of the contents of the judgment and of the true state of affairs, he cannot take any advantage of the mistaken description of the property to be sold in the decree. It is well settled that when the truth is known to a party, he cannot plead estoppel against his opponent. In my judgment, since the mistake in the decree was due to the action of the office of the Court and Kanhaiyalal, auction purchaser, had constructive notice of the true facts, his case does not fall within the exception mentioned in 'Hatton's case' (C) & the principle of estoppel does not debar Khanzade Singh's heirs from making the application for amendment.

(12) It was next urged that the sale cannot be set aside after the sale certificate had been issued. The answer to this contention is twofold. Firstly, the lower Court having amended the decree and not the sale certificate, we are not concerned with the setting aside of the sale in the present proceedings. Secondly, the bar to the setting aside of a sale as laid down in O. 21, R. 92, Civil P. C. relates to a suit to set aside an order confirming a sale and does not refer to an application for amendment under S. 152, Civil P. C.

(13) The contention that the application for amendment was barred by the principle of 'res judicata' has also no force. The principle of 'res judicata' has no application to the correction of accidental errors or mistakes in the decree or judgment.

(14) The contention that the application has been made after a long lapse of time also is without foundation. The application was made as soon as the mistake was discovered. It is immaterial that the discovery of the mistake was made after a long lapse of time.

(15) The principle that wherever one of two innocent persons must suffer by the acts of a third person, he, who had enabled such third person

to occasion the loss, must sustain it (—'Lickbarrow v. Mason', (1787) 100 ER 35 (Q)) is not applicable when the mistake is of the Court. The Court is not a person and the third person in the principle enunciated is a person other than the Court.

(16) Lastly, I think the contention of the learned counsel for the opposite-party that I should not interfere with the order of the lower Court, in exercise of my revisional jurisdiction, is also not without force. The Court below had jurisdiction to amend the decree or not to amend it. I cannot say that in amending the decree it has exercised a jurisdiction not vested in it by law or that it has acted with any illegality or irregularity in the exercise of its jurisdiction. For all these reasons, I dismiss the application with costs.

B/V.S.B. Revision dismissed.

A. I. R. 1953 ALL. 488 (Vol. 40, C. N. 232)

MALIK C. J. AND V. BHARGAVA J.

Lachhman Pandey, Applicant v. Commr. of Income-tax, U. P. and Ajmer-Merwara, Lucknow, Respondent.

I. T. Misc. Case No. 185 of 1949, D/- 18-11-52.

(a) Income-tax Act (1922), S. 25 (4) — Succession.

Where a Hindu person, at the commencement of the Income-tax (Amendment) Act of 1939, carrying on the business in his capacity as an 'individual' is succeeded in his capacity as Karta of Hindu undivided family by his sons under an award, he is entitled to the relief under the provisions of S. 25 (4). (Para 8)

Anno: I. T. Act, S. 25 N. 4.

(b) Income-tax Act (1922), Sec. 25 (4) — "Succeeded in such capacity."

Where a business, which exclusively belonged to a Hindu person, remains his business even when the Amendment Act of 1939 came into force but thereafter ceases to be his business and becomes the business of the joint family in the hands of his sons as a result of a valid award, there is a succession within the meaning of S. 25(4). (Para 5)

The words 'in such capacity' in S. 25 (4) mean nothing more than the capacity of a person who carries on the business as the predecessor was carrying it on, that is, with a liability to be taxed on its profits and gains. The fact that the sons got it by transfer as a result of the decision of the arbitrators to the effect that they had acquired some interest in the property by reason of their own exertions makes no difference: AIR 1934 PC 200 and AIR 1951 SC 111, Foll. (Para 6)

Anno: I. T. Act, S. 25 N. 4.

(c) Income-tax Act (1922), S. 25 (4) — "Previous year".

The words "previous year" mean the account year preceding the date of succession. They do not mean the assessment year. (Para 7)

Anno: I. T. Act, S. 25 N. 4.

B. Upadhya, for Applicant; S. C. Das, for Respondent.

CASES CITED:

(A) ('34) AIR 1934 PC 200: (1934) 2 ITR 345 (PC)

(B) ('51) AIR 1951 SC 111: (1951) 19 ITR 182 (SC)

MALIK C. J.: This is a reference under S. 66 (1), Income-tax Act, and the question, which has been referred to us for decision, is as follows:

"Q. Whether, on the finding of fact that Pandit Lachhman Prasad was, at the commencement of the Indian Income-tax (Amendment) Act of 1939, carrying on the business in his capacity as an 'individual' but was succeeded in his capacity as Karta of an Hindu undivided family by his sons under the award of 31-3-1941, the provisions of S. 25 (4) of the Income-tax Act allow any relief to him?"

In other words, the question for our decision is whether the estate of Lachhman Prasad Pandey is entitled to the benefit under the provisions of S. 25 (4), Income-tax Act.

(2) Pandit Lachhman Prasad Pandey had three sons, Chintamani Pandey, Vishnu Datt Pandey and Hari Datt Pandey. He was assessed to income-tax from the assessment year 1918-19 to the assessment year 1926-27. It was not mentioned in what capacity he was being assessed but, from the order of the Income-tax Appellate Tribunal, it appears that he was assessed as an individual. From the assessment year 1927-28 to the assessment year 1937-38, Lachhman Prasad Pandey was assessed to income-tax as representing the Hindu undivided family. It appears that, in 1932 there was some litigation and Civil Suit No. 15 of 1932 was filed in which Lachhman Prasad Pandey had claimed that he was the exclusive owner of the business and that his sons had no interest in it. There was a compromise entered into between the parties which was filed in the Chief Court of Avadh. Under this compromise, it was recognised that Lachhman Prasad Pandey was the sole owner. On 28-7-1938, Lachhman Prasad Pandey executed a will, declaring therein that all the properties which were the subject-matter of the will including the business were his self-acquired properties and that he was competent to divide the same. By reason of that compromise and the assertions made in the will, the Income-tax Officer started assessing Lachhman Prasad Pandey as an individual from the assessment year 1938-39 and the capacity, in which he continued to be assessed, remained the same till his death in 1942. There was some dispute in 1940 or 1941 between the three sons and Lachhman Prasad Pandey and the matter was again referred to arbitration. The sons claimed that they were living with Lachhman Prasad Pandey as members of the joint Hindu family and as they had also worked in running the business, the business must be deemed to be joint family business. On 31-3-1941, the arbitrators gave an award, holding that the business belonged to the joint family. They also proceeded to partition the properties, giving the business to the three sons of Lachhman Prasad and the other property to Lachhman Prasad Pandey. On 5-4-1942, Lachhman Prasad Pandey died.

(3) During the assessment proceedings for the year 1941-42 against Lachhman Prasad Pandey through Chintamani Pandey, one of his sons, the three sons of Lachhman Prasad Pandey filed an application on 25-9-1942, claiming the relief under S. 25 (3), Income-tax Act. They claimed

that no income-tax should be levied for the year 1941-42. The Income-tax Officer, however, rejected this contention and made the assessment on 5-3-1943. There was an appeal before the Appellate Assistant Commissioner of Income-tax who, on 4-9-1943, allowed the appeal and sent the case back to the Income-tax Officer, directing him to reconsider whether relief should be given under S. 25 (4), Income-tax Act. On 19-10-1943, the Income-tax Officer held that no relief under S. 25 (4) of the Act was claimable and that order was confirmed by the Appellate Assistant Commissioner of Income-tax though on different grounds. There was a further appeal to the Income-tax Appellate Tribunal which proceeded to record some findings of fact, on the basis of which it wanted to decide the question of law. The facts, which the Tribunal found, were as follows:

"(1) that Lachhman Prasad Pandey had paid Income-tax under the provisions of the Indian Income-tax Act of 1918 as an individual on the profits of the business which was being run by him;

(2) that he was carrying on the business in the same capacity, i.e. as an individual, at the commencement of the Indian Income-tax Act of 1939; and

(3) that the award given on 31st March 1941, "affected his title to the property divesting him of a portion of it and investing the same in his three sons, a succession to Lachhman Prasad as an individual did take place on the date of the award, i.e., 31-3-1941."

After having recorded these three findings, the Tribunal held that the assessee was not entitled to claim the benefit of S. 25(4) as

"the succession of the three sons was not as an heir to an individual but was by virtue of an independent title which was held by the arbitrator to have accrued to them through their personal efforts to expand the business."

This is the only reason given for the conclusion that the three sons had not succeeded in the same capacity.

(4) The relevant portion of S. 25 (4), Income-tax Act, runs as follows:

"Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 (7 of 1939), carrying on any business.....on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (7 of 1918), is succeeded in such capacity by another person .....no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period....."

There can be no doubt that, on the findings of fact recorded by the Tribunal, Lachhman Prasad Pandey was carrying on a business which had been charged to income-tax under the provisions of the Income-tax Act of 1918. On those findings, it cannot be disputed that Lachhman Prasad Pandey was carrying on the same business in the year 1939 when the amendment came into force.

(5) The Income-tax Appellate Tribunal has recorded a finding that Lachhman Prasad was succeeded by his three sons under the award. Apparently, therefore, the requirements of this section were fulfilled. The Tribunal, however, appears to have been under the impression that as Lachhman Prasad had paid income-tax as an individual and, in 1941, the arbitrators had held that the property had become the joint family property and proceeded to divide the same among the three sons of Lachhman Prasad the sons could not be said to have succeeded to the business in the same capacity as Lachhman Prasad Pandey. The Tribunal, however, if we may say so, does not appear to have analysed the result of its own findings step by step. According to the Tribunal, the business exclusively belonged to Lachhman Prasad Pandey, and he had paid income-tax as an individual under the Income-tax Act of 1918, it had continued to remain his business even when the Amendment Act of 1939 came into force. It, however, ceased to be his business and became the business of the joint family as a result of a valid award given on 31-3-1941. To pause here, if Lachhman Prasad Pandey had transferred the property from his own individual ownership to the ownership of the joint family, it could not be said that the joint family had not succeeded to the business which was owned by Lachhman Prasad Pandey. As a matter of fact, in the case before us, the Tribunal has, in so many words, held that there was a succession on the date of the award, i.e., on 31-3-1941. The fact that not only did the arbitrators hold that the property was joint family property but they actually proceeded to divide it into different shares among the three sons of Lachhman Prasad Pandey giving other property instead to Lachhman Prasad means that Lachhman Prasad Pandey ceased to be the owner of the business and the ownership in the business passed to his sons. We, therefore, find it difficult to understand what the Tribunal exactly meant when it said that the three sons had not succeeded in the same capacity. The portion quoted above would show that what probably the Tribunal meant was that they had not succeeded Lachhman Prasad Pandey but had acquired independent title under the award. As a result of the award, Lachhman Prasad's right as an individual came to an end & other rights were created under it. A succession, therefore, did take place on the date of the award, i.e., 31-3-1941. and the appellate order would show that the Tribunal came to the same conclusion.

(6) The question, however, remains whether the sons had succeeded in "such capacity". The words 'in such capacity' came up for consideration before their Lordships of the Privy Council in the case of — 'Maharajadhiraj of Darbhanga v. Commr. of Income-tax, Bihar & Orissa', AIR 1934 PC 200 (A). Their Lordships held that a succession 'in such capacity' meant a succession by a person carrying on the business. The point was elaborately discussed by the Supreme Court in the case of — Executors of the Estate of J. K. Dubash v. Commr. of Income-tax, Bombay City', AIR 1951 SC 111 (B). Kania C. J. at page 113 of the report said that when the legal estate is transferred by operation of law to an executor, the executor holds the business in the same capacity as the previous owner. His Lordship remarked:

"The words 'in such capacity' in that clause further make the position clear. It makes the distinction of legal and beneficial ownership irrelevant. The contention that the business was to be carried on by the executors as such, as a going concern or that it was being carried

on for the benefit or loss of the testator's estate is not relevant for the present discussion. The only relevant question under S. 25 (4), Income-tax Act is whether in respect of the business there is a succession to another person."

There can be no doubt that there was such a succession in the case before us. The property had ceased to be the self-acquired property of Lachhman Prasad Pandey and became the property of the joint Hindu family and was thereafter allotted to his three sons. Dealing with the same point, Patanjali Sastri J. (as he then was) observed:

"The words 'in such capacity' in Ss. 25 (4) and 26 (2) mean nothing more than the capacity of a person who carries on the business as the predecessor was carrying it on, that is, with a liability to be taxed on its profits and gains."

All that S. 25 (4) requires is that, if a person was carrying on a business in the year 1939, for which he had paid income-tax under the provisions of the Income-tax Act of 1918, and his rights had been transferred to some one else, he should be given the benefit under that section so that he may get relief for the fact that, in one year he had been subject to double taxation. On the findings recorded by the Tribunal, Lachhman Prasad Pandey had fulfilled the requirements mentioned in the first part of that clause and, on the further finding that there had been a succession as a result of the award, we think the Tribunal erred in unnecessarily laying stress on the word 'capacity' to mean that his sons did not get the property by inheritance but by transfer. The fact that they got it by transfer as a result of the decision of the arbitrators to the effect that they had acquired some interest in the property by reason of their own exertions should make no difference. If the sons had purchased the property for cash, nobody would have doubted that they owned the business in the same capacity.

(7) We have already said that the award is dated 31-3-1941, and the Tribunal has found that the succession took place on that date. A question has arisen that, with reference to the assessment year 1941-42, what exactly is the period for which relief should be granted under Cl. (4) of S. 25 of the Act? We have carefully considered the provisions and we find no difficulty. The account year in the case before us was the financial year from 1-4-1940 to 31-3-1941. The clause provides that

".....no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession....."

The date of succession in this case was 31-3-41. The end of the previous year was thus 31-3-1940. The assessee was, therefore, not liable to pay any income-tax on the income of the period from 1-4-1940, to 31-3-1941. As the assessee, we are informed, has not applied for the benefit of the second portion of that clause, we need not discuss it at length. The clause goes on to provide that:

"such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period....."

The period, as we have already said, is from 1-4-1940 to 31-3-1941, and if the assessee had made an application within one year, he would have been entitled to claim that the assessment for the year 1940-41 should be re-opened and the income for that year should be deemed to be the income made by him during the period from 1-4-1940, to 31-3-1941. It has been urged by the learned counsel for the assessee that there was some conflict of opinion and the words 'previous year' might mean either the account year or the assessment year. We do not think that there is any reason to think that the previous year would mean anything other than the account year preceding the date of succession.

(8) Our answer, therefore, to the question referred to us is in the affirmative. The assessee is entitled to his costs which we assess at Rs. 300/-.

B/V.S.B. Answered affirmatively.

A. I. R. 1953 ALL. 490 (Vol. 40, C. N. 233)

CHATURVEDI J.

Piare Lal, Applicant v. Ram Swaroop and another, Opposite Party.

Civil Revn. No. 400 of 1950, D/- 13-10-1952.

Civil P. C. (1908), O. 21, Rr. 43 and 55 — Suit for arrears of rent of house — Suit decreed — Movable property left by defendant in house attached — Decree satisfied by deposit in Court — Order that possession of house besides movables be returned to defendant is without jurisdiction and wholly unenforceable. (Para 2)

Anno: C. P. C., O. 21 R. 55 N. 3.

Anangpal Gupta, for Applicant.

ORDER: This is a plaintiff's application in revision from the order of the learned Judge Small Cause Court, Aligarh dated 29-3-1950. The order under revision is to the effect that the property attached was to be released and returned to the defendant. It proceeds

"If the plaintiff took possession when the Amin attached the goods it will be returned to the defendant and he will be put in possession as before."

(2) The learned counsel, Mr. A. P. Gupta, appearing on behalf of the applicant has assured me that the only property that was ordered to be attached, and which was actually attached, was some movable property left by the defendant in one or other of the rooms of the house. The house belongs to the applicant and it appears that he had got the movables attached, in a suit for recovery of certain arrears of rent. The amount of the suit was subsequently deposited in court and therefore the attached property was ordered to be released by the order under revision. This order does not say that the possession of the house also was to be returned to the defendant, nor could it possibly say so. What was attached was only movable property and that could only be returned in obedience to the order under revision. There could be no question of returning possession of the house itself or any portion of the house. In case, the order meant that the possession of the house also, was to be returned, the order was without jurisdiction and wholly unenforceable.

(3) The portion of the order, which I have quoted, is capable of being interpreted so as to include the returning of the possession of the house also. I, accordingly, modify that order and direct that only the movable properties which were attached, were to be returned

to the defendant; but possession of no portion of the house itself was to be delivered to the defendant. I, accordingly, modify the order in revision as indicated above.

(4) The opposite parties are not represented before me, and I make no order as to costs of this revision.

C/V.R.B. Order modified.

A. I. R. 1953 ALL. 491 (Vol. 40, C. N. 234)
(LUCKNOW BENCH)

KAUL J,

Ghariby and others, Accused-Appellants v. The State.

Criminal Appeal No. 308 of 1951, D/- 21-10-1952.

(a) Penal Code (1860), Ss. 304, Part II, 325 and 34 — Conviction under S. 304 read with S. 34.

Where out of six injuries inflicted by four persons upon the deceased, five injuries were simple, and only one was grievous which resulted in death:

Held, that obviously that injury could have been inflicted only by one person. It must be taken that the person who inflicted that injury had the knowledge that it was likely to cause death, for, it was on the head of the deceased; but knowledge of one person was not necessarily the knowledge of others who had joined him in beating and as it was not ascertained as to who inflicted the fatal injury, none of the accused could be rightly convicted under S. 304, Penal Code, though they were all guilty under S. 325 read with S. 34. Penal Code. (Para 10)

Anno: Penal Code, S. 325, N. 2.

(b) Criminal P. C. (1898), S. 32—Sentence—Fight not premeditated — Loss of life, no reason for severe sentence.

Where the fight was not premeditated and only a few hot words were responsible for the unfortunate result, a heavy sentence need not be passed. Loss of life, though unfortunate should not be a reason for inflicting too severe a punishment. (Para 11)

Anno: Criminal P. C., S. 32 N. 3.

(c) Criminal P. C. (1898), S. 439 (5) — Appealable case — Exercise of revisional jurisdiction 'suo motu' by High Court.

Four accused convicted under S. 304 read with S. 34, Penal Code — Appeal by only three of them — High Court setting aside their convictions and sentences and altering them to one under S. 325/34, Penal Code — High Court used 'suo motu' exercise of revisional jurisdiction and set aside the conviction of the fourth accused and altered it to one under S. 325/34. (Para 13)

Anno: C,. P. C., S. 439 N. 46 Pt. 4.

Kesri Bir Prasad, (for Nos. 1 to 3), Mohd. Yaqub Siddequi, (for No. 3), for Appellants; Dy. Govt. Advocate, for the State.

CASE CITED:

(A) ('51) AIR 1951 All 21:
52 Cri LJ 131 (FB)

JUDGMENT: Ghariby, Bhaggan, Autar and Mahadin were convicted by the learned Sessions Judge of Barabanki for an offence under S. 304, latter part, and S. 323 read with S. 34, Penal Code. They were sentenced each to five years' rigorous imprisonment under S. 304, Penal Code, and to six months' rigorous imprisonment under section 323. The sentences were to run concurrently. Of them three, Ghariby, Bhaggan and Autar, come up in appeal. No appeal has been preferred by Mahadin.

(2) The case for the prosecution as established at the trial briefly stated is as follows:

On 11-7-1950, some time after mid-day, Pancham was tethering his bullocks in his field in village Pandrawan, police station Tikaitnagar, district Barabanki. One of the bullocks began to fight the bullock of Ram Bakhsh Kori and injured it, whereupon Bhaggan, who was standing there, abused Pancham. This led to further hot words and exchange of abuse whereupon Ghariby, Bhaggan, Autar and Mahadin assaulted Pancham with lathis. His niece (brother's daughter) Santa, his brother Budh and his own wife Ram Raji attempted to intervene and they were also injured. Pancham became unconscious. He was carried to police station Tikaitnagar. He regained consciousness and a first information report of the occurrence was recorded at 5-15 p.m. the same day, at the police station which was only one and a half miles from the place of occurrence. Pancham died the next day, that is 12-7-1950.

(3) Bhaggan also made a first information report at police station Tikaitnagar at 8 p.m. on 11-7-1950, giving his own version of the affair. According to him Pancham's bullock had fought and injured his bullock. This led to exchange of hot words between him and Pancham whereupon Pancham, Budhu, Ram Ghulam and Lautan belaboured him. Ram Bakhsh and Mahadin who attempted to intervene were also belaboured.

(4) The three appellants with Mahadin, who has not appealed pleaded not guilty before the Sessions Judge. Autar relied on an alibi. The other accused contented themselves with stating that they had been implicated on account of enmity. Pancham being dead Budhu P. W. 1, Santa P. W. 2 and Ram Raji P. W. 3 were the main witnesses of the occurrence. As they had received injuries, their presence at the place of occurrence could not not be disputed. The learned Sessions Judge relied on their evidence and the statement of other prosecution witnesses and convicted the appellants as well as Mahadin as already stated.

(5) The learned counsel for Ghariby and Bhaggan contented himself with arguing the appeal on the question of sentence. His contention was that in the circumstances of the case, the accused were guilty only of an offence under S. 325, Penal Code, and not under S. 304, Penal Code as held by the learned Sessions Judge. The learned counsel for Autar, however, challenged the correctness of the finding arrived at by the learned Sessions Judge that the accused before him were guilty of having inflicted upon Pancham the injuries which resulted in his death. He complained that the Sessions Judge had omitted to consider his client's alibi evidence.

(6) Before dealing with the arguments advanced by the learned counsel for the appellants, I will refer briefly to the injuries on the person of Pancham. We find from the post mortem report of his dead body that he had six injuries on his person:

1. A contused wound 1" x 1/6" scalp deep on the left side 3" above the left ear.

2. An abrasion 1½" x 1" on the left side of the head 2" below the first injury.
3. A contusion with swelling 4½" x 3½" on the left elbow.
4. A contusion 3" x ½" on the right side of the back in the middle.
5. A contusion 1½" x 3/4" at the back of the left forearm.
6. An abrasion 2½" x 1" on the left foot in the middle. The parietal and the temporal bones were fractured. There was congestion of the blood to the extent of 6" x 5" x 3/4" on the right side and 2" x 2" x ½" on the left side. The brain had been pressed inside.

(7) The plea of Autar's alibi may be disposed of in a few words. His case was that on the date of occurrence he had filed a suit before the Panchayat Court, 12 miles away from the place of occurrence. He produced what purported to be a copy of the plaint and copy of what purported to be a deposition of one Autar recorded by the Sarpanch. No evidence was, however, led to prove that he was the same person who presented the plaint before the Panchayat Court and if the person whose deposition was recorded was Autar the present appellant. In the absence of such proof, naturally these documents could be of no assistance to Autar. Moreover, it will be noticed that there is nothing to show at what hour of the day the plaint was presented and the deposition relied on by Autar recorded. It cannot, therefore, be said that there is any proof of Autar's presence at a place so far removed from the place of occurrence that he could not participate in the commission of the offence. There is definite evidence not only of Budhu, Santa and Ram Raji but also of other witnesses that he participated in the commission of the crime. The plea of alibi must, therefore be rejected.

(8) I will now consider the argument advanced on behalf of Ghariby and Bhaggan that the appellants were not guilty of an offence under S. 304, Penal Code. I have mentioned above the injuries which were found upon the person of the deceased Pancham. Death in the opinion of the Surgeon who performed the autopsy was due to the fracture of the skull and consequent shock and haemorrhage. It will be noted that all the injuries except the first, found on Pancham, were simple. His death was due to injury No. 1 which was grievous and proved fatal. Who inflicted this injury is not clear, but all the four accused, i.e., the three appellants and Mahadin, who has not appealed, were convicted under S. 304, Penal Code, read with S. 34, Penal Code. This section runs as follows:

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

(9) If we now turn to S. 304, Penal Code, we find that before a person can be convicted under the latter part of that section, the Court must record a finding that the act which caused death was done with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. Accordingly if four persons attack another with lathis, with the common intention of beating him, we have an illustration of a criminal act done by several persons in furtherance of the common intention of all. If death is caused as a result of one of the injuries inflicted by some one of these persons, they would all be surely guilty under S. 325, Penal Code, in view of the provisions of S. 34. The question may arise, if they can be held guilty of the graver offence under S. 304, Penal Code. It will be seen that a particular knowledge is an essential ingredient of the offence under S. 304, latter part. Unless a Court can record a finding that an accused person had the knowledge that the act done by him and his companions was likely to cause death, the accused cannot be rightly held guilty under S. 304, second part. This was the view taken by a Full Bench of our Court in — 'State v. Saidu Khan', AIR 1951 All 21 (A). At page 43 of the report Wanchoo J. observed as follows:

> "I am, therefore, of opinion that it is possible to convict an accused person of an offence under S. 304, Part II, read with S. 34, Penal Code, provided the Court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death. This is my answer to the first question."

The first question referred to the Full Bench was:

> "Whether it is possible to convict an accused person of an offence under S. 304, Part II, read with S. 34, Penal Code."

(10) We may now apply the law thus enunciated to the facts of the present case. We have seen that of the six injuries inflicted upon the deceased, five were simple. They comprised three contusions and two abrasions none of which was of any serious character. It was injury No., 1, a contused wound on the scalp above the left ear, which was grievous and resulted in Pancham's death. Obviously, this injury could have been inflicted only by one person. It must be taken that the person who inflicted this injury had the knowledge that it was likely to cause death for, if one strikes another on the head with a lathi, he must be taken to have such knowledge. But knowledge of one person is not necessarily knowledge of others who joined him in beating Pancham and as it has not been ascertained as to who inflicted the fatal injury, I am of opinion that none of these appellants can be rightly convicted under S. 304, Penal Code. They are all, however, guilty under S. 325, Penal Code.

(11) Having regard to the circumstance that the fight was not premeditated, I am of opinion that this is fit case in which a heavy sentence need not be passed. As is not unusual, a few hot words used by Pancham may have been responsible for the unfortunate result which followed. Hot words grew into vulgar abuse and then resort was had to lathis. It is very unfortunate that a man lost his life, but that should not be a reason for inflicting too severe a punishment.

(12) Accordingly I allow the appeal in so far that the appellants' conviction and the sentence under S. 304/34 passed upon them are set aside and they are convicted under S. 325/34, Penal Code. Their conviction and sentence under S. 323/34 is maintained. They are sentenced to two years' rigorous imprisonment each under section 325/34, Penal Code. The sentences under both the sections shall run concurrently.

(13) For the reasons given in my judgment in Criminal Appeal No. 308 of 1951, in exer-

cise of the revisional jurisdiction of this Court I acquit Mahadin of the offence under S. 304/34, Penal Code, and instead convict him under S. 325/34, Penal Code. He is sentenced to two years' rigorous imprisonment for that offence. His conviction and sentence under S. 323/34, I. P. C. is maintained. Both the sentences shall run concurrently.

B/H.G.P. Appeal allowed.

A. I. R. 1953 ALL. 493 (Vol. 40, C. N. 235)

(LUCKNOW BENCH)

KAUL J.

Ahibaran Singh and another, Accused Applicants v. The State.

Criminal Revn. No. 11 of 1952, D/- 10-10-52.

(a) Penal Code (1860), S. 411 — Burden of Proof — (Evidence Act (1872), Ss. 101 to 103).

In a case under S. 411, it is not upon the accused to prove how he came to possess the property which is said to be stolen property. The elementary principle of criminal law, that in all cases the burden of proof lies upon the prosecution to bring the guilt home to the accused, does not admit of any exception. (Para 6)

Anno: Penal Code, S. 411 N. 1; Evidence Act, Ss. 101 to 103 N. 3.

(b) Evidence Act (1872), S. 3 — "Proved".

What is required, even in criminal cases, is not absolute certainty. All that is required is material whereon the court can reasonably act upon the supposition that a fact exists. (Para 6)

Anno: Evidence Act, S. 3 N. 5.

(c) Criminal P. C. (1898), S. 32 — Property stolen from train—(Penal Code (1860), S. 411).

Cases under S. 411, especially when the property found is property stolen from a railway train, call for deterrent punishment and hence the sentence of nine months rigorous imprisonment cannot be said to err on the side of severity. (Para 8)

Anno: Penal Code, S. 411 N. 12; Cr. P. C., S. 32 N. 3.

Ram Asrey Misra, for Applicants; B. L. Kaul, for Deputy Govt. Advocate, for the State.

ORDER: Ahibaran Singh and Gokaran were convicted by a Magistrate of the first Class, Hardoi, under S. 411, Penal Code, and sentenced to nine months' rigorous imprisonment each. An appeal preferred by them was dismissed by the learned Sessions Judge of Hardoi. They now come up in revision.

(2) The prosecution story as held established at the trial was as follows:

(3) Two consignments of 'Kattha' were despatched from Najibabad by the firm Babu Ram Suresh Chander. One of these consignments was intended for Shahganj and the other for Jaunpur. The consignment for Jaunpur consisted of two packages weighing 2 mds., 17 seers while that intended for Shahganj consisted of five packages weighing six maunds. The railwayman at the west Cabin of Karwa Station noticed on the night between the 28th and 29th April, 50, that the door of one of the vans in the goods train, which had passed his cabin, was open. He informed the Station Master who got into touch with the next station. When the train stopped at Balamau, about three stations from Karwa the packages in the van, whereof the door was found open, were checked. There was a shortage in the weight in each of these consignments. The next morning the two present petitioners were found selling kattha in Hardoi railway bazar. While the two petitioners were engaged in settling the rate with Ram Ratan a dealer in 'Kattha' in Hardoi Railway Station bazar, a constable came and interrogated them. They gave some explanation but when questioned further, they attempted to run away and were caught. They were in due course sent up for trial.

(4) Ahibaran Singh's defence was that the whole quantity of kattha which had been taken to Ram Ratan's shop belonged to him and that Gokaran had nothing to do with the same. Gokaran also pleaded not guilty. His case was that he knew Ahibaran Singh & as he met him in the market he accompanied him to the shop of Ram Ratan to whom Ahibaran Singh wanted to sell the kattha. By way of explanation of his presence at the bazar, he said that he had been there to purchase 'bhoosa' for some Court Inspector.

(5) Evidence was led on behalf of the prosecution to prove that the theft of 'Kattha' despatched by the firm Babu Ram Suresh Chandra took place on the night between the 28th and 29th April 1950 at some place between Rosa and Karwa railway station and that the Kattha which the accused offered to sell to Ram Ratan was manufactured by the firm Babu Ram Suresh Chandra. Reliance was further placed on the conduct of the accused when they attempted to run away on being questioned by the police. On behalf of Ahibaran Singh there is produced an invoice purporting to be written on a form of invoices used by a firm at Kanpur known as firm Narain Das Chhotey Lal. Ahibaran Singh called the 'munib' of that firm to prove the invoice.

The 'munib's' evidence, however, did not go further than this that the form on which the invoice was written was similar to that used in his firm. He was clear that it was not written by him nor was he in a position to say who had written it. On a consideration of the evidence on record the learned Magistrate came to the conclusion that the 'kattha' found in possession of the accused was stolen property and that they had not been able to furnish any reasonable explanation to account for their possession of the same. He accordingly held that the guilt had been brought home to the accused, and convicted and sentenced them as already stated. The learned Sessions Judge took the same view.

(6) It was streneously argued by their learned Counsel Mr. Ram Asrey Misra that the approach of the two Courts below to the question that was before them was not correct. He contended that the burden of proof in a criminal case always lies on the prosecution. It never shifts to the accused, and even if Ahibaran Singh was unable to prove definitely that the Kattha which he had offered to sell to Ram Ratan was purchased by him from Kanpur, it does not necessarily lead to the inference that his defence was false; nor can it relieve the prosecution of their duty to prove

(1) that the property in possession of the accused was stolen property, and

(2) that they had come into possession or retained its possession with knowledge that it was stolen property.

The law as propounded by the learned Counsel for the petitioners is unexceptionable.

It is true that in a case under S. 411 it is not upon the accused to prove how he came to possess the property which is said to be stolen property. The elementary principle of criminal law, that in all cases the burden of proof lies upon the prosecution to bring the guilt home to the accused, does not admit of any exception. The only question is whether on certain material it can be properly held by the Court that the accused is proved to have been in possession of property which was stolen property and that he had come into possession of such property or retained such property with the knowledge that it was stolen property. According to our Evidence Act, a fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists.

One of the essential ingredients of an offence under S. 411 is knowledge of the accused that the property which is said to be stolen property came into his possession with the knowledge that it was stolen property or that he retained it with such knowledge. Ordinarily there can be no direct proof of knowledge of a fact by any person. This is almost invariably inferred from his conduct and the surrounding circumstances. In the present case, we find it established that the kattha which the petitioners took for sale to Ram Ratan was manufactured by the firm Babu Ram Suresh Chandra. There is definite evidence of Ram Chandra brother of Suresh Chandra, that having seen the kattha he could say from its quality, texture, and shape of the cubes or lumps that it was manufactured by his firm. He said that the texture, variety, quality and shape of the cubes of the kattha prepared by this firm was different from that prepared by any other firm.

Thus there can be no doubt that this was kattha prepared by the firm Babu Ram Suresh Chandra. It is further established from the two consignments of kattha despatched from Najibabad one for Shahganj and the other for Jaunpur that various quantities were stolen on the night between the 28th and 29th of April 1950 between Rosa and Karwa railway stations. We further find that the very next morning these two persons were found selling large quantities of kattha to Ram Ratan in Hardoi market. Karwa railway station is only six or seven miles from Hardoi. When questioned by the constable, the accused gave some explanation but when pressed further they attempted to run away.

The explanation offered by Ahibaram Singh that it was kattha purchased by him from the firm Narain Dass Chhotey Lal of Kanpur is not established. Not only it is not proved but significantly we find that this part of the case viz., that Ahibaran Singh purchased the kattha, which he was found selling to Ram Ratan from Kanpur was not disclosed till a very late stage. He was asked to reply to the charge framed against him on 28-4-1951. On that day, he contended himself only with saying that the kattha belonged to him. He was again examined on 9-5-1951. Even on that day he did not say where he bought this kattha.

It was only twenty days after on 29-5-1951, that the court was apprised for the first time by the production of what purported to be an invoice of the firm Narain Das Chhotey Lal of Kanpur that the kattha was purchased from that firm. On these facts the learned Magistrate held that the defence put forward by the accused was false and that the explanation furnished by him could not be called a reasonable explanation. He appears to have been materially influenced by two factors — the conduct of the accused when interrogated by the police and the inordinate delay in his coming forward with his story that he purchased the kattha from Kanpur.

It cannot be said that these were factors which should not influence his judgment. An inference in a legal trial is drawn from a long chain of facts. It is not essential that every one of these facts should by itself be sufficient to establish the guilt, nor can we expect that every one of these facts taken individually would lead to one conclusion. May be that some facts in a certain setting may lead to one conclusion while in another setting they may lead to a different conclusion altogether. Having regard to all the circumstances, it cannot be said that the courts below came to an erroneous conclusion. What is required, even in criminal cases, is not absolute certainty. All that is required is material whereon the court can reasonably act upon the supposition that a fact exists.

(7) With regard to Gokaran it is sufficient to say that he did not lead any evidence to support the explanation given by him that he came to the railway station bazar to buy bhusa and had nothing to do with the kattha that was being sold to Ram Ratan. The witnesses called for the prosecution are definite that both these persons brought the kattha and that both of them were settling the terms with Ram Ratan. I am satisfied that the guilt is satisfactorily established against both the accused.

(8) It is argued by Mr. Ram Asrey Misra that the sentence errs on the side of severity. I am not at all impressed by this argument. Cases under S. 411, especially when the property found is property stolen from a railway train, call for deterrent punishment and I am not satisfied that the sentence of nine months rigorous imprisonment errs on the side of severity.

(9) The application is dismissed. The accused are on bail. They shall surrender thereto and serve out the unexpired portion of the sentence.

B/V.R.B. Application dismissed.

A. I. R. 1953 ALL. 494 (Vol. 40, C. N. 236)

(LUCKNOW BENCH)

KAUL J.

Badri Prasad and others, Applicants v. State.

Criminal Revn. No. 12 of 1952, D/- 21-10-1952.

(a) Penal Code (1860), S. 21(9) — Canal mate is public servant.

A canal mate who is employed by the Government and receives salary for carrying out the orders of his official superiors and in that capacity assists the canal overseer in regulating the supply of canal water by keeping guls and kulabas at their proper place, which is a public duty under the Northern India Canal and Drainage Act, is a public servant within S. 21(9), Penal Code: 28 Cal 344 and AIR 1925 Mad 1093, Rel. on. (Para 4)

Anno: I.P.C., S. 21 N. 6.

(b) Penal Code (1860), S. 353 — Sentence — Guls placed under orders of Gaon Sabha — Canal mate trying to remove them and replace them at proper place — Accused obstructing him in zeal to uphold Gaon Sabha's order — Light view of the case taken — Sentence of 3 months' R. I. reduced to one already undergone. (Para 5)

Anno: I.P.C., S. 353 N. 4.

S. Mohd. Hussain, for Applicants; B. L. Kaul, for Deputy Govt. Advocate, for the State.

CASES CITED:

(A) ('01) 4 Cal WN 798: 28 Cal 344
(B) ('25) AIR 1925 Mad 1093: 48 Mad 867: 27 Cri LJ 81

ORDER: Badri Prasad, Gur Prasad, Jagannath, Ram Prasad, Ram Singh and Mohammad Yakub were convicted by the Judicial Magistrate, Rae Bareili, for offence under Ss. 147, 341/149 and 353/149, Penal Code. Under S. 147 they were sentenced to six months' rigorous imprisonment, under S. 341/149 to a fine of Rs. 50/- or one month's imprisonment each and under S. 353/149 to nine months' rigorous imprisonment each. On appeal the Sessions Judge of Rae Bareili acquitted Mohammad Yaqub of all the charges. The other convicted persons were also acquitted of the offence under S. 341/149, Penal Code. Their convictions under Ss. 147 and 353/149 were, however, confirmed. The sentence under S. 147, Penal Code was reduced to two months' rigorous imprisonment and that under S. 353/149 to three months' rigorous imprisonment. The sentences were to run concurrently.

(2) Badri Prasad, Gur Prasad, Ram Singh, Jagannath and Ram Prasad have preferred this revision application against their convictions and sentences passed upon them.

(3) The material facts lie within a short compass. Canal Kulaba No. 23 is at mile 2 of Maharajganj Road in Rae Bareili district. A gul pertaining to this kulaba was removed from its original place and put in a different position by persons belonging to village Rasulpur at the instance of the Gaon Sabha. Under orders from Radha Mohan Canal Overseer, Canal Mate Manohar Lal went to Rasulpur village with some labourers, and when he was trying to remove the gul and place it again at its old position, the petitioners surrounded him and threatened to prevent him by show of force. Manohar Lal and the labourers got frightened and had to leave the place. On these findings, the petitioners were convicted and sentenced as already stated.

(4) There was only one point worth consideration which was raised on behalf of the petitioners. It was contended that Canal Mate Manohar Lal was not a public servant, within the meaning of that term as defined in the Indian Penal Code. An attempt was made to show that it was not his duty to remove the gul to its proper place. I am clear that the contention is without substance. Under S. 21 (9) every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duties is a public servant. It cannot be disputed that a Canal Mate is employed by the Government and receives a salary for the performance of certain public duties. Section 14, Northern India Canal and Drainage Act, provides:

"Any Canal Officer or other person acting under the general or special order of a Canal Officer, may enter, upon any land, building, or watercourse on account of which any water-rate is chargeable, for the purpose of inspecting or regulating the use of the water supplied and of doing all things necessary for the proper regulation and management of such canal."

Regulation of the supply of canal water by keeping the guls and kulabas at their proper place is obviously a public duty under the Act and Manohar Lal, while discharging this duty, cannot be held to be a public servant. The full scope of the duties of a canal Mate is not clear, but we may take it that it was his duty to carry out the orders of his official superiors and in that capacity to assist the canal overseer in the performance of public duties of his office. As was observed by Princep and Handley JJ. in — 'Nazamuddin v. Queen-Empress', 28 Cal 344 (A):

"In that sense he would be an officer of Government although he might not possibly exercise 'any delegated function of the Government'. Still his duties would be 'immediately auxiliary to those of the Superintendent who is so armed'. We think that an 'officer in the terms of S. 21, Penal Code, is one who is appointed to some office for the performance of some public duty. In this sense the peon would come within S. 21, Cl. 9."

In —'Public Prosecutor, Madras v. K. Annam Nayudu', AIR 1925 Mad 1093 (B) a P. W. D. lascar was held to be a public servant within the meaning of S. 353, Penal Code and persons guilty of assaulting him while he was engaged in distributing water from an irrigation channel were held liable to be convicted under that section. It is, therefore, clear that the petitioners were rightly convicted.

(5) It has been stated that the gul had been placed in the field of Kandhaiya Baba under the orders of the Gaon Sabha and not improbably the petitioners considered that the order of the Gaon Sabha should be respected and whatever they did was done by them in the zeal to uphold the order of the Gaon Sabha which is an authority recognised under the U. P. Panchayat Raj Act. Having regard to these circumstances, I am of opinion that the ends of justice will be met if we take a light view of the case and reduce the sentence passed upon the petitioners to the period already undergone. Ordered accordingly. If they are on bail they need not surrender thereto.

B/D.R.R. Order accordingly.

A. I. R. 1953 ALL. 495 (Vol. 40, C. N. 237)

MALIK C. J. AND V. BHARGAVA J.

Kanpur Mazdur Congress, Applicant v. J. K. Spinning & Weaving Mills Co. Ltd., Kanpur and another, Opposite Party.

Civil Misc. Writ No. 65 of 1953, D/-16-1-1953.

Industrial Disputes Appellate Tribunal Act (1950), S. 7 — Substantial question of law.

Whether the Industrial Court was entitled to interfere with the punishment inflicted by the management which was in accordance with the Standing Orders when the charge of misconduct against the employee, as defined in the Standing Orders, was established, is a question of law, and not of fact. The question is of great importance and is substantial question of law either. The Appellate Tribunal, therefore, has

jurisdiction to entertain an appeal against the order of the Industrial Court. A. I. R. 1952 Mad 659, Distinguished. (Para 5)

S. C. Khare, for Applicant.

CASE CITED:

(A) ('52) AIR 1952 Mad 659: 1952-2 Mad LJ 805

ORDER: This is a Writ application under Art. 226 of the Constitution against an order of the Labour Appellate Tribunal dated 19-5-52. The application is a belated one and even on that account we were inclined to dismiss it. We are, however, of the opinion that even on the merits the application has no force.

(2) One Lalta Prasad was employed as a weaver in the firm of the opposite party No. 1. He was paid wages according to the yardage woven by him. To get more wages than the amount of work done by him entitled him to, he used certain fraudulent methods which were detected in September, 1950. The management after making proper enquiries dismissed him. There was an appeal filed before the Regional Conciliation Board which came to the conclusion that Lalta Prasad had been guilty of misconduct and that his previous record had also not been satisfactory. The Regional Conciliation Board was, therefore, of the opinion that he was rightly dismissed. It was against the order of the Regional Conciliation Board a further appeal was filed before the Industrial Court. The learned Judge held that Lalta Prasad was guilty of misconduct which made him liable to summary dismissal under standing Order 24 (a). After having come to that finding, he added as follows on the question of punishment:

"On the question of punishment, however, I am of the opinion that dismissal, under the circumstances, was uncalled for. Appellant was warned on 23-6-50, and suspended for one day in January 1949. It was stated at the bar that the appellant has put in about four years' service. Under the circumstances, agreeing with the opinion of the assessor, I modify the award of the Board in this way that Lalta Prasad would be reinstated, but without any pay for the period of his unemployment."

Against the order of the Industrial Tribunal dated 21-4-1951, there was an appeal filed under S. 7, Industrial Disputes Appellate Tribunal Act (Act XLVIII of 1950). Section 7 gives a right of appeal against certain specified orders and also in a case where the appeal involves any substantial question of law. The order passed by the Industrial Court is admittedly not one of the several orders mentioned in S. 7 against which an appeal is specifically provided and the appeal should, therefore, have involved a substantial question of law before it could be entertained by the Appellate Tribunal.

(3) The question raised in this Writ Application is that the case involved no question of law, and at any rate, it did not raise any substantial question of law and the Appellate Tribunal, therefore, had no jurisdiction to entertain the appeal, differ from the conclusion arrived at by the Industrial Court and hold that the order of dismissal should not have been set aside.

(4) Before we deal with this argument, we wish to mention that we are not satisfied that an appeal did lie to the Industrial Court against the order of the Regional Conciliation Board. The duty of the Regional Conciliation Board, which consisted of a representative of the workmen, a representative of the management and an officer appointed by the Government, was to bring about a settlement between the workers and the management. As, however, we are dismissing the application on the merits, it is not necessary for us to consider whether the order of the Regional Conciliation Board was or was not final.

(5) The point, whether the case involved a substantial question of law was raised before the Tribunal. The Tribunal came to the conclusion that the case did raise a substantial question of law. Learned counsel has urged that by deciding this question wrongly the Tribunal could not give itself, jurisdiction which it did not possess. We are, however, not satisfied that the Tribunal decided the question wrongly. The question of law as formulated by the Tribunal is, whether the Industrial Court was entitled to interfere with the punishment inflicted by the management which was in accordance with the Standing Orders when the charge of misconduct against the employee, as defined in the Standing Orders, was established. This clearly is a question of law. Jurisdiction of the Industrial Court to interfere with the sentence passed by the management, which had been approved of by the Regional Conciliation Board cannot be deemed to be a question of fact. The question is of great importance and we fail to see how it can be argued that it is not a substantial question of law either. The Tribunal has pointed out that there is some difference of opinion on the question between the various benches of the Tribunal and the matter was even referred to a Full Bench. The Tribunal, after considering the various decisions, deduced therefrom that the court should not substitute its judgment for the judgment of the management where the misconduct has been proved and the order is in accordance with the Standing Orders, unless the management is guilty of victimisation of the workman or has passed an order which, on the face of it, is unduly harsh. They quoted with approval an observation made in a decision by a bench of the Tribunal wherein it had said:

".....here again the Tribunal should not substitute its own judgment (for the judgment?) of the Management unless it is apparent that the requirements of discipline and good conduct would not be prejudiced if a lesser punishment was awarded."

The Tribunal then proceeded to say that the Industrial Court had not kept these various points in mind when interfering with the sentence. The Tribunal had, therefore, reconsidered the matter and, having considered the previous record and the past conduct of Lalta Prasad, it was satisfied that the order of reinstatement was wrong and the order of dismissal should be maintained. Even if the Tribunal was wrong in its conclusion, it cannot be said that it acted beyond its jurisdiction, nor can it be said that the appeal did not lie to it.

(6) Learned counsel has laid great stress on a decision of a learned single Judge of the Madras High Court in — 'M. K. Ranganathan v. The Madras Electric Tramways (1904) Ltd.', AIR 1952 Mad 659 (A). The learned Judge in that case has held that the principles enunciated above, which should guide the Industrial Tribunal and the Appellate Tribunal in interfering with the punishment inflicted by the management, were taken into consideration both by the Industrial Court as well as the Tribunal, but they differed as to the conclusion

on a question of fact, viz., whether applying those principles the order of dismissal passed against the workmen should or should not be maintained. It is not for us to say how far the learned Judge's view was right. The case before us is entirely different. Here, the Tribunal was satisfied that the Industrial Court had not kept in view the various principles which should guide its decision whether the sentence passed by the management should or should not be interfered with.

(7) We are satisfied that the case did raise a substantial question of law on the findings arrived at by the Tribunal and there appears to be no reason to interfere.

(8) The application is, therefore, dismissed.

B/H.G.P. Application dismissed.

A.I.R. 1953 ALL. 497 (Vol. 40, C.N. 238)

AGARWALA AND CHATURVEDI JJ.

Chandan, Complainant-Applicant v. Babu and another, Accused, Opposite Party.

Criminal Revn. No. 1678 of 1950, D/- 21-1-1953.

(a) Penal Code (1860), Ss. 300, Exceptions 1 and 4, 302 — Weapon used.

If the injuries were caused on vital organs of the body by a sharp-edged weapon, the inference is irresistible that the accused intended to kill the deceased. Exceptions 1 and 4 were held not applicable. (Paras 3, 4, 5)

Anno: Penal Code, S. 300 N. 4, 8, 26 S. 302 N. 16.

(b) Criminal P. C. (1898), S. 439 — Enhancement of sentence.

Accused charged under S. 302, Penal Code, but convicted under S. 304, Part 2, and sentenced to 10 years' imprisonment — High Court in revision cannot convict accused under S. 302 and enhance sentence either to transportation for life or death — High Court, held, could not also alter conviction from S. 304 Part 2 to one under S. 304 Part I. AIR 1952 All 369 (F. B.) and AIR 1950 All 380 Foll. (Paras 7, 8)

Anno: Cr. P. C., S. 439 N. 12, 13, 29.

(c) Criminal P. C. (1898) S. 439 — Retrial.

Application by private party for enhancement of sentence — On question whether there should be retrial wishes of State should have greater weight, offence being against the State. (Para 10)

Anno: Cr. P. C., S. 439 N. 25a.

B. S. Darbari, for Applicant, P. C. Chaturvedi, for Opposite-Party No. 1.

CASES CITED:

(A) ('52) AIR 1952 All 369: (Cri Appeal No. 937 of 1949): 1952 Cri LJ 751 (FB)
(B) ('50) AIR 1950 All 380: 51 Cri L J 1040

AGARWALA, J.: This is a revision application by one Chandan for enhancement of sentence of Babu who has been convicted under S. 304, Part II, I. P. C., and sentenced to the maximum sentence of ten years' R. I. which could be passed under that Part of the section. The facts briefly stated are as follows:

(2) The opposite party Babu and Ram Dayal deceased lived as tenants in the same house at Deorhi Begam. On 19-7-1950 at 6-30 p. m. there was a quarrel between Smt. Harpiari, wife of the opposite party Babu, and Smt. Bhauti, wife of the deceased Ram Dayal. The opposite party Babu intervened and scolded Smt. Bnauti. Ram Dayal reprimanded the opposite party Babu and said that he should not interfere in a quarrel between ladies. On this Babu became furious and threatened to kill some one and in furtherance of his intention ran to his room, brought out a knife, rushed at Ram Dayal and inflicted several blows on him, hitting him in the back, neck, arms and chest. Ram Dayal collapsed and died at the spot because of the serious injury to the left lung and cutting of the blood vessels of the neck and the arm. The opposite party was prosecuted under S. 302, I. P. C. The incident was amply proved by the evidence adduced by the prosecution. The learned Sessions Judge was of opinion that the case fell within Exceptions 1 and 4 of S. 300, I. P. C. He, therefore, acquitted Babu of the offence of murder under S. 302, I. P. C. and convicted him under S. 304, Part II. He expressed the opinion in the course of his judgment that Babu neither intended to kill the deceased nor intended to inflict such bodily injury as was likely to cause death.

(3) The view of law taken by the learned Sessions Judge is undoubtedly incorrect. On the facts proved in the case, the offence fell under S. 302 I. P. C. and Exceptions 1 and 4 of S. 300 I. P. C. did not apply. It was established by the evidence on the record that Babu declared that he would kill some one, that he brought out a knife from his room, that he attacked the deceased with that knife causing injuries on the neck, chest and other parts of the body and that the injuries on the neck and the chest proved fatal. When a person causes injuries with a sharp-edged weapon, or a fire-arm, on vital organs of the body, the inference is irresistible that his intention was to cause death. When he causes these injuries with a lathi, the inference may still be that the accused intended to cause the death of the deceased. But sometimes in the case of few lathi blows causing the death of the deceased, that inference may not be drawn. In the present case, as the injuries were caused on vital organs of the body by a sharp-edged weapon, the inference was irresistible that the accused intended to kill the deceased. This was reinforced by the prosecution evidence that the opposite party Babu had declared before he made the attack on the deceased that he would kill some one.

(4) Exception 1 to S. 300 I. P. C., does not apply when the provocation was not so grave that it should deprive a normal man of the power of self-control. The question whether the prqvocation was so grave or sudden as to prevent the offence from amounting to murder is always a question of fact as laid down in the Explanation to Exception 1. No doubt, the murder in the present case was not premeditated in the sense that Babu had no intention to kill the deceased before the quarrel started. But he formed an intention to kill before he made the attack. The alleged provocation was only this that the deceased said to the opposite party Babu that he should not interfere in a quarrel between the ladies. This remark was called for by the action of Babu himself because he himself had scolded the wife of the deceased. The remark of the deceased was, therefore, fully justified and the opposite party Babu had no business to get into rage over it.

(5) Exception 4 also did not apply because Babu took undue advantage of the position as the deceased was unarmed, and Babu further acted in a cruel and unusual manner when he attacked an unarmed person with a knife inflicting severe injuries on him. The Learned Sessions Judge was, therefore, wrong in thinking that Babu's offence did not fall under S. 302, I. P. C.

(6) Even if the two Exceptions applied the learned Sessions Judge should have at least convicted Babu under Part I of S. 304. Assuming for the sake of argument that there was no intention to kill the deceased, still Part I of S. 304 would apply because Babu obviously had the intention to inflict injuries on the deceased & did inflict injuries on him & the injuries inflicted were likely to cause the death of the deceased. The learned Sessions Judge in the present case, we regret to say, has disclosed an utter lack of understanding of the law on the subject.

(7) The question, however, for our consideration is whether we have power to alter the conviction of Babu from S. 304 Part II to one either under S. 302, I. P. C. or under S. 304, Part I, I. P. C. That we have no power to alter a sentence of acquittal into one of conviction and at the same time enhance the sentence has been recently held by this Court in a Full Bench, vide —'Taj Khan v. State', AIR 1952 All 369(A). Therefore, we cannot convict Babu under S. 302 I. P. C. of which offence he has been acquitted, and enhance the sentence either to transportation for life or to death.

(8) The question whether we can alter the conviction from S. 304 Part II to one under S. 304, Part II, depends on the answer to the further question whether Babu has been acquitted of the offence under S. 304 Part I, I. P. C. The learned Sessions Judge, in the course of his judgment, did say that Babu did neither intend to kill nor cause bodily injuries likely to cause death. There is no doubt, therefore, that he did intend to hold that Babu was not guilty under S. 304, Part I, I. P. C. This indication of the views of the learned Sessions Judge, in the course of his judgment may fairly be construed to amount to an acquittal of Babu under that Part of S. 304 I. P. C.

(9) In —'Mohammad Sharif v. Rex', AIR 1950 All 330(B), an accused was charged under S. 302 I. P. C. but was acquitted of that offence and convicted under S. 304, Part II, I. P. C. It was held that the Court had no power to alter the conviction under Part II of S. 304, I. P. C., to one under Part I of the same section and at the same time to enhance the sentence.

(10) The other alternative open to us is to order a retrial of the case. The learned Government Advocate has opposed this course because he fears that, as more than two years have elapsed from the date of the order of the court below, some of the crucial witnesses may not be available to the prosecution. Mr. B. S. Darbari on behalf of the complainant Chandan insists that there should be a retrial. We think that, although a private complainant may be heard in support of a revision application for the enhancement of the sentence passed on an accused or for an order of retrial, the wishes of the State in a matter like this, when the offence is really against the State and not against the individual, should have greater weight. We, therefore, do not propose to adopt the course suggested by Mr. Darbari.

(11) Before we part with this case, we would like to mention that it is anomalous that the High Court should have no power to convict a person of the offence of which he ought to have been convicted by the court below in the exercise of its revisional jurisdiction and that it should be forced to order retrial and thus be a party to a waste of public time and energy. It is a matter which should be set right by the Legislature. Let a copy of this judgment be sent to the Government concerned.

(12) In the result, we dismiss the revision application.

B/D.H. Revision dismissed.

A.I.R. 1953 ALL. 498 (Vol. 40, C. N. 239)

HARISH CHANDRA J.

Ram Autar, Applicant v. Udaibir Singh and others, Opposite Party.

Criminal Revn. No. 1130 of 1952, D/- 13-2-1953.

Criminal P. C. (1898), Ss. 435 and 146 — Interim Orders pending revision.

Though the revisional jurisdiction under S. 435 is very wide, it does not confer upon a Court calling for the record of any proceedings of an inferior Court, the power to pass any interim order except in a case in which a sentence has been passed by such inferior Court.

Held that the order passed by the Sessions Judge releasing the attachment made in proceedings under S. 145, Criminal P. C. against which an application in revision was pending before him was without jurisdiction. AIR 1949 Cal 241, Rel. on. (Paras 2 and 3)

Anno: C.P.C., S. 435 N. 13; S. 146 N. 11.

Pratap Narain Bakshi, for Applicant; D. Sanyal, for Opposite Party No. 1.

CASE CITED:

(A) ('49) AIR 1949 Cal 241: 50 Cri LJ 471

ORDER: In this case proceedings under S. 145, Criminal P. C., are going on in the Court of a Magistrate. During the course of the proceedings the learned Magistrate passed an order directing that the property in dispute be attached. Against that order of attachment a revision application was filed in the court of the learned Sessions Judge of Aligarh. After that application had been filed before the learned Sessions Judge he passed an order staying attachment. But before this order could be communicated to the station officer of the police station concerned the attachment had taken place. When this fact was brought to the notice of the Sessions Judge, he passed an order that the attachment be released in favour of the person from whose possession the property had been attached and the applicant in the proceedings under S. 145, Criminal P. C. has come to this Court against that order of the learned Sessions Judge.

(2) The simple point that arises in this case is whether the learned Sessions Judge could pass an order releasing the attachment while an application in revision was pending before him. A perusal of S. 435, Criminal P. C. seems to indicate that he has no such powers. The revisional jurisdiction under S. 435 is very wide. But it does not seem to confer upon a court calling for the record of any proceedings of an inferior court, the power to pass any

interim order except in a case in which a sentence has been passed by such inferior Court. This point was considered in the Calcutta case of — 'Mukutdhari Shao v. Ajodhya Shao', AIR 1949 Cal 241 (A). The circumstances of that case were very much similar and Sen J. by whom the case was decided, observed—

"The learned Sessions Judge had no jurisdiction whatsoever to stay the order for possession granted in favour of the first party. Still less did he have any jurisdiction later to pass an order restoring possession to the second party."

(3) I am, therefore, of the opinion that the interim orders passed by the learned Sessions Judge of Aligarh on 15-7-1952, and 31-7-1952, respectively were passed without jurisdiction and accordingly allow the revision and set them aside. The property in dispute will remain under attachment meanwhile. The learned Sessions Judge may, however, deal with the revision application pending before him and pass such orders as he may consider necessary.

B/D.R.R. Revision allowed.

A.I.R. 1953 ALL. 499 (Vol. 40, C.N. 240)

P. L. BHARGAVA J.

Shiv Dutt and another, Plaintiffs-Appellants v. Ghasita and others, Defendants-Respondents.

Second Appeal No. 1310 of 1948, D/- 3-12-51.

T. P. Act (1882), Ss. 105 and 107 — Kabuliat cannot create lease. AIR 1924 All 514 and AIR 1943 All 279, Rel. on. (Para 14)

Anno: T. P. Act, S. 105 N. 9, 14.

M. L. Chaturvedi, for Appellants; V. D. Bhargava, for Respondents.

CASES CITED:

(A) ('24) AIR 1924 All 514: 46 All 303
(B) ('43) AIR 1943 All 279: 208 Ind Cas 422

JUDGMENT : This is a plaintiffs' appeal. It arises out of a suit for possession of land and recovery of arrears of rent for a period of six years. The facts are these : On 25-2-1891, a registered 'quabuliat' was executed by the predecessor-in-interest of Phonda, defendant 1, in favour of the plaintiffs' predecessor-in-title & under this 'qabuliat' payment of rent at Rs. 3/- per annum was agreed upon. Defendants 2 to 4 are the sub-tenants of the land on behalf of Phonda. Under the terms of the 'qabuliat Phonda was entitled to make 'kham' constructions on the land and the value of the contructions was not to exceed Rs. 50/-. It was also provided in the 'qabuliat' that, if at any time the owner of the land desired to obtain back possession over the land, Phonda, would receive Rs. 50/- for the constructions made by him. Phonda took possession of the land and made certain constructions thereon. On 2-5-1945, Phonda executed a sale deed transferring the house, which he had constructed on the land, along with its site, to Ghasita, defendant 5. These facts have not been disputed before me.

(2) After the execution of the sale deed by Phonda in favour of Ghasita in 1945, the plaintiffs served a notice for ejectment upon the defendant, apparently on the ground that the execution of the sale deed by Phonda in favour of Ghasita amounted to assertion of his title and denial of their title, which had the effect of determination of the lease by forfeiture. Thereafter, the plaintiffs instituted the suit, which has given rise to this appeal. In the plaint also they alleged that the lease was determined by forfeiture; consequently, the defendants were liable to ejectment. In the alternative, it was alleged in the plaint that the plaintiffs were also entitled to the relief claimed on the basis of their title.

(3) The suit was contested by Ghasita, defendant 5, alone. The defence put forward by him was that he had purchased only the materials of the house standing on the land in dispute; that the transfer of the proprietary right in the land was never contemplated by the parties to the sale deed; that the lease was not determined by forfeiture; that he was entitled to the benefit of the provisions of S. 114, T. P. Act; that Phonda and after the transfer by him in his favour he was the permanent lessee of the land in dispute and as such he was not liable to ejectment; and that the notice issued by the plaintiffs was invalid.

(4) The suit was tried by the Munsif of Mathura, who found that there was no lease; but even if the 'qabuliat could be any evidence of a lease Phonda was not a permanent lessee of the land in dispute; that Phonda having transferred the land in suit along with the house, the plaintiffs were entitled to determine the lease by forfeiture; that S. 114, T. P. Act had no application to the facts of the present case; and that the notice issued by the plaintiffs was valid. In the result, the learned Munsif decreed the suit for ejectment and for recovery of Rs. 18/- as arrears of rent.

(5) Ghasita, defendant 5, preferred an appeal against the decision of the trial Court and the learned Civil Judge of Mathura, who heard the appeal, dismissed the suit for ejectment and maintained the decree for recovery of arrears of rent. The findings recorded by the learned Civil Judge were that there has been no such denial of plaintiffs' title on the part of Phonda or Ghasita, which might entitle the plaintiffs to determine the lease by forfeiture; that the 'qabuliat' affords good evidence of the contract of tenancy, and it shows that there was a permanent lease; and that the notice issued by the plaintiffs was valid but ineffective, inasmuch as Phonda was a permanent lessee.

(6) In this appeal by the plaintiffs, the main point which has been raised on behalf of the appellants is that the plaintiffs' case was based upon a 'qabuliat' and not on any lease; that the position of Phonda and his transferee was that of a mere licensee and not of a lessee; and that the rights of a licensee were not transferable and as such the sale by Phonda in favour of Ghasita was invalid and ineffective. In reply to this contention it has been urged on behalf of the contesting respondent, Ghasita, that the plea that Phonda was a mere licensee was never raised in the pleadings; on the other hand the plaintiffs had in their plaint admitted that Phonda was a lessee; and that in a second appeal the plaintiffs were not entitled to set up an entirely new case.

(7) A reference to the pleadings in this case goes to show that the plaintiffs had nowhere admitted in the plaint that Phonda was a lessee; although it may be said that they had impliedly recognised his position to be that of a lessee. In the opening paragraphs of the plaint the plaintiffs had merely stated facts, including the fact of the execution of the 'qabuliat'. In para 7 of their plaint, however, they had alleged that by execution of the sale deed Phonda had denied their title and he had asserted his own title, which terminated his rights as a tenant. In the

next paragraph of the plaint reference was made to the provisions of S. 111(g), T. P. Act. In order to controvert these allegations it was alleged on behalf of the contesting respondent that the position of Phonda was really that of a permanent lessee.

(8) On the pleadings of the parties the contesting respondent, Ghasita, having denied all the plaint-allegations a question arose whether the relationship of lessor and lessee existed between the plaintiffs on the one hand and Phonda or Ghasita on the other. As far as the 'qabuliat' is concerned, the trial Court rightly observed that the 'qabuliat' was not a lease; and that, in any case, it did not confer upon Phonda the rights of a permanent lessee. The learned Civil Judge was wrong in saying that the 'qabuliat' was good evidence of a lease and that it created a permanent lease. The learned Judge entirely overlooked the relevant provisions of the T. P. Act; and also the terms of the 'qabuliat' itself.

(9) Section 105 T. P. Act is in these terms :

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor or by the transferee, who accepts the transfer on such terms."

No such transfer is alleged in this case, and the 'qabuliat' is not such a transfer, and it cannot, therefore, be treated as a lease. Section 107, T. P. Act lays down that a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made 'only' by a registered instrument. These two sections when considered together clearly show that there must be a transfer, and in the case of a lease from year to year, like the one in this case, a transfer by means of a registered instrument, in order to constitute a valid lease.

(10) Learned counsel for the appellants invited my attention to the amendment made in 1929 in S. 107, T. P. Act whereby the following paragraph was added thereto :

"Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee."

This paragraph was added long after the 'qabuliat' in the present case was executed; but apart from it in view of the provisions of Ss. 105 and 107, T. P. Act, a document had to be executed by the transferor when making a transfer of immoveable property in the nature of a lease. As already stated, there was no such transfer in this case. Consequently, the relationship of lessor and lessee did not come into existence by the execution of the 'qabuliat, and the reference in the plaint to the said 'qabuliat' by the plaintiffs was of no consequence.

(11) A reference to the terms of the 'qabuliat' goes to show firstly that Phonda was liable to ejectment in the event of non-payment of rent. Secondly, the 'qabuliat' provided for ejectment at the option of the transferor, and a provision was made for payment of compensation for the constructions made on the land. Thirdly, Phonda was permitted to leave the land at his option and to remove the constructions made thereon. Lastly, it was agreed that only a 'kham' house would be constructed on the land and the value of the constructions would not exceed Rs. 50. The terms embodied in the 'qabuliat' do not contain any provision that Phonda was to occupy the land permanently. Having regard to the terms on which Phonda was given the land, it is difficult to hold that any permanent rights in the land were granted to Phonda. He was only allowed to hold the land for an unspecified period.

(12) It follows, therefore, that in the present case the relationship of lessor and lessee was not created under the 'qabuliat'; and it is not possible to hold that Phonda ever became a permanent lessee of the land in dispute.

(13) Now, if the relationship of lessor and lessee did not, in fact, exist between the plaintiffs and Phonda or Ghasita, there was no question of determination of any lease by forfeiture under S. 111(g), T. P. Act. That being so, the mere allegation in the plaint about forfeiture was of no consequence; and it could not give any cause of action for the suit by the plaintiffs. The plaintiffs, however, claimed, in the alternative, to eject the defendants as trespassers on the basis of their title. The contesting respondent unsuccessfully resisted this claim on the ground that Phonda was a permanent lessee.

(14) On behalf of the appellants it has now been contended that the position of Phonda was that of a bare licensee and as such he was not entitled to transfer by sale of the land in dispute or the constructions made thereon. This case was not set-up in the plaint; but, inasmuch as even a registered 'qabuliat' cannot be considered a lease as defined in S. 105, T. P. Act —'vide, Kedar Nath v. Shankar Lal', AIR 1924 All 514(A); and in the absence of a valid lease the position of a transferee is merely that of a licensee, as pointed out by this Court in —'Anand Sarup v. Taiyab Hasan', AIR 1943 All 279(B), on the facts established in this case, the plea can be raised by the plaintiffs. The defendants, however had had no opportunity to raise their objection to the said plea, in the absence of any clear pleadings. As the position of the contesting respondent in relation to the land in dispute has to be determined and it has also to be decided (1) whether as owners of the land the plaintiffs are entitled to eject him and (2) whether having made the constructions which now stand on the land Phonda or his transferee is entitled to be ejected in this suit, the matter must be reconsidered on the assumption that the position of Phonda was that of a bare licensee.

(15) As the case has not been approached from a right angle and the decision of the Court below cannot be supported, in view of the findings recorded above, this appeal must be allowed and the decision of the Court below set aside. Accordingly, the appeal is allowed, the decree passed by the Court below is set aside and the suit is remanded, through the lower appellate Court, to the trial Court for disposal according to law after deciding the following questions :

1. Whether Phonda had any right to transfer the land in dispute.
2. What is the nature and effect of the constructions made on the land in suit? and
3. Whether Ghasita is liable to ejectment from the land in suit.

The costs here and hitherto will abide the ultimate result.

C/V.B.B. **Case remanded.**

A.I.R. 1953 ALL. 501 (Vol. 40, C.N. 241)

MALIK C. J. AND MUSHTAQ AHMAD J.

Kundan Singh and others, Defendants-Appellants v. Hardan Singh, Plaintiff-Respondent.

Letters Patent Appeal No. 4 of 1948, D/- 20-11-1951; from judgment of Sapru J., in S. A. Nos. 98 and 99 of 1944, D/- 1-12-1947.

(a) Limitation Act (1908), Art. 144 — Usufructuary mortgage by manager of joint Hindu family without legal necessity — Other member having knowledge of mortgage — Mortgagee's possession must be deemed to be adverse to such member. (Para 11)

Anno: Lim. Act, Art. 144 N. 60.

(b) Evidence Act (1872), S. 112 — No satisfactory evidence that even during the period that the wife was living with another person her husband had nothing to do with her — Child born must be presumed to be son of the husband. (Para 9)

Anno: Evidence Act, S. 112 N. 6.

Anangpal Gupta, for Appellants; H. C. Sharma and S. B. L. Gaur, for Respondent .

MALIK, C. J. : This is a letters patent appeal by defendant 2 and the legal representatives of defendant 1, Mukhtar Singh. The plaintiff respondent Hardan Singh claimed that he was a son of Har Lal Singh who died in the year 1920, that he and his elder brother Mukhtar Singh were members of a joint Hindu family, that on Har Lal Singh's death in 1920 Mukhtar Singh was the head of the family and that on 20-12-1927, he had executed a mortgage in favour of Zabar Singh, defendant 3, which mortgage being without legal necessity was not binding on him (plaintiff). The plaintiff claimed that defendant 2, Tej Singh, had a simple money decree against Har Lal Singh, that in execution of that decree some property had been sold which was purchased by Tej Singh, defendant 2, and that as the plaintiff was not a party to the execution proceedings he was not bound by the same. On these allegations the plaintiff claimed possession of a half share in the property in suit.

(2) The suit was contested by all the three defendants and it was alleged that Hardan Singh was not a son of Har Lal Singh. The defendants' case was that Har Lal Singh's wife Bhup Kuer had become unchaste and that Har Lal Singh had turned her out about the year 1895. Bhup Kuer thereafter filed an application for maintenance under S. 488, Criminal P. C. which was dismissed by the Magistrate on the grounds that she was living in adultery with one Umrao Singh and that Hardan Singh had been born of this adulterous intercourse on 1-3-1903. It was alleged in the alternative that the mortgage and the auction sale were binding on the plaintiff as they were for legal necessity to pay off antecedent debts.

(3) The trial Court held that Hardan Singh was a legitimate son of Harlal Singh. It decided the other issues also against the defendants and decreed the plaintiff's suit.

(4) The lower appellate Court disagreed with the finding on the first issue and held that Hardan Singh was not a son of Harlal Singh and dismissed the plaintiff's suit. It did not go into the other issues.

(5) On second appeal a learned single Judge of this Court remitted the following two issues :

1. Was Bhup Kuer turned out by Harlal Singh and did she live with Umrao Singh?
2. Did Harlal Singh have no access to his wife during the period when Hardan Singh could have been begotten?

The learned Judge directed the lower Court to decide the other issues that it had left undecided.

(6) The lower Court answered the first issue in the affirmative and on the second issue its finding was that there was no evidence on the record that Harlal Singh had no access to his wife during the period when Hardan Singh could have been begotten. As regards the other issues that it had left undecided it held that the auction sale in favour of defendant 2 was binding on the family as the property had been sold to pay off the debts of the father Harlal Singh and that the mortgage in favour of defendant 3 was not proved to be for legal necessity.

(7) The learned Judge on return of the findings held that in view of S. 112, Evidence Act, Hardan Singh must be presumed to be a son of Harlal Singh and that, as it was not established that Hardan Singh's claim was barred by limitation, the suit must be decreed as against defendant 3 but dismissed as against defendant 2. The learned Judge gave leave to appeal under the letters patent, and the defendants, other than defendant 2, have filed this appeal.

(8) Mukhtar Singh, defendant 1, died during the pendency of the appeal, and Kundan Singh, his son, and Sm. Lado, his wife, have been brought on the record as his legal representatives. The appellants before us are Kundan Singh and Sm. Lado, legal representatives of Mukhtar Singh and Zabar Singh, defendant 3.

(9) Learned counsel for the appellants has urged that the facts clearly established non-access between Sm. Bhup Kuar and Harlal Singh as it was clear that Sm. Bhup Kuar had been turned out by Harlal Singh about the year 1895 and that she did not go back to his house till 1910 while the plaintiff was born on 1-3-1903, when Bhup Kuar was living with Umrao Singh. Section 112, Evidence Act is as follows:

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man ....shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

We have no evidence as to the year when Sm. Bhup Kuar was married to Harlal Singh, but it is not disputed now that Mukhtar Singh was born in 1892 and was a son of Harlal Singh by Bhup Kuar. It can also be accepted that Harlal Singh and Bhup Kuar had fallen out and by 1895, Bhup Kuar had been turned out by Harlal Singh, that Umrao Singh was a neighbour who had his house just opposite to the house of Harlal Singh and that Bhup Kuar was a woman of bad character. In the case brought under S. 488, Criminal P. C. in 1895 Harlal Singh had disowned the paternity of even Mukhtar Singh and had alleged that he too was a son of Umrao Singh. Harlal Singh must have, therefore, suspected that Bhup Kuar had been carrying on with Umrao Singh from even before 1892.

In spite of the fact that he had turned out Bhup Kuar and she was living with Umrao Singh it was admitted by Mukhtar Singh, defendant 1, that Bhup Kuar had come back to Harlal Singh and had lived with him for a number of years. He admitted in the witness-box that after living with Umrao Singh for a period of ten or fifteen years she had come back to Harlal Singh and lived with Harlal Singh for more than a decade before he died in 1920. The lower ap-

pellate Court held in the circumstances that there was no satisfactory evidence that even during the period that Bhup Kuar was living with Umrao Singh her husband Harlal Singh had nothing to do with her. The finding of the lower appellate Court that it was not proved that Harlal Singh had had no access to Bhup Kuar about the time when Hardan Singh could have been begotten is a finding of fact and it is binding on this Court. The learned Judge was, therefore right in coming to the conclusion that Hardan Singh must be presumed to be a son of Harlal Singh in accordance with the provisions of S. 112, Evidence Act.

(10) The result of this finding is that when Harlal Singh died in 1920 he left two sons, Mukhtar Singh and Hardan Singh. There is no allegation that there was a separation between them. Hardan Singh as a matter of fact, was aged only seventeen at the time of Harlal Singh's death. There being no evidence and no suggestion that there was a separation between Mukhtar Singh and Hardan Singh, Mukhtar Singh could execute the mortgage dated 20-12-1927, in favour of defendant 3, Zabar Singh, only for legal necessity. The finding that there was no legal necessity is also a finding of fact.

(11) As regards the plea of limitation, the learned single Judge held that the case was not governed by Art. 142 and was governed by Art. 144 and, as there was no evidence of ouster or of dispossession of Hardan Singh to his knowledge, the suit was not barred by limitation. The suit having been dismissed against defendant 2, Tej Singh, and he having submitted to the decree it is not necessary to consider the effect of the auction sale. But mortgage of 20-12-1927, was a usufructuary mortgage, and the mortgagee, Zabar Singh, was put in possession of the property and he had remained in possession for about fifteen years when the suit was filed on 4-7-1942. The plaintiff could not claim that he had no knowledge of this mortgage, and the mortgagee's possession from 1927 must be deemed to be adverse to the plaintiff. The plaintiff should not, therefore, have been given a decree for dispossession of Zabar Singh.

(12) We, therefore, allow this appeal in part and modify the decree passed by the learned single Judge only to this extent that we give to the plaintiff a declaration that he was the owner of a half share in the property which was mortgaged to Zabar Singh, defendant 3, but the mortgage not having been challenged within twelve years and the mortgagee having been allowed to remain in possession for more than twelve years, the plaintiff has no right now to claim possession of the property in the possession of Zabar Singh without redeeming it.

(13) So far as appellants Kundan Singh, Sm. Lado and Zabar Singh are concerned, we modify the decree for costs passed by the learned single Judge and direct that they, the appellants, as well as the plaintiff shall bear their own costs in all the Courts. Our order shall not affect the order as regards costs in favour of defendant 2.

C/D.H. Order accordingly.

A.I.R. 1953 ALL. 502 (Vol. 40, C.N. 242)
(LUCKNOW BENCH)
KAUL J.

Shafi, Appellant v. The State.

Criminal Appeal No. 280 of 1951, D/- 7-10-1952.

(a) Criminal P. C. (1898), S. 367 — Appreciation of evidence.

The mere fact that the prosecution witnesses try to conceal from the Court certain fact which was brought out in the defence should not be allowed to detract from the weight to be attached to their testimony relating to the occurrence which formed the subject matter of the trial. (Para 6)

Anno: Cr.P.C., S. 367 N. 6.

(b) Criminal P. C. (1898), Ss. 252 and 286 — Non-examination of prosecution witness mentioned in first information or delay in examining witnesses before police do not affect credibility of prosecution story unless prosecution has had opportunity to explain — (Evidence Act (1872), S. 114, ill. (g)). **(Para 7)**

Anno: Cr. P. C., S. 252 N. 5; S. 286 N. 6; Evi. Act, S. 114 N. 11.

(c) Penal Code (1860), S. 376 — Sentence — Accused young man of 20 years committing rape on a girl of 14 — Deterrent sentence though called for, sentence of five years reduced to one of three years — (Criminal P. C. (1898), S. 32). **(Para 10)**

Anno: Cr. P. C., S. 32 N. 3.

Hakimuddin and P. I. Varghese, for Appellant; P. N. Chaudhary, Deputy Govt. Advocate, for the State.

JUDGMENT: Shafi, a young man of 20, was convicted by the learned Assistant Sessions Judge of Sitapur under S. 376, Penal Code for having committed rape upon Shanti, a girl aged 15 or 16 years, and sentenced to five years' rigorous imprisonment. He comes up in appeal.

(2) The prosecution story as found established at the trial was as follows:

(3) On the morning of 15-7-1950, at about 6 or 6-30, Mst. Shanti who is a resident of Baragaon went out to ease herself near a tank about 20 or 25 paces from her house. The tank is situated at the back of the house of one Debi Prasad and the place appears to be screened from public view on account of the existence of some bamboo clumps and bushes. After the girl had finished and was returning home, the accused came, caught hold of her, threw her down and overcoming all resistance that was offered by her, removed her dhoti and committed rape upon her. The girl raised an alarm which brought Debi Prasad P. W. 3 and Ram Ghulam P. W. 2 to the spot. They saw Shafi in the act. Seeing them come, he left the girl and attempted to run away but was chased and caught by these two persons. The girl went to her home and shortly after the accused, the girl as well as her husband and the two witnesses Ram Ghulam and Debi Prasad, proceeded to the house of the surpanch where a report of what had happened was reduced to writing. These persons then proceeded to the police outpost at Baragaon. While on their way, they met the village chaukidar and constable Sri Krishen. The accused was handed over to them. The constable and the chaukidar then took these persons as well as the accused to police station Maholi 7 miles distant — and handed over the written report prepared by the sarpanch to S. I. Bhagwan Sarup. A first information report was recorded on the basis of written report handed over to the S. I. Bhagwan Sarup. The dhoti which the girl was wearing at the time of the report and which was still on her person was taken over by the investigation officer.

(4) In due course the accused was challaned and committed to the Court of Session. He

pleaded not guilty to the charge. His defence was that this was a false case concocted against him by the prosecution witnesses who were inimical to him. According to him there was some parti land measuring 1 or 1½ bighas to the south east of Debi Prasad's house which was used as a ghoora (place for storing refuse) by the village people. That about three or four years before the occurrence Shafi's brother Karim obtained a lease of this land from the Zamindar and brought it under cultivation. The village people, including the prosecution witnesses, could therefore no longer use it as their ghoora and this led them to entertain hostile feelings against Shafi and his brother. In the statement made by Shafi before the Committing Magistrate this defence was further developed. He stated that inasmuch as he did not allow the prosecution witnesses to use the land for which his brother had obtained a lease from the Zamindar as their ghoora, they had formed a party against him. That on the morning of the occurrence while he was going to his sister-in-law and was at mile 2 of the canal which passes by the village, the prosecution witnesses caught hold of him and belaboured him; that the S. O. of Mitauli police station and the sarpanch of village Dhakia arrived on the spot and got him released. He added nothing to this statement in the Court of Session.

(5) The learned Assistant Sessions Judge accepted the evidence of the prosecution witnesses, disbelieved the defence version and convicted and sentenced the appellant as already stated.

(6) It was contended by the learned counsel at the hearing of the appeal that the evidence of the prosecution witnesses, who were inimical to his client was untrustworthy and should not have been relied upon. He pointed out that a perusal of the report prepared by the Sarpanch Ex. 1 would suggest that actually there was no rape committed, but at the worst there was an attempt at raping Shanti and the story that a rape was actually committed was an afterthought and a latter development. I am unable to attach much weight to this argument. The report prepared by the Sarpanch specifically mentioned that Shafi thrust his male organ into the private parts of the girl whom he had made the victim of his lust. A reference in the course of argument was also made to the attempt made by the prosecution witnesses to conceal from the Court the fact that there formally existed a ghoora on the land for which a lease had been obtained by Shafi's brother Karim three or four years ago, and it was contended that the prosecution witnesses were not truthful persons. It must be conceded that such an attempt was made by the prosecution witnesses, but I agree with the learned Assistant Sessions Judge that this should not be allowed to detract from the weight to be attached to their testimony relating to the occurrence which formed the subject matter of this trial. Ram Ghulam and Debi Prasad were eye-witnesses of the occurrence. They fully corroborate the evidence given by the girl of how she was pounced upon by the appellant, thrown down and raped. Reference was also made by the appellant's learned counsel to the failure of the prosecution to examine Sukhwa who was one of the witnesses named in the first information report. No question having been put to the investigating officer why Sukhwa was not produced, no inference adverse to the prosecution case can be drawn from the fact that he was not called as a witness.

(7) Mr. Hakimuddin learned counsel for the appellant invited my attention to the delay in the examination of the main prosecution witnesses by the police. The occurrence took place on 15-7-1950. The main witnesses belonged to village Baragaon. They do not appear to have been examined for six or seven days. No question having been put to the investigating officer in respect of the delay in examining these witnesses while he was in the witness-box, it would be wrong to draw any inference adverse to the prosecution from this circumstance.

(8) It was faintly argued that the Court might also consider if this was not a case of sexual intercourse having been committed with Shanti with her consent. No such plea was taken by the accused in his statement either before the Committing Magistrate or in the Court of Session. It was a case put forward by the learned counsel on behalf of his client. The torn dhoti of the girl which was exhibited as also the injuries found upon her person when she was medically examined clearly negative any inference of consent on her part. It was pointed out by the learned counsel that the girl was medically examined 30 hours after the occurrence and so much importance cannot be attached to the injuries found upon her person. I am unable to follow this argument. She was made the victim of rape on the morning of the 15th July. The first information report of the occurrence was recorded at police station Maholi the same day before noon and she was sent up for medical examination to Sitapur the head quarters of the district. She was medically examined on the 16th, i.e., the next day after the occurrence. There is no delay in her medical examination.

(9) I agree with the view taken by the learned Assistant Sessions Judge that the evidence of Shanti corroborated as it is by P. W. 2 Ram Ghulam and P. W. 3 Debi Prasad is wholly trust-worthy and the offence is brought home to the accused.

(10) It appears to me, however, that the sentence passed by the learned Assistant Sessions Judge errs on the side of severity. It is true, as pointed out by him, that the circumstances of the case call for a deterrent sentence. Shafi is a young man of 20 and I am of opinion that the ends of justice will be met if the sentence is reduced from five years to three years rigorous imprisonment. The appeal is dismissed except in so far that while maintaining his conviction as recorded by the learned Assistant Sessions Judge, I reduce the sentence passed upon him from five years to three years' rigorous imprisonment.

C/K.S. Sentence reduced.

A.I.R. 1953 ALL. 503 (Vol. 40, C.N. 243)

BRIJ MOHAN LALL J.

Loknath Misir and others, Defendants-Appellants v. Smt. Daulta Kuer and others, Respondents.

Civil Revn. No. 1428 of 1951, D/- 17-12-1952.

T. P. Act (1882), S. 60 — Right of redemption — (Civil P. C. (1908), O. 34 R. 7) — (U. P. Agriculturists' Relief Act (27 of 1934), S. 12).

A preliminary decree passed under O. 34,

R. 7 (as it stood before its amendment in 1929) by itself does not put an end to a mortgagor's right to redeem even if it purports to say so. Even under the law as it stood prior to the amendment, a final decree had to be passed under O. 34, R. 8, before the right to redeem could be lost. In the absence of such a final decree, the right of redemption remains intact, under S. 60, T. P. Act, notwithstanding the preliminary decree and the mortgagor as well as his lessee against whom the preliminary decree is passed are entitled to apply under S. 12, U. P. Agriculturists' Relief Act. AIR 1950 All 88, Rel. on; 24 All 44 (FB), Expl.; 29 All 481, Disting. (Paras 4, 5, 7)

Anno: T. P. Act, S. 60 N. 26 Pts. 2 to 4.

S. K. Varma, for Appellants.

CASES CITED:

(A) ('50) AIR 1950 All 88: 1950 All WR 189
(B) ('07) 29 All 481: 4 All LJ 447
(C) ('01) 1901 All WN 194: 24 All 44 (FB)

JUDGMENT: This is an application in revision by the defendants mortgagees arising out of a claim brought under S. 12, U. P. Agriculturists' Relief Act. The mortgage sought to be redeemed was a possessory mortgage and was executed on 28-5-1909 by one Sm. Daulata Kunwar in favour of two persons, viz. Gaya Rai and Prayag Dube. Padam Nath, the predecessor-in-interest of the present applicants, acquired the mortgagee rights by pre-emption and took possession of the mortgaged property as a usufructuary mortgagee. Later on, Sm. Daulata Kunwar executed a lease of the mortgaged property in favour of two persons, viz., Jagarnath Singh and Sri Bahadur Singh. The lessees brought a suit No. 231 of 1922 for redemption of the mortgage. Shrimati Daulata Kunwar was arrayed as a defendant to that suit. The predecessors of the present applicants were the main defendants to that suit. On 27-9-1923 the suit was decreed. A preliminary decree was prepared under O. 34, R. 7 directing the then plaintiffs to pay a sum of Rs. 1700/- till 27-3-1924. It was also stated in the decree that, in case the payment was not made within the aforesaid time, the right of redemption would be extinguished. No payment whatsoever was made. The present claim for redemption under S. 12, U. P. Agriculturists' Relief Act was brought in 1949 by three persons, viz. Shrimati Daulata Kunwar and the aforesaid two lessees. Various pleas were taken in defence. But the only one which is material for the purposes of the present revision was that the decision in Suit No. 231 of 1922 operated as res judicata and the right to redeem had been extinguished.

(2) Both the Courts below have taken the view that the lessees' right to redeem has been extinguished by reason of the aforesaid decision and that that decision operates as res judicata. They are, further, of the opinion that Sm. Daulata Kunwar's right is not so extinguished. The claim for redemption has therefore been decreed in favour of Sm. Daulata Kunwar only.

(3) The point urged by the learned counsel for the applicants is that not only the lessees' right but also the right of Sm. Daulata Kunwar has been extinguished as a result of that decision. It is argued that that decision operates as res judicata against the lessees and also against Sm. Daulata Kunwar as res judicata between co-defendants.

(4) The decree that was prepared in Suit No. 231 of 1922 was not in accordance with law. In accordance with O. 34, R. 7, as it stood before the amendment of 1929, the decree should have said that in the event of non-payment the mortgaged property would be sold. Foreclosure was not a penalty which, under the law as it then stood, could be imposed on the defaulting mortgagor. After the aforesaid amendment the Court can neither order sale nor foreclosure when a mortgagor under a usufructuary mortgage fails to make a deposit within the time allowed by law. But the present case is to be decided according to law as it stood prior to the said amendment. Under that law the penalty to be imposed on the defaulting mortgagor was, as already stated, that the mortgaged property should be sold. But that was not mentioned in the decree and a penalty of a wrong nature, not warranted by law, viz., that the right to redeem would be foreclosed, was mentioned in the decree. It is argued by the learned counsel for the applicants that since the Court, rightly or wrongly, imposed that penalty and since the decree was not appealed against, the right to redeem has been extinguished. With this contention I am unable to agree. Even in cases where the penalty of foreclosure is rightly imposed, e.g. in the case of mortgages by conditional sale, it is not the preliminary decree itself which extinguishes the right of redemption finally. Even under the law as it stood prior to the amendment, a final decree had to be passed under O. 34, R. 8, before the right to redeem could be lost. The preliminary decree simply indicated what consequences would follow in the event of non-payment of the mortgage money. But those consequences did not take effect automatically on default of payment within the prescribed time. The passing of the final decree was a condition precedent to the coming into existence of those consequences. Had it been the intention of law to let those consequences follow automatically, it would have been unnecessary to enact Rule 8, Order 34 which provides for the preparation of the final decree. I am, therefore, of the opinion that even in cases where the Court could legitimately include a clause in the preliminary decree to the effect that in case of non-payment of the mortgage-money by the depositor the right to redeem would be lost, such right could not be extinguished unless the final decree was passed. Much less such a right could be lost by a preliminary decree in which this clause was improperly included.

(5) Section 60, T. P. Act lays down that at any time after the principal money has become due the mortgagor has a right to redeem, provided that the right conferred by this section has not been extinguished by an act of the parties or by decree of a Court. There is no question of the right being extinguished by an act of the parties in the present case. The decree of the Court also did not, as held above, extinguish the right. Therefore, the right of redemption remained intact, notwithstanding the preliminary decree passed in the aforesaid terms in Suit No. 231 of 1922.

(6) I am fortified in the view taken by me by the case of — 'Suraj Bali v. Rang Bahadur', AIR 1950 All 88 (A). In that case also it was held that unless the final decree was passed, the right to redeem could not be extinguished.

(7) Reliance was placed by the learned counsel for the applicants on the case of — 'Lach-

man Singh v. Madsudan', 4 All LJ 447 (B). That case is clearly distinguisnable on facts. What had happened in that case was that a preliminary decree was passed, under S. 92, T. P. Act (which corresponded to the present O. 34, R. 7) as it stood before its repeal in 1908, on payment of a sum of Rs. 2555. The deposit was made. The mortgagors took possession. The mortgagee went up in appeal. The appellate Court enhanced the amount to be paid by the mortgagors. This extra payment was not made by the mortgagors. The mortgagee then put in an application under S. 93 (which corresponded to present O. 34, R. 8) got back possession and refunded the amount to the mortgagors. The latter took back the amount and the mortgagee went into possession. It was held that a subsequent suit for redemption brought by the mortgagors was untenable. The reason is obvious. The matter did not rest with the preliminary decree only. A final decree was passed under S. 93 of the Act. This decision, therefore, does not militate against the view which I have taken, viz. that a preliminary decree by itself does not put an end to a mortgagor's right to redeem even if it purports to say so.

(8) The learned counsel for the applicants referred to certain remarks made by Banerji and Aikman JJ. in the Full Bench case of — 'Sita Ram v. Madho Lal', 24 All 44 (FB) (C). In that case their Lordships remarked that if the decree says that the right would be extinguished and the decree is not appealed against, the right would be extinguished. This was a mere obiter dictum. The decision of their Lordships was that in that particular case the right had not been extinguished.

(9) I am, therefore, of the opinion that the aforesaid decisions do not lend support to the contention put forward by the learned counsel for the applicants. The right of redemption has, in my opinion, not been extinguished.

(10) No question of res judicata can possibly arise. The two points that arose for decision in the present case are (1) whether the right of redemption has been extinguished? and (2) What is the amount now due? None of these points was in issue in the former suit. The first point, viz. whether the right has been extinguished as a result of the former decision, could not possibly have been in issue in the former suit. As to the second point, the issue in that suit was as to what was the amount then due and not what is now due. It is, therefore, obvious that the former decision cannot operate as res judicata.

(11) It will, therefore, follow that the right of redemption remains intact not only 'qua' Sm. Daulata Kunwar but also 'qua' the lessees. In the circumstances, this revision must fail. It is hereby dismissed. As nobody has appeared for the opposite parties, no order is made for costs.

B/V.S.B. Revision dismissed.

A.I.R. 1953 ALL. 505 (Vol. 40, C.N. 244)

BEG J.

Shiamsundar Lal Jain, Applicant v. Sheo Parshad, Opposite Party.

Criminal Ref. No. 64 of 1951, D/- 14-10-52.

Criminal P. C. (1898), Ss. 145 (4), 146 — Procedure prescribed by S. 145(4) must be first exhausted before taking action under S. 146.

The provisions of sub-cl. (4) of S. 145 are imperative. It is not open to a Magistrate to refuse to take evidence on behalf of a party merely on the ground that he was satisfied on the written statements filed by both the parties that a certain conclusion was the correct conclusion. (Para 3)

Anno: Cr. P. C., S. 145 N. 37; S. 146 N. 2, 5.

Jai Kishenlal brief holder for the Deputy Govt. Advocate, for the State.

ORDER : This is a reference by the learned Sessions Judge of Dehra Dun recommending that the order of the trial Court attaching the property in dispute under S. 146, Criminal P. C. be set aside. It would appear that in Dhamanwala Bazar, situate in the district of Dehra Dun, there is a shop and above the shop there is a Chaubara with a balcony belonging to Colonel Kunwar Shamsher Bahadur Singh. One Sheo Prasad Goel, a student of the D. A. V. College claimed to be the tenant of the said Chaubara and balcony. He moved an application under S. 145, Criminal P. C. alleging that he had allowed one Shiam Sunder Lal Jain, a hardware merchant, to carry on his business in the said Chaubara and balcony. He further alleged that subsequently he had withdrawn his permission and Shiam Sunder Lal forcibly dispossessed him from his Chaubara and there was a danger of a breach of the peace in respect of it. The second party, Shiam Sunder Lal, put in a written statement alleging that in fact he himself was a tenant of the property in dispute and had allowed Sheo Prasad Goel to use the balcony for the purposes of study so long as it did not interfere with his professional work.

After the filing of the written statements by the parties, the learned Magistrate recorded the statements of ten witnesses on behalf of Sheo Prasad after which the applicant closed his case. The evidence of Shiam Sunder Lal was then begun. After recording his examination-in-chief and before his cross-examination started, the learned Magistrate proceeded to pass the following order under S. 146, Criminal P. C.

"Each of the parties claims to be in possession and alleges that the other was allowed temporary use of the room. Under the circumstances each admits the other to have been in possession and the modes of possession being incompatible, it follows that no satisfactory conclusion as to possession can be reached.

I, therefore, direct under S. 146, Criminal P. C. that the property remain attached till either party obtains a decision in its favour from the civil Court."

(2) The second party, Shiam Sunder Lal, being aggrieved with the aforesaid order went up in revision before the learned Sessions Judge on the ground that the provisions of S. 145, sub-cl. (4), Criminal P. C., were not complied with and the order of attachment under S. 146 was, therefore, illegal and invalid in law. The learned Sessions Judge agreed with the said contention and made this reference recommending that the order in question be set aside.

(3) Having gone through the order of reference and the explanation submitted by the learned Magistrate, I am of opinion that this reference must be accepted. Under S. 145, sub-cl. (1), Criminal P. C., once a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, he should make an order in writing requiring the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by such Magistrate

and to put in written statement of their respective claims as respects the fact of actual possession of the subject of dispute. After the written statements have been filed, then under sub-cl. (4) of the same section, the Magistrate is required without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary and, if possible decide whether any and which of the parties was at the date of the order before mentioned in possession of the said subject.

Thus it is evident that the Criminal Procedure Code has prescribed a definite and a comprehensive procedure to enable the Magistrate to come to a conclusion on the question of possession which is the question in issue in proceedings under S. 145, Criminal P. C. Unless the entire procedure has been gone through it is not possible for the Magistrate to come to any definite conclusion one way or the other. The provisions of sub-cl. (4) of S. 145, Criminal P. C. seem to be imperative. It is not open to a Magistrate to refuse to take evidence on behalf of a party merely on the ground that he was satisfied on the written statements filed by both the parties that a certain conclusion was the correct conclusion. It is significant that under sub-cl. (4) of S. 145, Criminal P. C. even after both the parties have adduced the entire evidence on their behalf, it is open to the Magistrate to act 'suo motu' and to summon any fresh evidence in order to enable him to determine the question as to which party is in actual possession of the subject of dispute. Before the Magistrate can take any action 'suo motu' it will be helpful to him to have the entire picture of the case as appearing from the evidence of both the parties.

Proceedings under S. 145 are proceedings of a criminal nature and are resorted to only when there is a danger of breach of peace. The policy of the Legislature seems to be to encourage their speedy disposal and the arrival of some definite conclusions on merits by the trial Courts so as to avoid the apprehended breach of peace. If after having exhausted every avenue of enquiry and investigation open to a Magistrate under S. 145, Criminal P. C., he still fails to come to any definite conclusion regarding the merits of the case, then and then alone, as a last resort, he can invoke the aid of S. 146, Criminal P. C. and state that having been unable to satisfy himself as to which of the parties was in possession of the subject of dispute, he has no other alternative but to attach the property until the matter was decided by a competent Court. It may also be mentioned that in Court Shiam Sunder Lal has not admitted that he was out of possession. On the other hand, he has stated that

> "I was in possession till the police sealed the room.....I allowed Sheo Prasad to study here during March on the understanding that he would not interfere with my work. He never had possession of the room."

He further goes on to state that his tools were kept in the room all along, that he had got the entire premises white-washed and had retained the key of the room with him. I should not, however, be taken to express any opinion on the merits of the case of either party. I, however, feel that the matter needs clarification by further investigation and the order shutting out evidence is not warranted.

(4) I, accordingly, accept the reference, set aside the order of the Magistrate and direct that he shall hold an enquiry in accordance with S. 145, Criminal P. C. and pass final order after complying with the procedure prescribed therein.

C/R.G.D. Reference accepted.

A.I.R. 1953 ALL. 506 (Vol. 40, C.N. 245)

(LUCKNOW BENCH)

KAUL J.

Tittar and another, Applicants v. State.

Criminal Revn. Appln. No. 39 of 1952, D/- 25-10-1952.

Criminal P. C. (1898), Ss. 103, 439—Search by Excise Sub-Inspector — Failure to call witnesses of the locality — Evidence should be reviewed in revision. (Paras 4, 5)

Anno: Cr.P.C., S. 103 N. 16, 17; S. 439 N. 1.

H. D. Srivastava and Babu Ram Gir, for Applicants; B. L. Kaul, Deputy Govt. Advocate, for the State.

ORDER : Tittar Khatik and his son, Bhajan were convicted under S. 60(b), U. P. Excise Act, and sentenced to six months' rigorous imprisonment. They preferred an appeal, which was unsuccessful. They have now come up to this Court in revision. The material facts are as follows :

(2) A house in village Sahibganj said to belong to Tittar was raided on 20-4-1951, by Excise Inspector, Ram Pratap Singh. The search witnesses who accompanied him were head constable Lalta Singh P. W. 1, Amiruddin an octroi clerk P. W. 2 and Rafiq, an ekkawallah P. W. 5. According to the prosecution version, Tittar and Bhajan were found distilling liquor in the house. A Charbua, a bhapka, a pipe, an urnai, handsome distilled liquor and a quantity of mahua wash were said to have been recovered from their possession.

(3) The accused pleaded that there was enmity between them and the Excise Inspector, Ram Gopal Singh (Ram Gopal Singh was on leave and one of his subordinates, Ram Pratap was apparently officiating for him and carried out this raid). That practically all the members of his family had been challaned under the Excise Act by Ram Gopal Singh on 15-11-1950 and it was the ill-feeling that existed between them and Ram Gopal Singh which was responsible for this false case being concocted against them. According to the accused they attended the Court of a Magistrate in Gonda on 20-4-1951 and returned to their home at about 5-30 p. m.. It was while returning home that they were stopped by the Excise Inspector who was accompanied by a constable and two or three other persons and were challaned. This defence was disbelieved by both the Courts below and the petitioners were convicted and sentenced accordingly.

(4) Mr. Hargovind Dayal Srivastava, learned counsel for the petitioners was alive to the fact that this was a revision application and ordinarily findings of fact could not be challenged in this Court. He, however, invited my attention to the failure of Ram Pratap who effected this search to observe the provisions of S. 103, Cr. P. C. Under that section before making a search under Chap. VII it is incumbent on the officer or the persons about to make the search to call upon two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search and may

issue an order in writing to them or any of them so to do. It was contended by the petitioners' counsel that in this case no regard was paid to these provisions of the law. On the other hand the Excise Inspector took with him a head constable, Lalta Singh, from the police outpost Bargaon and picked up the octroi clerk, Amiruddin from the octroi barrier and Rafiq an ekkawallah who happened to be at the octroi post. It was stated by one of the prosecution witnesses that an attempt was made to call the local inhabitants to witness the search but it was unsuccessful. This does not appear to be correct as we find from the evidence of head constable Lalta Singh that the Excise Inspector asked him to accompany him while coming to effect the search. It is in evidence that Sahibganj is a village where there are a number of houses and some mahajans also live there. There is nothing but the word of mouth of one of the prosecution witnesses that an attempt was made to call local inhabitants to witness the search and was unsuccessful. It is open to the Excise Inspector to issue an order in writing to any of the inhabitants of the locality and to ask him to witness the search. This was not done. I am not oblivious of the fact that in carrying out such raids, care is to be taken to keep the whole thing secret otherwise the raids are bound to be unsuccessful because if the culprits came to know that an officer of the Excise Department was likely to visit their house, they are bound to do away with the incriminating articles before he arrives. The fact, however remains that in this case the Excise Inspector brought the search witnesses with him when he came to Sahibganj. They were persons who cannot be said to be inhabitants of the locality. It is, therefore, clear that there was a total disregard of the provisions of S: 103, Cr. P. C.

(5) It was contended, however, by the learned counsel for the State that if it was proved from reliable evidence that the petitioners were distilling liquor the fact that the search was irregular would not affect their guilt. This may be so but the irregularity in effecting the search opens the door for the argument that the Court below not having approached the evidence from this point of view, it should be reviewed by this Court. I have, therefore, to consider if the prosecution evidence establishes the applicants' guilt without reasonable doubt.

(6-8) (His Lordship then considered the facts and the evidence in the case and continued as follows :) Having regard to the irregularities in the making of the search, the improbability on the evidence of Tittar and Bhajan having started the process of distilling the liquor and the statement of P. W. 5 Rafiq I am not satisfied that the case is free from reasonable doubt.

(9) I allow the revision application, set aside the petitioners' conviction and the sentences passed upon them and acquit them. The applicants are on bail. They need not surrender thereto.

C/D.R.R. Application allowed.

A.I.R. 1953 ALL. 507 (Vol. 40, C.N. 246)

BRIJ MOHAN LALL J.

Lal Singh, Petitioner v. Smt. Hira and others, Objectors.

Testamentary Suit No. 2 of 1952, D/- 30-1-53.

Succession Act (1925), S. 300 — Question of title — (Civil P. C. (1908), S. 9).

If an estate has been duly administered and the object of asking for the Letters of Administration is simply to agitate a question of disputed title the application should be rejected. Such question should appropriately be decided by means of a regular suit in a civil Court. 5 Ind Cas 395 (Cal); 16 Ind Cas 588(1) (Cal) and AIR 1941 Oudh 474, Rel. on. (Paras 8, 9)

Anno: Succession Act, S. 300 N. 1; Civil P. C., S. 9 N. 16.

B. N. Misra, for Petitioner; D. P. Uniyal, for Objectors.

CASES CITED:

(A) ('12) 5 Ind Cas 395: 15 Cal LJ 305
(B) ('13) 16 Ind Cas 588(1): 17 Cal LJ 65
(C) ('41) AIR 1941 Oudh 474: 17 Luck 78

JUDGMENT: This is an application for Letters of Administration in respect of the estate of one Thakur Dewan Singh, who died in village Kishun Khera, Tahsil Haldwani, district Nainital on 24-12-1950. The application, when presented, purported to have been made on behalf of two persons, viz. Lal Singh and Roop Singh, although it bore the signature of Lal Singh alone. During the pendency of the petition Roop Singh presented an application praying that his name might be removed from the array of the petitioners. He made it clear that he did not want to proceed with this petition. In the circumstances, it is Lal Singh alone who is now claiming the Letters of Administration.

(2) The deceased was a Naik by caste. Lal Singh and Rup Singh are his brothers. He left a married daughter, Smt. Rami and her sons. But it is the common case of the parties that according to the customary law to which the deceased was subject, the married daughter and her descendants are no heirs.

(3) The petition is opposed by the deceased's two sisters viz. Smt. Hira and Smt. Anandi. The parties are agreed that under the law applicable to the Naik community married sisters do not inherit the estate of their deceased brother. An unmarried sister is, however, an heir, and ranks equally with the brother in the matter of inheritance.

(4) The defence put forward by the objectors, i.e. the two sisters, is that the estate has already been administered and there remains nothing more to be done to administer it.

(5) Parties are agreed that after the deceased's death an application for mutation was made. During the pendency of those proceedings the petitioner, i.e. Lal Singh made two applications, one before the Assistant Collector and the other before the Panchayat Court, in which he stated that the matter had been compromised, that the two brothers would get the half share and the two sisters would get the remaining half and that the mutation might be made accordingly. He was examined on oath by the Panchayat Court and during the examination also he re-affirmed that statement. He made a petition before the patwari also and therein, too, he stated that he, his brother and their two sisters would share the deceased's property equally. As a result of this compromise mutation has been effected on the "Hissedari" property, which is the name given in hill areas to the zamindari property.

(6) There was some dispute about the house property. But the Chairman of the Municipal Board Haldwani passed an order on 16-3-51 to the effect that the two sisters and the two

brothers would share equally. After that order mutation was effected in the Municipal registers in respect of the house property also. The orders passed by the mutation Court in respect of Hissedari property and by the Chairman, Municipal Board, Haldwani in respect of house property were not challenged before higher authorities. The house property is in the actual occupation of the tenants. Kirayanamas have been obtained from them in such a manner that the two sisters have begun to realize half the rent and the two brothers the other half. Thus the house property has, for all practical purposes, been divided and taken separate possession thereof by the co-sharers.

(7) The deceased left no debts nor any liquid assets.

(8) The real object of starting the present proceedings is that the applicant, for reason best known to him, has thought fit to resile from the compromise arrived at in the mutation Court. He challenges that agreement by alleging that his sisters are married and cannot inherit any share out of the deceased's assets. A question of title is sought to be raised and the compromise arrived at during the mutation proceedings is challenged. It is also suggested that the agreement was not arrived at by free consent on his part. It is certainly open to him to raise these pleas in a separate civil suit and to have this compromise set aside provided he succeeds in proving the allegations made by him. But it is not the function of this Court to enter into this dispute and to record a finding thereon. In exercising testamentary jurisdiction it is not for me to adjudicate upon these disputed questions of title or to record a finding as to whether or not the compromise should be set aside. The compromise has been carried into effect and has been acted upon. The parties are now in separate possession of the houses through their tenants and in possession of their respective shares in Hissedari property. The estate has therefore been completely administered. Letters of Administration cannot be granted when the estate has already been administered. It has been held by a long chain of authorities that if an estate has been duly administered and the object of asking for the Letters of Administration is simply to agitate a question of disputed title the application should be rejected. In — 'Lalit Chandra v. Baikuntha Nath', 15 Cal L J 305 (A) it was held that

> "It is the duty of the Court in granting Letters of Administration to consider whether there is any estate whatever to be administered" and that "no application for Letters of Administration should be entertained in respect of an estate which has already been fully administered."

This view was affirmed in a later case, — 'Parsania v. Hari Charan', 17 Cal LJ 65 (B). Sir Ashutosh Mookerjee delivering the judgment of the Division Bench remarked that:

> "Where the object of the litigation was not to administer the estate left upon the death of the owner but merely to obtain a declaration of heirship so as to fortify the position of the successful party in a regular suit that may be instituted no grant of letters of administration should be made."

The erstwhile Chief Court of Avadh had also taken a similar view in the case of — 'Mt. Hajira Khatoon v. Mustafa Hussain', A. I. R. 1941 Oudh 474 (C). It was remarked that:

> "Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for Letters of Administration is a transparent device to secure from the probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. The proper course is to obtain an adjudication of the rights in a regular suit properly framed for the purpose."

(9) With these authorities I respectfully agree. I am definitely of the opinion that the present case is exactly similar to the cases cited above and the object of this petition is simply to obtain an adjudication about the question of title which should appropriately be decided by means of a regular suit in a civil Court. I am, therefore, of the opinion that this application cannot be entertained. It is hereby rejected. The opposite parties shall get their costs from Lal Singh.

C/H.G.P. Application rejected.

A.I.R. 1953 ALL. 508 (Vol. 40, C.N. 247)

V. BHARGAVA J.

Mata Badal Pandey, Defendant-Appellant v. Bal Karan Pandey and others, Plaintiffs- Respondents.

Second Appeal No. 1882 of 1946, D/- 15-11-50.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 26 — Sir land — Transfer of proprietary rights — Proprietor continuing in possession — Ex-proprietary rights are not extinguished — Putting claim in respect of ex-proprietary rights is necessary only when he is out of possession. (Para 4)

Jagdish Swarup, for Appellant; S. N. Singh and N. Upadhya, for Respondents.

JUDGMENT: This appeal arises out of a suit brought by the plaintiff-respondents for a declaration that they are the sir-holders of the plots in suit and for possession over those plots by ejectment of the defendant-appellant.

(2) It is the admitted case of both the parties that the plots in suit originally belonged to one Ram Jas who was the sole and separate proprietor of all of them. Ram Jas had three brothers Sheo Ratan, Sri Nivas and Mata Badal, who were separate from him. The present appellant is Mata Badal and the present respondents are the sons of Sheo Ratan and Sri Nivas. In 1921 Ram Jas executed a registered deed of agreement by which he gave possession over the plots in suit to his widowed daughter-in-law Sm. Bachcha in lieu of her maintenance. She entered into possession over these plots in pursuance of that agreement. Thereafter Ram Jas died. Before the death of Sm. Bachcha, Mata Badal transferred all his property including his proprietary rights in the plots in suit to one Gopi Chaubey. Sm. Bachcha died some time in the year 1940. Thereafter a dispute arose as to who was entitled to mutation in respect of these four plots of land. The Commissioner who finally decided the mutation proceedings directed that mutation be made in favour of Mata Badal appellant. Consequently, the respondents brought this suit for declaration of their rights in the plots in suit and for possession against Mata Badal.

(3) Both the lower Courts held that Mata Badal had transferred his proprietary rights in the lifetime of Sm. Bachcha and the right to possession

over the plots in suit by either of these two parties came into existence only after her death and since by the time of her death, Mata Badal had already lost his proprietary rights in these plots, he could not claim 'sir' rights in them nor could he claim ex-proprietary rights. They consequently held that the respondents had become the sole 'sir-holders' of these plots and, therefore, decreed the suit in their favour.

(4) Mata Badal has come up in appeal challenging these decisions by the two lower Courts. It appears to me that the view taken by the two lower Courts that no ex-proprietary rights accrued to Mata Badal at all is incorrect though their decision that he should not claim any 'sir' rights is perfectly correct. It has already been found by the lower Courts that Ram Jas had not transferred any proprietary rights in these plots to his daughter-in-law, Sm. Bachcha. All that he had done was to give possession of these plots to Sm. Bachcha to cultivate them and to enjoy them in lieu of her maintenance. Consequently, when Ram Jas died, his proprietary and 'sir' rights in these plots passed, according to the Law of Succession, to his three brothers, Sheo Ratan, Sri Nivas and Mata Badal, in equal shares. At the time when Mata Badal transferred his proprietary rights in favour of Gopi Chaubey, Mata Badal possessed one-third proprietary rights and one-third 'sir' rights in these plots; the transfer being only of proprietary rights, ex-proprietary rights in one-third of these plots automatically accrued in law to Mata Badal at the time of that transfer. The actual possession at that time was with Sm. Bachcha on behalf of all the three brothers of Ram Jas, viz., Sheo Ratan, Sri Nivas and Mata Badal. Even after the transfer of his proprietary rights by Mata Badal, Sm. Bachcha continued to be in possession as before so that it must be held that she continued in possession on behalf of all the three brothers, Sheo Ratan, Sri Nivas and Mata Badal. Naturally, after that transfer, it must be held that she was in possession on behalf of Sheo Ratan and Sri Nivas who were the 'sir-holders' and on behalf of Mata Badal who was ex-proprietary tenant, each of the three being entitled to one-third share in these plots in exercise of these rights. The possession of Sm. Bachcha must, therefore, be deemed to be the possession of Mata Badal also in addition to its being on behalf of Sheo Ratan and Sri Nivas. When Sm. Bachcha died in 1940, Sheo Ratan, Sri Nivas and Mata Badal acquired the right to take actual possession over these plots. In taking possession, they were entitled to one-third share each, Sheo Ratan and Sri Nivas as 'sir-holders' of their shares and Mata Badal as ex-proprietary tenant of his share. It, however, appears that Mata Badal took possession over the entire plots to the exclusion of Sheo Ratan and Sri Nivas or their heirs. In these circumstances, it is obvious that if the rights of all the three parties are properly enforced, all the three of them should be put in joint possession over these plots of land. In accordance with the provisions of the U. P. Tenancy Act, 1939, which applied at the time when Sm. Bachcha died, the duty rested on the revenue authorities to demarcate the area which had become the ex-proprietary tenancy of Mata Badal and to leave the remaining area in possession of the heirs of Sheo Ratan and Sri Nivas as their sir. The law nowhere lays down that it is the duty of the ex-proprietary tenant to have such demarcation made. Ex-proprietary rights accrue to a proprietor in his 'sir' land automatically as soon as he transfers his proprietary rights and in case, even after the transfer, that proprietor continues in possession of the land, his ex-proprietary rights cannot get extinguisned. It is only in those cases where the person acquiring ex-proprietary rights is out of possession that it is necessary for him to put in a claim in respect of his exproprietary rights. Where, as in this case, the person acquiring ex-proprietary rights is in actual possession either himself or through another person holding possession on his behalf, there is no need for claiming ex-proprietary rights. In this case, therefore, there was no question of Mata Badal having to claim his exproprietary rights at any time after he had made the transfer of his proprietary rights in favour of Gopi Chaubey. The question of putting forward his claim in respect of ex-proprietary rights could arise only after the death of Sm. Bachcha and, at that time, he only came into possession himself. Again, therefore, there was no question of his claiming ex-proprietary rights and asking for demarcation or partition.

(5) The contention on behalf of the respondents that Mata Badal has lost his rights because he failed to claim his ex-proprietary rights after he had made his transfer in favour of Gopi Chaubey has, therefore, no force at all. In the present case, the rights of the parties, as they exist now, require that all the three be put in joint possession but, in accordance with the law now in existence, demarcation has to be made by the revenue authorities separating the one-third ex-proprietary tenancy area of Mata Badal appellant from the two-thirds 'sir' area of the respondents. Of course either party can move the revenue authorities to do so. In this case, the proper order would be that the respondents be put in joint possession with the appellant.

(6) As a result, I partly allow this appeal and amend the decree passed by the lower Court inasmuch as the suit of the plaintiff-respondents will be decreed only for joint possession with the defendant-appellant. In the circumstances of this case, I would direct parties to bear their own costs throughout.

C/V.B.B. Appeal partly allowed.

A.I.R. 1953 ALL. 509 (Vol. 40, C.N. 248)

MALIK C. J. AND MUSHTAQ AHMAD J.

Jagannath Prasad, Appellant v. Hazari Lal and others, Respondents.

Supreme Court Appeal No. 6 of 1950, D/- 31-8-1951.

(a) Civil P. C. (1908), S. 110 — Valuation of subject matter in dispute on appeal — (Arbitration Act (1940), S. 39).

Where the question for decision by the trial Court as well as by the High Court was whether the award should or should not be made a rule of the Court, the value of the entire property dealt with by the award and not the value of any share in the total assets is the criterion for judging the valuation of the suit and proposed appeal to the Supreme Court. (Para 3)

Anno: Civil P. C., S. 110 N. 8; Arbitration Act, S. 39 N. 1.

(b) Constitution of India, Art. 133 — Scope — (Civil P. C. (1908), S. 110) — (Arbitration Act (1940), S. 39).

A person, whose appeal in High Court was decided before the Constitution, has a vested right to file an application for leave to appeal to Supreme Court in accordance with the provisions of the Civil Procedure

Code and the mere fact that the application for leave to appeal to the Supreme Court was filed after the Constitution had come into force does not take away that right. Case law referred. (Para 4)

Anno: Civil P. C., S. 110 N. 1, Arbitration Act, S. 39 N. 1.

J. N. Takru, for Appellant; Harnandan Prasad, for Respondents.

CASES CITED:

(A) ('28) AIR 1928 Cal 640: 56 Cal 512 (FB)
(B) ('28) AIR 1928 All 708: 50 All 865
(C) ('50) AIR 1950 Nag 222: ILR (1950) Nag 830
(D) ('51) AIR 1951 Mad 251: ILR (1951) Mad 125

MALIK C. J.: There was a reference to arbitration out of Court. The arbitrators gave an award & filed an application in accordance with the provisions of the Arbitration Act in the Court of the learned Civil Judge, Shahjahanpur, that the award be made a rule of the Court. This was opposed on various grounds. We are not concerned with the other grounds, but one ground that came up to this Court was the question whether it was open to the arbitrators to hold that Madho Ram had no share in the partnership assets as he was not a partner. The trial Court had decided the contention against the objectors and had made the award a rule of the Court. In appeal this Court came to the conclusion that Madho Ram was a party to the partnership deed, that the reference was made by Hazari Lal, Jagannath Prasad and Madho Ram as partners, that the reference itself showed that it was admitted that Madho Ram was a partner and that it was, therefore, not open to the arbitrators to go into the question whether Madho Ram was a partner and to hold that he was not a partner. This Court, therefore, allowed the appeal, set aside the order of the lower Court and dismissed the application for making the award a rule of the Court. Against the order this application for leave to appeal to the Supreme Court has been filed.

(2) Learned counsel for the appellant has urged that he is entitled to appeal as a matter of right. The application is, however, opposed on behalf of the opposite party for whom it has been contended that the appellant has no such right.

(3) The property which was the subject-matter of the award was valued at over Rs. 22,000/-, in which Hazari Lal had admitted an eight-anna share. The question was whether Jagannath Prasad had the remaining eight-anna share of Madho Ram also had a three anna share in the partnership assets. Mr. Harnandan Prasad has urged that it was only the value of Madho Ram's three-anna share that was in dispute in the suit and that was the proper valuation of the suit, as of the application for leave to appeal to the Supreme Court. This, to our minds, is not correct. The application was for making the award a rule of the Court and that application was granted by the trial Court. The result of the decree passed by this Court was that the award was set aside in its entirety. At the time when the appeal was decided by this Court on 16-11-1949, the Code of Civil Procedure, Act 5 of 1908 was in force. Section 110 of the Code provided that the value of the suit must be Rs. 10000 or upwards, or the decree or final order must involve, direct or indirectly, some claim or question to or respecting property of like amount or value. The question for decision by the trial Court as well as by this Court was whether the award should or should not be made a rule of the Court. It cannot, therefore, be said that the value of Madho Ram's share and not the value of the entire property dealt with by the award was the true criterion for judging the valuation of the suit and the proposed appeal to the Supreme Court.

(4) Learned counsel for the opposite party has raised one more point: he has urged that this application for leave to appeal having been filed on 14-2-1950, the proposed appeal must now be valued at Rs. 20,000/- or above. On behalf of the applicant, on the other hand, it has been urged that the appeal having been decided by this Court on 16-11-1949, the appellant had a vested right to file an application for leave in accordance with the provisions of the Civil Procedure Code which was then in force and the mere fact that the application for leave was filed on 14-2-1950, after the Constitution had come into force would not take away that right. A Full Bench of the Calcutta High Court in — 'Sadar Ali v. Dalimuddin', AIR 1928 Cal 640 (F.B.) (A), dealing with the amendment of Cls. 15 and 39, Letters Patent of that High Court which required that there was no right of appeal from the decision of a single Judge sitting in second appeal in the absence of a certificate from him that the case was a fit one for appeal, held that in the absence of any provision making the amendment retrospective the proper rule of construction was that the new Letters Patent should operate upon appeals arising out of suits instituted after 14-1-1928, the date from which the amendment came into effect. Their Lordships observed:

"This new clause in the Letters Patent cannot be given retrospective effect. The provision which takes away jurisdiction is itself subject to the implied saving of the litigant's right."

The same view was taken in this Court in — 'Baij Nath v. Doolarey Hajjam', AIR 1928 All 708 (B). In — 'Nandlal Ganpatsao v. Hiralalsao Ganpatsao', AIR 1950 Nag 222 (C), the same view was accepted by the Nagpur High Court in the manner of an application for leave to appeal to the Supreme Court under Art. 133 of the Constitution. A Bench of the Madras High Court in — 'Ramaswami Chettier v. Ramanathan Chettier', AIR 1951 Mad 251. (D), has also taken the same view. The appellant, in our view, has a right of appeal, and we grant him the necessary certificate under Art. 133 of the Constitution.

A/H.G.P. Application allowed.

*** A.I.R. 1953 ALL. 510 (Vol. 40, C.N. 249)**
DESAI J.

Behari and others, Applicants v. The State, Opposite Party.

Criminal Revn. No. 294 of 1953, D/- 16-2-53.

(a) Penal Code (1860), S. 71 — No mention whether sentences were concurrent or consecutive — Sentences are consecutive — (Cr. P. C. (1898), S. 35). (Para 3)

Anno: Penal Code, S. 71 N. 1; Cr. P. C., S. 35 N. 7.

† * (b) Penal Code (1860), Ss. 71, 147, 149 and 325 — Scope and applicability of S. 71 — Separate sentence — (Cr. P. C. (1898), S. 35).

An accused can be punished separately for the offences of Ss. 147 and 323, or 324 or 325 or 326, I. P. C. read with section 149, I. P. C. Applicability and Scope of S. 71 fully discussed. (Paras 11, 28)

Anno: Penal Code, S. 71 N. 5; Cr. P. C., S. 35 N. 4, 3.

Jagdish Sahai, for Applicants.

CASES CITED:
(A) ('87) 1887 All WN 149: 9 All 645
(B) ('39) AIR 1939 Oudh 91: 40 Cri LJ 217: 1939 Oudh WN 27
(C) ('40) AIR 1940 Nag 120: 41 Cri LJ 360
(D) ('49) AIR 1949 All 180: 50 Cri LJ 232
(E) ('25) AIR 1925 PC 1: 52 Ind App 40: 26 Cri LJ 431 (PC)
(F) ('93) 17 Bom 260 (F B)
(G) ('17) AIR 1917 All 11: 39 All 623: 18 Cri LJ 788
(H) ('33) AIR 1933 Mad 338: 34 Cri LJ 273
(I) ('28) AIR 1928 Mad 18(1): 28 Cri LJ 982
(J) ('83) 1883 All WN 241: 6 All 121
(K) ('84) 1884 All WN 220: 7 All 29
(L) ('85) 1885 All WN 105: 7 All 414
(M) ('85) 1885 All WN 195: 7 All 757 (FB)
(N) ('19) AIR 1919 All 379: 20 Cri LJ 517
(O) ('26) AIR 1926 All 225: 27 Cri LJ 287
(P) ('33) AIR 1933 All 819: 34 Cri LJ 1099
(Q) ('87) 1887 All WN 274: 10 All 58
(R) ('79) 2 All 101
(S) ('11) 11 Cri LJ 480: 33 All 48
(T) ('16) AIR 1916 All 49: 17 Cri LJ 418
(U) ('33) AIR 1933 All 438: 55 All 557: 34 Cri LJ 641
(V) ('40) AIR 1940 Oudh 419: 41 Cri LJ 775
(W) ('45) AIR 1945 Oudh 102: 1944 Oudh WN 275: 46 Cri LJ 587
(X) ('53) AIR 1953 All 315: 1952 All LJ 392: 1953 Cri LJ 711
(Y) (1914) 237 US 632: 59 Law Ed 1153
(Z) ('25) AIR 1925 Cal 1015: 26 Cri LJ 1253
(Z1) ('32) AIR 1932 Pat 335: 34 Cri LJ 81
(Z2) (1931) 284 US 299: 76 Law Ed 306
(Z3) ('89) 16 Cal 442
(Z4) ('43) AIR 1943 Sind 212: 45 Cri LJ 130
(Z5) ('53) AIR 1953 Cal 1: 90 Cal LJ 25
(Z6) ('19) AIR 1919 Mad 353: 20 Cri LJ 145
(Z7) ('22) AIR 1922 Lah 405: 24 Cri LJ 629
(Z8) ('24) AIR 1924 Cal 771: 25 Cri LJ 945
(Z9) ('24) AIR 1924 Rang 291: 25 Cri LJ 1305
(Z10) ('31) AIR 1931 Cal 606: 33 Cri LJ 1
(Z11) ('31) AIR 1931 Cal 450: 32 Cri LJ 890
(Z12) ('27) AIR 1927 Mad 970: 28 Cri LJ 1004
(Z13) ('34) AIR 1934 Mad 388: 35 Cri LJ 1226

ORDER: This is an application in revision by nine men against their conviction and sentences under Ss. 147, 148, 325 and 326 read with section 149, I. P. C.

(2) On 29-4-1951 at about 5-30 p.m. when Dharmi and Makundi were returning home from a bazar, they were surrounded by the applicants, who were waiting for them, and struck with lathis and spears. Dharmi received 14 injuries and Makundi, 15. Three of Makundi's injuries were caused with sharp-edged and sharp-pointed weapons and the rest were caused with blunt weapons. Among the rest was a contused wound in which there was a fracture of both the bones of the rest forearm. Dharmi also had injuries caused with sharp-edged and blunt weapons; three of his injuries were grievous, one of them was caused with a sharp-edged weapon. There is ample evidence to prove these facts. The courts below did not act improperly or illegally in accepting it and rejecting the defence. The applicants were rightly convicted under Ss. 147 or 148, 325 and 326 read with S. 149, I. P. C.

There is no truth in the complaint of the applicants' counsel that the appellate court ignored the evidence of the defence witnesses who had given evidence regarding enmity. Five defence witnesses were examined, two of whom gave evidence about the occurrence. The appellate court discussed their evidence when dealing with the prosecution evidence about the occurrence. It did not mean to say that no other defence witnesses were examined. It did not refer to the defence witnesses whose evidence was only circumstantial probably because the applicants' counsel did not rely upon that evidence before it. It must have considered and rejected it as useless, though without referring to it in the judgment. There was, therefore, no flaw in the hearing of the appeal.

(3) Next it was argued that separate sentences under the various sections are illegal. The sentences imposed on each of the applicants are as follows: (1) under Ss. 147 and 148 I. P. C., rigorous imprisonment for one year or 1½ years and a fine; (2) under S. 325 read with S. 149, rigorous imprisonment for one year and a fine; and (3) under S. 326 read with S. 149, rigorous imprisonment for one year and a fine. Neither the Magistrate nor the appellate court has mentioned whether the sentences would be concurrent or consecutive. Therefore, they will be consecutive. The contention of the applicants is that separate sentences under Ss. 325 and 326 read with S. 149 cannot be inflicted in addition to the sentence under S. 147.

(4) The question is an important question; it is also a difficult one and has given rise to conflicts between High Court and High Court and between one Judge and another Judge of the same High Court. And it is answered in different ways in different cases.

(5) When in the course of a transaction several offences are committed by an accused, for which of them he can be tried and convicted is a matter of procedure dealt with in Ss. 233 to 239, Criminal P. C., and for which of them he can be punished is dealt with in S. 71, I. P. C.

If in one series of acts forming one transaction more offences than one are committed by an accused he may be charged with (and convicted of) for every such offence: S. 235 (1) of the Code. If the acts constitute

> "an offence falling within two or more separate definitions ..... the person accused of them may be charged with and tried at one trial for each of such offences":

Section 235 (2).

> "If several acts of which one or more of them would by itself or themselves constitute an offence, constitute, when combined, a different offence",

the person accused of them may be charged with the offence constituted by such acts when combined and for any offence constituted by anyone or more of such acts: 235 (3). Thus under section 235 (1) an accused can be convicted under Ss. 225 and 332, or Ss.454 and 497, or Ss. 147, 325 and 152, I. P. C.; under S. 235 (2) he can be convicted under Ss. 323 and 325, or Ss. 317 and 304, or Ss. 471 and 196, I. P. C., under S. 325 (3), he can be convicted under Ss. 323, 392 and 394, I. P. C. These examples are taken from the illustrations to the section.

(6) Section 71, I. P. C. is in three parts. The first part is:

> "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences",

the second part is:

"Where anything is an offence falling within two or more separate definitions of any law in force, the offender shall not be punished with a more severe punishment than the court which tries him could award for any of such offences",

and the third part is:

"where several acts of which one or more would be itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court could award for any such offence".

The first part deals with a continuous or continual series of similar acts each forming the same offence or offence of the same nature as the whole series; for instance, giving a man fifty strokes with a stick (see illustration (a) to section 71), stealing five articles from an owner, abducting a female from her residence and taking her through several places in continuation etc. Illegally giving strokes with a stick is an offence punishable under S. 323, I. P. C.; as soon as one stroke is given, hurt is caused and the offence is completed. When the next stroke is given, hurt is again caused, and another offence committed. The same is the case with the examples of offences under Ss. 379 and 366, I. P. C. There is nothing in the Code of Criminal Procedure to prevent the accused from being convicted under S. 323, I. P. C. as many times as there are blows given by him. But when it comes to punishing him, the first part of S. 71, I. P. C. provides that he cannot be punished with the punishment of more than one of the offences. So for practical purposes, the whole beating is treated as one offence under S. 323 I. P. C. the whole act of stealing several articles is one offence under S. 379, I. P. C. and the whole act of abducting the female to various places is one offence under section 366, I. P. C. If he cannot be punished more than once for the several offences committed by him, it would be no use convicting him of the several offences; that is why in practice only one charge under S. 323 or 379 or 366, I. P. C. is framed and only one conviction is recorded.

An important point to be noticed is that the first part deals with a case in which the whole of the act is punished under the same section under which its parts are punished; it does not deal with a case in which the whole act constitutes an offence different in nature from the offence or offences constituted by its parts. This is made clear not only by the illustration but also by the provision about the punishment. The provision is that the accused must not be punished with the punishment of more than one of the offences. The restriction is on the number of the sentences to be passed and not on the quantum. The very fact that he is required to be punished only once shows that otherwise he would be liable to be punished several times, i. e., several times for the same offence. Were the part dealing with a case in which the accused is liable for the various offences under different sections to punishments different from one another, the restriction would not have been that he should be punished only once or for only one offence; it would have been similar to that imposed under the second and third parts.

Another fact to be noticed is that there must be more than one act done by the accused; otherwise it cannot be split up into parts each of which must be an act. The second and the third parts deal with offences committed by an accused which are punishable under different sections to punishments different from one another and so the restriction is that he should not be punished more severely than he could be punished for any of those offences. Because the offences committed by him are different in nature, the legislature has provided that he can be punished upto the maximum provided for the gravest offences.

It is said in Ratan Lal's Law of Crimes that the first part provides for the punishment for cases similar to illustration (1) to S. 235 (2) of the Code, but that is obviously wrong. It provides for the punishment for offences, the trial of which is dealt with in Ss. 234 and 235 (1). The second part provides for the punishment for an act punishable under two or more sections, the trial of which is dealt within S. 235 (2) of the Code. The third part provides for the punishment for a series of dissimilar acts some of which themselves are offences though differing from the offence constituted by the whole series, the trial of which is dealt with in S. 235 (3) of the Code. The third part is inapplicable when only one act is done by the accused.

As the second and the third parts deal with offences differing from one another committed by an accused, the restriction is not that he can be punished with the punishment of only one of the offences, but that he should not be given a punishment exceeding the maximum that could be given for any of the offences. The court is not expressly debarred from punishing him separately for the various offences committed by him, nor is it debarred from making the sentences for the various offences cumulative. There is only one restriction and it is that the punishment should not exceed the maximum provided for any of the offences. If the court inflicts separate sentences for the various offences and makes them cumulative, and the total does not exceed the maximum provided for any of those offences, or if it makes the sentences concurrent and the imprisonment to be suffered by the accused does not exceed the maximum provided for any of the offences, the law is fully complied with.

The language in which the restriction is couched suggests that the infliction of separate sentences for the various offences is not barred but rather contemplated. Of course, the restriction is capable of being interpreted to mean that the accused will be punished as if he had committed only the gravest of the offences committed by him. But it does not exclude the interpretation that he can be punished separately for the various offences committed by him provided the total punishment does not exceed the maximum provided for the gravest offence. Therefore, the infliction of separate sentences for the various offences, provided the limit is not exceeded, cannot be said to be against the law.

(7) An accused must be convicted of every offence with which he has been charged and which is proved against him and this, regardless of whether he can separately be punished for every offence or not. Ordinarily he must

be punished for every offence of which he has been found guilty. The sections under which he is convicted themselves lay down that he should be punished within certain limits. Section 71 is the only section that places restrictions upon the separate punishment for every offence of which he is convicted. There are no other restrictions. If a case is not governed by S. 71, the accused is liable to be punished separately for each offence (of which he has been convicted) up to the maximum provided for it.

(8) The question is whether an accused can be punished separately for the offences of S. 147 and 323, or 324 or 325 or 326, I. P. C. read with S. 149, I. P. C. Being a member of an unlawful assembly is an offence punishable under S. 143. The offence of S. 147, I. P. C. consists of being a member of an unlawful assembly, any member of which uses force or violence in prosecution of its common object. If any member commits any offence in prosecution of its common object, every member of it is guilty of that offence; this is S. 149, I. P. C. Thus both the Ss. 147 and 149, I. P. C punish an accused for being a member of an unlawful assembly, the former when any member of it uses force or violence and the latter, when he commits some offence. Because mere use of force or violence is not an offence, enactment of S. 147 was necessary in addition to enactment of S. 149. It is not necessary that the force or violence should be used by the accused himself in order to be guilty of S. 147, I. P. C., and simlarly it is not necessary for him to commit the offence in order to be guilty of it. If he himself, while being a member of an unlawful assembly commits an offence, he is undoubtedly guilty of it. But even if somebody else commits it, he is equally guilty under S. 149. One fact to be borne in mind is that the section makes him liable just because he is a member of the assembly; it does not require any act to be done by him as a member. It does not even say that he is deemed to have done the act. It just punishes him because the act was done in prosecution of the assembly's common object. It thus creates an offence which does not require any act to be done. Ordinarily the fact is of no importance but it assumes importance when there arises the question of the number of acts done by the accused, as for instance under the third part of section 71.

The provisions of S. 149 have been interpreted in a number of cases, for instance, — 'Queen Empress v. Bisheshar', 9 All 645 (A); — 'Raghubar v. Emperor', AIR 1939 Oudh 91 (B); — 'Baldeo Singh v. Emperor', AIR 1940 Nag 120 (C); — 'Faiyaz Khan v. Emperor', AIR 1949 All 180 (D) and — 'Barendra Kumar Ghosh v. Emperor', AIR 1925 P C 1 (E). In 'Bisheshar's case (A)' Sir Johan Edge, C. J. said that S. 149 creates no offence but like S. 34, I. P. C., merely declares a principle of the common law that has prevailed in England (p. 649) and that its object is to make it clear that an accused who comes within it cannot put forward as a defence that it was not his hand which inflicted the hurt (p. 650).

In 'Barendra Kumar's case', (E) the Judicial Committee speaking through Lord Sumner observed at page 52 that the section creates a specific offence and deals with punishment of that offence alone. That observation was explained by Yorke, J. in 'Raghubar's case', (B) at p. 93. The learned Judge said that S. 149 itself is not a section which creates an offence in the same sense as S. 147 does, that it does create an offence though only in the sense that it creates in all the persons who have taken part in a riot the same offence as is committed by the particular individuals who cause hurt, that is, enlarges the area of guilt under S. 323 or S. 325 or whatever the section may be, in cases to which S. 147 applies and that it certainly does not create a new offence composed partly of rioting and partly of the offence constructively committed. In 'Baldeo Singh's case', (C) Niyogi, J. stated that the effect of the section is to make every member of an unlawful assembly in the eye of the law a principal offender in respect of an act falling within the ambit of the common object, so as to make him primarily responsible for the consequences of the physical act of any of the members.

(9) "Force" is defined in S. 149, I. P. C. to mean causing motion, change of motion or cessation of motion. Violence is not defined. Hurt is defined as causing bodily pain, disease or infirmity. Evidently hurt is not the same thing as force; it is also not the same thing as violence, of which pain or disease or infirmity is not an essential ingredient; see — 'Queen Empress v. Bana Punja', 17 Bom 260 (F); — 'Emperor v. Katwaru Rai', AIR 1917 All 11 (G); —'Sothavalan v. Rama Kone', AIR 1933 Mad 338 (H) and — 'Anthony Udayar v. Royappudayar', AIR 1928 Mad 18(1) (I). In the 'Bombay case', (F) Jardine, J. in his referring order remarked that force and violence have not the same meanings as are commensurate with the word 'hurt'.

In 'Anthony Udayar's case', (I) Wallace, J. stated that the force necessary to constitute the offence of rioting may fall short of causing bodily pain, and if further force is used which does cause bodily pain, the offence of rioting has been exceeded and the excess constitutes another offence of causing hurt punishable under S. 323, I. P. C.

(10) When A, B, C, D and E form an assembly with any of the common objects mentioned in S. 141, each of them becomes guilty under S. 143. If in furtherance of the common object A gives a blow, he does two further acts, one of being a member at the moment of giving the blow and the other of causing hurt and commits the offences of Ss. 147 and 323 in addition of that of S. 143. He can be separately convicted and sentenced under Ss. 143 and 323; S. 71 would not come into application at all because the act of giving the blow is not an ingredient of the offence of S. 143. Separate punishments under Ss. 143 and 147 would be barred by the first part of S. 71 because the acts of being a member done every moment are parts of the whole offence of being a member. His punishment under Ss. 323 and 147 will be governed by the third part. It is because of the blow that he simultaneously commits the offences of Ss. 147 and 323. Giving a blow itself is an offence under S. 323 but when it is combined with the facts of his being a member and of his acting in furtherance of the common object, the offence of S. 147 also is committed. In the result, he can be separately convicted and sentenced under Ss. 143 and 323 without any restriction, or under Ss. 147 and 323 subject to the third part of S. 71. If it be

said that he does not commit offences of S. 143 at every moment during his membership, he does only two acts, one of being a member and the other of causing hurt and for those two acts, he is punishable under Ss. 147 and 323.

The original offence of S. 143 committed by him when he became a member becomes aggravated by his causing hurt into an offence of S. 147. In that case he can be separately convicted under Ss. 147 and 323 but his punishment will be governed by the third part of S. 71. As regards B (and also C, D and E) the acts done by him are the original membership and the membership at the time when A gives the blow. He thus commits two offences punishable under Ss. 143 and 147. Section 149 makes him further liable under S. 323. He cannot be separately punished under Ss. 143 and 147 as already explained. He can be punished under Ss. 143 and 323 read with 149 without any restriction; S. 71 does not apply. He can also be punished under Ss. 147 and 323 read with 149. In this case S. 71 does not by its own force apply because he has not done any act besides that of being a member and is not deemed to have done the act of causing hurt. But obviously he cannot be punished more severely than A who actually caused the hurt and therefore his punishment for the two offences must be governed by the same restriction which governs the punishment of A for them.

One may also take the view that his punishment for the two offences is governed by the second part of S. 71 inasmuch as his being a member at the time when A causes hurt becomes punishable under both the sections. It does not matter whether the punishment is governed by the second part or the third part. If it be said that B does not do any new act by continuing his membership at the time of the hurt caused by A, then the offence of S. 143 becomes aggravated into that of S. 147 and in addition he becomes guilty under S. 323 read with S. 149. He would still be liable to the same punishment as if he had done two acts of membership. Suppose A gives a further blow or blows (the number of further blows is immaterial). Now the acts done by him are the original membership, the membership at the time of the first blow, the membership at the time of the second blow and the two hurts and commits the offences of Ss. 143, 147 (first offence), 147 (second offence), 323 (first offence) and 323 (second offence). He cannot be punished separately under Ss. 143 and 147, or under Ss. 323 and 323 or under Ss. 147 and 147; the first part of S. 71 creates the bar. He can be separately punished under S. 143 and S. 323. He can be separately punished for the first offence of S. 147 and the second offence of S. 323 without any restriction. Section 71 does not apply because he gave the second blow after he had completed one offence of S. 147.

The first offence of S. 147 combined with the second offence of S. 323, does not constitute a different offence. A different offence is constituted where the offence of S. 325 is combined with that of S. 143. but not when it is combined with that of S. 147.

In the result, he can be separately punished under Ss. 147 and 323 without any restriction. If it be said that he has done only one act of membership, the acts done by him are the membership now punishable under S. 147, and the two hurts punishable under S. 323 and S. 323. He cannot be separately punished under Ss. 323 and 323. His separate punishment under S. 147 and the first offence of S. 323 is governed by the second or third part of S. 71 as explained above; but his punishment under S. 147 and the second offence of S. 323 is not governed by S. 71 because the second blow was given by him after he had completed the offence of S. 147 and forms no part of it at all.

In the result, he would be punished under Ss. 147 and 323 separately without any restriction. Once more it makes no difference whether his membership at different stages is treated as one act or different acts. As regards B, the acts done by him are membership at three stages punishable under Ss. 143, 147 and 147. In addition S. 149 makes him punishable under S. 323 and S. 323. He cannot be separately punished under Ss. 143 and 147, nor can he be punished under S. 323 and S. 323; S. 71, part I, creates the bar. His punishment for the first offences of Ss. 147 and 323 and for the second offences with the same sections is governed by the second or the third part of S. 71. But he can be punished separately without any restriction for the first offence of S. 147 and the second offence of S. 323 or for the first offence of S. 323 and the second offence of S. 147. S. 71 does not apply. In the result B can be punished separately under Ss. 147 and 323 read with 149 without any restriction. If his membership at the different stages were treated as one act, he has done only one act viz. that of membership now punishable under S. 147.

In addition S. 149 makes him punishable under Ss. 323 and 323. As explained, he cannot be punished twice under S. 323. His punishment under S. 147 and the first offence of S. 323 would be governed by the second or the third part of S. 71 but not his punishment under S. 147 and the second offence of S. 323. Thus he can be separately punished under Ss. 147 and 323 without any restriction.

The position, therefore, is that when A gives a further blow or blows, not only he but all other members of the assembly can be separately punished under Ss. 147 and 323 without any restriction and S. 71 will not apply. Suppose instead of A, B gives a further blow or blows. Then the acts done by A are the three acts of membership at the three stages punishable under Ss. 143, 147 and 147 and one act of causing hurt punishable under S. 323. In addition he becomes liable to be punished under S. 323 by virtue of S. 149 for the hurt caused by B. He cannot be punished separately under Ss. 143, 147 and 147. He can be punished separately under S. 143 and the first offence of S. 323. He can be separately punished under S. 143 and for the second offence of S. 323 read with S. 149.

I am inclined to think that his separate punishment under S. 323 for the first hurt and S. 323 read with S. 149 for the second hurt also is not barred because the case does not appear to be covered by S. 71 at all. If he gave both the blows the first part of S. 71 would apply; but I am not certain that it would apply if the blows are given by different men. I, however, express no definite opinion on this point because it is not material in the present case. The punishment for the first offences of Ss. 147 and 323 will be governed by the third

part and also the punishment for the second offence of S. 147 and the second offence of S. 323 read with S. 149. But his punishment for the first offence of S. 147 and the second offence of S. 323 read with S. 149 is not governed by S. 71.

Thus he can be punished separately without any restriction under Ss. 147 and 323. The same result will be achieved if his membership at the different stages were treated as one act. As regards B (and also C, D and E) he has done three acts of membership at the three stages punishable under Ss. 143, 147 and 147, and the act of causing hurt punishable under S. 323. Section 149 has already made him further punishable under S. 323 for the hurt caused by A. He may be separately punished under S. 143 and for the first offence of S. 323 read with S. 149 and the second offence of S. 323 without any restriction; I do not express any definite opinion on his liability to be punished separately under S. 323 and S. 323/149. He can be separately punished without any restriction for first offence of S. 147 and the second offence of S. 323. If the membership were treated as one act, he would have done two acts, one punishable under S. 147 and the other punishable under S. 323 for the second hurt & in addition he is liable to be punished under S. 323 read with S. 149 for the first hurt caused by A. He can be separately punished without any restriction under Ss. 147 and 323 (for the second hurt). Thus he is liable to be punished in the same manner as A.

(11) The conclusions that I arrive at are:

1. If only one blow is given by a member of an unlawful assembly all the members can be separately punished under Ss. 143 and 323 without any restriction, or under Ss. 147 and 323 subject to the restriction imposed by the second or the third part of S. 71.

2. The second and the third parts of S. 71 bar, not separate punishments for the various offences but the aggregate punishment exceeding the punishment provided for any of them.

3. When more than one blow is given, every member can be punished separately without any restriction under Ss. 147 and 323; section 71 will not apply.

4. The law makes no distinction between the actual assailant and other members. He does one more criminal act than the others but it does not follow that the law must provide for a severer punishment than that provided for the other members or that it must provide for a less severe punishment for the other members than that provided for him. The other members must not be liable to be punished more severely than the actual assailant but they can be made liable to be punished as severely as the actual assailant.

5. If any member uses force or violence not amounting to an offence punishable under S. 323 and then hurt is caused by any member, all are liable to be punished separately under Ss. 147 and 323 without any restriction and S. 71 will not apply.

(12) In — 'Emperor v. Ram Partap', 6 All 121 (J) Straight, J. decided that an accused cannot be punished under Ss. 147 and 325 read with S. 149. The stress of his argument was that the one essential ingredient towards warranting the conviction under S. 325 was the membership of an unlawful assembly without which there could be no conviction and sentence for the offence of S. 147. He interpreted the language of S. 71 to mean that

> "if in the course of a transaction a person commits different offences, inextricably mixed up with one another, and all graduating towards, essential to, and culminating in a single distinct offence, he is not to be punished separately upon conviction for such single and distinct offence, and for any or each of such other offences as well."

There is no discussion of the provisions of S. 71, nor is there any discussion of the meaning of the words "shall not be punished for a more severe punishment.....any of such offences."

Brodhurst, J. dissented from that view in — 'Queen Empress v. Dungar Singh', 7 All 29 (K). He pointed out that an offence under S. 147 can be committed without causing hurt and that hurt can be caused without committing an offence under S. 147, that the two offences are distinct and that separate punishments upto the maximum prescribed for each offence can be inflicted.

The conflict between the views of Straight, J. and Brodhurst, J. gave rise to two Full Bench decisions in 1885. They are — 'Queen Empress v. Pershad', 7 All 414 (L) and — 'Queen Empress v. Ram Sarup', 7 All 757 (M). In 'Pershad's case', (L) the trial began before a second class Magistrate who became invested with first class powers before he delivered the judgment, the accused were convicted by him under Ss. 325, 325 and 323 for causing grievous hurt to two persons and simple hurt to a third person and given separate sentences of two years' imprisonment and a fine, one year's imprisonment and a fine and three months' imprisonment and a fine respectively, and it was contended that the sentences were illegal because the Magistrate could not exercise the powers of a first class Magistrate in the case commenced by him as a second class Magistrate and separate sentences could not be passed for the three offences. The accused had really committed a riot and could have been convicted under Ss. 147 and 148 also but had not been convicted under those sections. Four questions were referred to a Full Bench of five Judges and the fourth question was whether a member of an unlawful assembly can be punished under Ss. 147 & 325 or not. The first question was the general question whether the sentences were legal or illegal. The fourth question really did not arise because the accused were not convicted under Ss. 147 and 148. The question whether separate punishments could be inflicted for causing injuries to different men is quite different from the question that is being considered by me. Two of the Judges answered only the first question and held the sentences to be legal. The Chief Justice also answered only the first question but held the sentences to be illegal. Brodhurst, J. held the sentences to be illegal on other grounds but gave his opinion that they would have been legal if the Magistrate had convicted the accused under S. 148, and that a member of an unlawful assembly can be punished under Ss. 147 and 325 both. Oldfield, J. thought that S. 71 had no application because there was no case of an offence made up of parts, any of which parts was itself an offence and that offences of Ss. 323 and 325 form no part of the offence of S. 147 which is a separate offence. He also did not decide the last three questions.

As the Full Bench did not decide the question under consideration, another Full Bench was formed on a reference made by Straight, J. in the case of 'Ram Sarup', (M). There, the accused were separately punished under Ss. 147 and 325 to three months' and six months' imprisonment respectively. The Chief Justice and two Judges including Straight, J. held in a very short judgment that the sentences were correct because the accused were shown to have committed individual acts of violence with their own hands which constituted distinct offences of Ss. 325 and 323 separate from, and independent of, the offence of S. 147 which was already completed. On that ground they distinguished the case from 'Ram Partab's', (J). Brodhurst, J. held the sentences to be legal but on the ground that the accused can be separately punished under Ss. 147 and 325 regardless of whether he himself has caused injuries or not. He pointed out that only one grievous hurt was caused, that it could have been caused by only one of the accused persons and that the others could be guilty under S. 325 only if S. 149 applied. Merely because the other accused used violence, they would not be guilty under S. 325. When the Full Bench upheld the sentences as legal, it must have been, as pointed out by Brodhurst, J. on the ground that separate sentences can be inflicted under Ss. 147 and 325 read with S. 149.

Two years later, the matter was dealt with by a Bench consisting of Sir John Edge, C. J. and Brodhurst, J. in the case of 'Bisheshar', (A). In that case there was an unlawful assembly which used force or violence, one of its members M. caused grievous hurt and all the accused were convicted under Ss. 147 and 325 and given separate sentences, the sentence of M. being one year & five years respectively & cumulatively. The Bench held the sentences to be legal and dissented from — 'Empress v. Ram Partab', (J). Sir John Edge, C. J. said that if the case was governed by the second and third parts of S. 71, there was no contravention of their provisions because the aggregate punishment inflicted on M., viz., six years, was less than the maximum that could have been inflicted under S. 325. He observed that if the legislature had intended that in cases governed by these two parts, there should be punishment for only one offence, it would have said so and that there would have been little use in enquiring into, and convicting an accused of, two offences, if he could be legally sentenced for one offence only. In his opinion the case was not governed at all by S. 71 because S. 149 does not create an offence.

In — 'Kure v. Emperor', AIR 1919 All 379 (N) the accused were convicted under Ss. 147 and 323 read with S. 149 and given separate and cumulative sentences of the aggregate term of two years. Piggot, J. observed that because S. 149 was invoked, it was not sound, as a general rule, to pass cumulative sentences under the two sections. He upheld the separate sentence but made them concurrent. This alteration could not have been done as a matter of law; the law leaves it to the absolute discretion of the Court to make two sentences of imprisonment concurrent or consecutive. There is no law laying down when they should be concurrent and when consecutive. In any case S. 71 does not deal with this matter at all. Therefore, the effect of Mr. Piggott's judgment is to uphold the validity of separate sentences under Ss. 147 and 323 read with S. 149. Sir George Knox, A. C J. upheld separate sentences under Ss. 147 and 323 in — 'Emperor v. Katwaru Rai', (G). He proceeded on the basis that hurt was caused to two men R. and S. that the offence of S. 147 was complete when hurt was caused to R. and that a separate and distinct offence punishable under S. 323 was committed when hurt was caused to S.

The same reasoning was employed by Sulaiman, J. as he then was in — 'Chhidda v. Emperor', AIR 1936 All 225 (O), where two persons S. and B. were injured in a riot and the accused were punished separately under Ss. 147 and 323 read with S. 149. The sentences were concurrent. Sulaiman, J. was of the opinion that when the first injury is caused, the offence of S. 147 is completed and the infliction of subsequent injuries produces a distinct offence of S. 323. Following 'Chhidda's case', (O) Bajpai, J. in — 'Emperor v. Sahab Raj Singh', AIR 1933 All 819 (P) upheld separate sentences under Ss. 147 and 325 read with S. 149 because more than one injury was caused by the unlawful assembly.

A very instructive decision dealing with the question is that of Mr. Justice Mahmood in — 'Queen Empress v. Wazir Jan', 10 All 58 (Q). In that case Wazir Jan pretending to be an official in an octroi establishment extorted money from a man and was convicted under Ss. 170 and 384 and sentenced to nine months' and nine months' imprisonment respectively, the sentences to run concurrently. Mahmood, J. held the sentences to be valid. The use of the word 'shall' in the sections was construed by him to "indicate the imperative mandate of the Legislature that persons guilty of those offences are to be punished." Section 71 was held by him to be not a rule of adjective law or procedure but a rule of substantive law regulating the measure of punishment and not affecting the question of conviction which relates to the province of procedure. He said on page 63 that when certain acts constitute two or more offences, whether they fall or do not fall under the purview of S. 71, and the accused is charged and tried for those offences and they are established by the evidences, the court is bound to convict him of those offences. If a conviction is recorded, the Court must pass a sentence in respect of it; Mahmood, J. said on page 65 that an omission to do so is illegal and that:

> "Just as the maxim 'ubi jus ibi remedium' is a rule of jurisprudence, so it is a principle of the criminal law that where there is an offence there must be a punishment, the general rule being in either case affected by exceptional provisions of the law."

As regards the implication of the restriction imposed by the second & the third parts of S. 71, he quoted with approval from — 'Emperor of India v. Budh Singh', 2 All 101 at p. 104 (R). There Turner, J. had pointed out:

> "The law does not.....prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offences collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination."

Mahmood, J. was of the view that the latest ruling of the Court on the subject was that of

the case of 'Bisheshar (A)' and did not approve of the decision of Straight, J. in the case of 'Ram Partab' (J). Explaining the provisions of S. 71, he said at page 68 that the first part is illustrated by illustration (a) to the section and did not apply to the facts of the case because the offence of S. 170 is not any part of the offence of S. 383 or 384, that S. 71 does not refer to matters of evidence, that even though the evidence in the case showed that but for personating as a public servant the accused could not practically have had the means of putting any person in fear of injury which is an essential element of extortion that circumstance did not bring the two offences within the purview of the third part of S. 71 and that the case was not governed at all by S. 71. The case of 'Bisheshar (A)' was treated as the ruling case in — 'Emperor v. Dharam Das', 33 All 48 (S) decided by Tudball and Chamier, JJ. In that case there was a riot in the course of which the accused drove out the complainant from a field and caused grievous hurt; the accused were separately sentenced under Ss. 147 and 325 read with 149 to imprisonment for six months and three months, the sentences being consecutive. Though it is not stated in the judgment whether one hurt was caused or more than one, the separate sentences were held to be valid and S. 71 was held to be inapplicable.

(13) In — 'Dharam Deo Singh v. Emperor', AIR 1916 All 49 (T) Walsh, J. upheld separate sentences under Ss. 147 and 325 read with 149 when more than one injury was caused and the aggregate sentence was of six months. The learned Judge expressed dissent from — 'Queen Empress v. Ram Partab', (J) because it failed to give effect to the whole meaning of S. 71 and thought that the matter was settled as far as this Court is concerned by the decision in the case of 'Bisheshar (A)'. It seems that Walsh, J. thought that the case was governed by the second or the third part of S. 71 and he laid down that all that is required under it is that the sentence ultimately passed should not exceed that provided for the offence of S. 325 (it is graver than the offence of S. 147).

(14) A case under different sections, but involving the consideration of S. 71, was — 'Mahomed Ali Khan v. Emperor', AIR 1933 All 438 (U) where the accused was convicted and separately sentenced under S. 60(a) and S. 60(b) and (f) of the Excise Act. Young, J. stated at page 439:

> "It seems to be unreasonable, when a man is found guilty of the major offence of illicitly manufacturing excisable articles, that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing them."

He, therefore, set aside the separate sentence under S. 60(b) and (f). It is not clear whether the learned Judge questioned the discretion of the Magistrate or the legality of the separate sentences. The use of the words "unreasonable" and "severely" suggests that he questioned merely his discretion and did not intend to lay down as a matter of law that the accused should not have been sentenced separately. But he also quoted S. 71 though without saying how it applied to the facts of the case. The decision goes against the previous decisions and does not appear to lay down the correct law.

(15) I have not come across a more recent case of this Court.

(16) The Avadh Chief Court also took the view that separate sentences under Ss. 147 and 325 read with 149 are legal. In — 'Raghubar v. Emperor', (B) separate sentences were maintained regardless of the fact that more than one injury was inflicted and of the question by whom grievous hurt was caused. In 'Parmeshwar v. Emperor', AIR 1940 Oudh 419 (V) a Division Bench adopted the reasoning of Sir George Knox in the case of 'Katwaru (G)'. Several injuries were caused and separate sentences under Ss. 147 and 323 were maintained by Thomas C. J. and Ziaul Hasan, J. The court adopted the view that the offence of S. 147 was completed as soon as the victim was knocked down on the ground and that the distinct offence of S. 323 was committed when he was beaten subsequently and that S. 71 did not apply. The court doubted the correctness of the view that separate sentences can be inflicted only on those persons who themselves cause hurt and are convicted under S. 323 without the help of S. 149. In — 'Dulan Dayal Singh v. Emperor', AIR 1945 Oudh 102 (W) Madeley, J. followed 'Raghubar's case', (B). This was the state of law in this Court and in the Chief Court of Avadh before the amalgamation. No case of this Court after the amalgamation, barring — 'Abdur Rashid Khan v. State', AIR 1953 All 315 (X) in which the question might have been discussed has been brought to my notice. In 'Abdur Rashid Khan's case', (X) Kidwai, J. held that separate sentences under Ss. 147 and 323 read with S. 149 are illegal. My learned brother has relied simply upon — 'Baldeo Singh v. Emperor', (C). No previous decisions of this Court or of the Avadh Chief Court were referred to my learned brother and I cannot help regretting that he was invited by counsel to decide the question only on the basis of — Baldeo Singh v. Emperor', (C) and without regard to the decisions of this Court. My learned brother's view is that the punishment under S. 323 read with S. 149 depends upon the fact that the accused are members of an unlawful assembly and have "committed a riot in the course of which someone or more of them caused simple injuries", and "their conviction under S. 147 also depends upon those very facts", and that they cannot "be punished twice over in respect of the facts which taken together constitute one offence". Section 71 is not referred to in the judgment. If the decision is not based on that section, then I may respectfully point out that there is no other law prohibiting separate punishments for various offences.

I have already made it clear that there are no general principles, apart from what one finds in that section, which in any manner limit the power (and that power is nothing short of a duty) of a court to impose separate sentences for the various offences of which it convicts an accused in a trial. If my learned brother thought that the case was governed by the second or the third part of the section, he ought to have, but has not, held that it prohibits separate punishments and not merely aggregate punishment exceeding certain limits, before he could set aside the separate punishments. That the punishment "depends upon their being members of an unlawful assembly and their having committed a riot" is not correct; it depends only upon an injury or injuries being caused by any member. Of course a riot is simultaneously committed but its commission is not made a

condition precedent or 'sine qua non' for the conviction under S. 323/149, I. P. C. Even if some facts are common to the offences of Ss. 147 and 323 read with S. 149, I. P. C. it does not mean that separate punishments for the two offences cannot be inflicted. That a person should not be punished twice for one act is understandable but there does not appear any reason for saying that a man should not be punished separately for two offences merely because some ingredients or facts are common to both. Just because two offences have a common ingredient or fact, they do not always become one offence punishable only once. If a person kills another with an unlicensed gun, he commits two offences punishable under S. 302 I. P. C. and 19 (f), Arms Act; his separate punishments for the two are not barred just because the gun was used for committing both the offences. Similarly, if one causes grievous hurt to two persons with a lathi, punishing him separately for the two offences of S. 325 and S. 325 is not prohibited merely because the same lathi was used to cause the two grievous hurts. If A and B enter into a conspiracy to commit an offence and also commit that offence, they can certainly be punished separately for that offence and also for criminal conspiracy. A person, who commits a burglary with intent to commit theft and also commits theft, is separately punished under Sections 457 and 380 I. P. C. even though some of the ingredients are common.

Such a case is — 'T. W. Morgan v. A. J. Devine', (1914) 59 Law Ed 1153 (Y) where two cumulative sentences for house-breaking and theft were inflicted; the Supreme Court of America held that the two offences were distinct, that one could be committed irrespective of whether it was necessary to commit the other or not, and that "although the transaction may be in a sense continuous, the offences are separate and each complete in itself", (per Day, J. at page 1155). Similar decision was given in — 'Kanchan Molla v. Emperor', AIR 1925 Cal. 1015 (Z). See also — 'Batesar Singh v. Emperor', A. I. R. 1932 Pat 335(Z1).

(17) Section 1 of the American Narcotic Act creates the offence of selling any forbidden drug except in or from the original stamped package, and S. 2 creates the offence of selling any forbidden drug not in pursuance of a written order of the person to whom it is sold. One Blockburger sold opium, which was a forbidden drug, without any written order of the purchaser and not in or from the original stamped package and was convicted under both Ss. 1 and 2 and given consecutive sentences of five years' imprisonment and 2000 dollars for each offence. The Supreme Court held the sentences to be legal; — 'H. Blockburger v. U. S. A.', (1931) 76 Law Ed 306 (Z 2). Sutherland, J. said, at page 309,

> "each of the offences created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not".

If one causes grievous hurt to two men in one transaction, he can be separately punished under Sections 325 and 325 I. P. C. If in a riot grievous hurt is caused to two persons, there is no reason why the members of the unlawful assembly should not be separately punished under Ss. 325 and 325 read with Section 149 I. P. C. If it were said that they could be punished for only one offence of section 325 I. P. C., it would mean that they would go unpunished for the other offence, in other words that once grievous hurt was caused to one man, grievous hurt could be caused to any number of men with impunity. If two separate punishments can be given, why should that case be distinguished from the one under consideration where the two offences are of Ss. 147 and 325? If the reasoning employed in — 'Abdur Rashid Khan's case', (X) were sound, it would apply there also.

One must not confuse an ingredient of an offence with the evidence required to substantiate the offence. Membership of an unlawful assembly is not an ingredient of the offence of S. 323; it is only a piece of evidence. If there is only one assailant, in order to convict him of the offence of S. 323 there must be evidence to the effect that he caused an injury. If there are five or more assailants, all the evidence that is required for the conviction of any one of them is that he was a member of an unlawful assembly constituted by the five or more persons and that injury was caused in furtherance of its common object. In addition to S. 149 there is S. 34 I. P. C. under which one can be punished for an act done by another. If a criminal act is done by two or more persons in furtherance of the common intention of all, each is liable for that act as if it were done by him alone; that is S. 34. "The common object" required under S. 149, I. P. C. is a thing of wider scope than "the common intention" required by S. 34. Section 149 will not apply unless there are at least five persons whereas for the applicability of Section 34 at least two persons only are required when there are five or more persons, less is required to make each of them liable for the act done by all of them; when there are less than five, more is required. What is included in "the less" must necessarily be included in "the more".

Consequently a case that is governed by S. 149 would ordinarily always be governed by S. 34. If in a case S. 149 is found inapplicable because there are four, three or two men, one can always fall back upon S. 34 to make them liable. A conviction recorded with the aid of section 149 can always be recorded with the aid of S. 34. If in the present case the accused had been convicted under S. 147 and 325 read with S. 34 I. P. C. and separately sentenced for the two offences, I do not think the separate sentences could have been assailed as illegal. The argument on the basis of which the separate sentences were held to be illegal in — 'Abdur Rashid Khan's case (X)', would not be applicable. If separate sentences could be legally awarded with the aid of S. 34 I do not understand why they cannot be legally awarded merely because instead of S. 34, S. 149 is used.

Whether separate sentences can be legally awarded or not should depend upon the facts and not upon the language one uses in describing the facts. If, on the facts, an accused is liable to be punished separately under Ss. 147 and 325, it should not make any difference whe-

ther S. 34 or S. 149 is brought in aid. It is not even necessary under the law to mention either S. 34 or S. 149 in the charge. If neither section is mentioned, one cannot assume that S. 149 was brought in aid and not the other section.

In — 'Abdur Rashid Khan's case' (X) my learned brother set aside even the conviction under S. 323 read with S. 149. Even if an accused cannot be punished separately for the offences of Ss. 147 and 323 I. P. C., he can certainly be convicted under each of them. Even in those cases in which the separate sentences have been held to be illegal, the separate convictions have not been held to be illegal; see for instance, — 'Nilmony Poddar v. Queen Empress', 16 Cal 442 (Z 3) — 'Queen Empress v. Ram Partap', (J), — 'Queen Empress v. Banna Punja', (F), — 'Baldeo Singh v. Emperor', (C), — 'Queen Empress v. Wazir Jan', (Q) — 'Haji Lal Baksh v. Emperor', AIR 1943 Sind 212 (Z 4) and — 'Parmeshwar v. Emperor', (V).

The legality of the separate convictions depends upon the Code of Criminal Procedure and S. 71 I. P. C. presupposes the existence of separate convictions. The question of separate punishments for various offences would not arise unless there were convictions for those offences. The view taken in — 'Abdur Rashid Khan's case (X)', is, thus, not only against the view held by this Court and the Avadh Chief Court in the past but also, I say with great respect, not sound. As it has ignored the previous decisions of this Court, I cannot consider it as binding upon me; e. g. — 'Calcutta Motor Cycle Co. v. Union of India', AIR 1953 Cal 1 (Z 5).

(17a) Coming to the other High Courts the earliest important case that I have come across is that of — 'Nilmony Podder' (Z 3). It was decided by a Full Bench of five Judges. The facts in that case were these: A riot was committed by six men, two of whom had themselves caused hurt with sharp-edged weapons. All were convicted under Sections 148 and 324 read with S. 149 I. P. C. and sentenced to three years' imprisonment under the former section and one year's imprisonment under the latter section by a Sessions Judge. Four of the learned Judges thought that the case was governed by the first part of S. 71 and held the separate sentences illegal. Their argument was that the offence of S. 324 read with S. 149 committed by the other four members was made up of two parts, (1) of their being members of an unlawful assembly which had used force or violence, and (2) of the offence of causing hurt committed by two of the members. I respectfully differ from the view that the offence was divisible into two parts like this and even if it were, I do not agree that the case was governed by the first part. Tottenham, J. dissented from the view of the four learned Judges. He pointed out that S. 149 does not punish any specific offence and that the four members are convicted of an offence punishable not under S. 149 but under S. 323.

(18) In — 'Banna Punja's case (F)', a Full Bench of the Bombay High Court laid down that it is not illegal to pass two sentences under Ss. 147 and 326, provided the aggregate punishment does not exceed the maximum which the Court can pass for either of them. Sargent C. J. pointed out that the combined effect of section 71 I. P. C. and section 235 Cr. P. C. is

> "that the assessment of punishment is to be found in the former section in cases falling within it; but the latter determines the procedure quite independent of it, and this Court has already ruled that, in case of separate convictions for two distinct offences in the same case, the proper course is to pass a separate sentence for each offence"

(page 270). The Full Bench followed the case of — 'Ram Swarup (M)'.

(19) In — 'Krishna Ayyar v. Emperor', AIR 1919 Mad. 353 (Z 6) a Bench of Madras High Court observed that it was well settled that where the object

> "of an unlawful assembly is to cause hurt, a member of it cannot be convicted under Ss. 147 and 323 etc. read with S. 149".

No reasons are given and no authorities are cited in support of the view, and I respectfully disagree.

(20) In — 'Bishna v. Emperor', A. I. R. 1922 Lah. 405 (Z 7) a riot was committed by A, B and C and two others, in which A caused hurt to G with a sharp-edged weapon, B caused hurt to D with a sharp-edged weapon and C caused grievous hurt to D. A, B and C were convicted and sentenced under S. 147 to three months' imprisonment and they were in addition convicted and sentenced under S. 324 or S. 325 to a similar imprisonment. It was held by the Lahore High Court that because D was the first man to be attacked by B and C, the offence of rioting was not completed until he was beaten, that consequently B and C could not be sentenced separately under S. 147 and that A, who inflicted injuries, subsequently could be separately sentenced I do not think any court has gone so far in any case. It is difficult to understand why the offence of rioting was not complete when the first blow was given to D & why even the second blow to him was required to complete the offence of rioting A, B and C had done two distinct and separate acts, one of being members of an unlawful assembly and the other of causing injuries and there is no law which prevented their being punished separately for them.

(21) In — 'Kianuddin v. Emperor', A. I. R. 1924 Cal 771 (Z 8) a Bench of Calcutta High Court held separate sentences under Ss. 147 and 325 read with section 149 I. P. C. to be illegal. The Bench had to follow the Full Bench decision in — 'Nilmony Poddar's case (Z 3). The sentences were concurrent. Sanderson, C. J., observed that it made no difference to the legality or illegality. I respectfully agree with him that the legality or illegality of separate sentences does not depend upon whether they are concurrent or consecutive. Cuming J. who generally agreed with the learned Chief Justice says that the object of the first part of Section 71 could be achieved by making the sentences concurrent. Thus he was not prepared to hold that separate sentences are always illegal.

(22) In — 'Nga Son Min v. Emperor', A. I. R. 1924 Rang 291 (Z9) the Rangoon High Court adopted the view taken in — 'Bana Punja's case (F)', and held the separate sentences under Ss. 147 and 325 read with section 149 passed on the actual assailants valid. The view taken in this case is midway between the view that a member of an unlawful assembly who him-

self causes grievous hurt can be punished separately under Ss. 147 and 325, and the view that other members also can be separately punished. A member who himself inflicts grievous hurt can be convicted and sentenced separately under Section 325 without the aid of S. 149; but other assailants who cause only simple hurts either to the same victim or to another are certainly not guilty under S. 325 unless S. 149 is brought in aid. If they can be separately punished under S. 325, there is no reason why other members of the assembly who themselves have not caused any hurt should not be separately sentenced under S. 325 read with S. 149 I. P. C. The distinction between the two is unwarranted.

(23) 'Harendra Barman v. Emperor', AIR 1931 Cal. 606 (Z 10) is another case from Calcutta; consecutive and concurrent sentences under Ss. 147 and 325 read with S. 149 were imposed on nine persons. The Calcutta High Court set aside the sentence under S. 147 passed on some of them but maintained the sentence passed on the others who were said to have inflicted the blows which caused the death of the victim. It does not appear from the judgment whether there was evidence to prove that each of the others had himself caused the grievous hurt to the victim; if there was, S. 149 was not necessary for the conviction under S. 325; but if there was not, and I would be surprised if there was, they could not be convicted under section 325 without the aid of S. 149, and if still the separate sentences were maintained, it only means that they are not at all illegal. Lort-Williams J. with whom S. K. Ghose J. agreed, though he felt bound by the decision in — 'Nilmony Poddar's case (Z 3)', doubted its correctness.

(24) Another case from Calcutta is — 'Kitabdi v. Emperor', A. I. R. 1931 Cal 450 (Z 11) where consecutive sentences were inflicted under Ss. 147 and 304 read with S. 149 I. P. C. The sentence under section 147 was set aside because the case could not be distinguished from that of — 'Nilmony Poddar (Z 3) and Sir George Rankin, C. J., and Sir Charu Chander Ghose, J. felt bound to follow it. But they also gave a notice of enhancement of sentence under Section 304. The two consecutive sentences were of two years' imprisonment each. The learned Chief Justice observed that the Sessions Judge could have inflicted a sentence of four years' imprisonment under S. 304 read with S. 149. The objection to the legality of separate sentences is certainly of a technical nature; the bar on the passing of separate sentences will prevent two or more sentences being passed but may not make any difference to the punishment or suffering to be undergone by the convict. If separate sentences are permitted, two years and two years may be given for the two offences and the sentences may be made cumulative; but if they are not permitted, all that the Court has to do is to give a sentence of four years' imprisonment for either of the offences.

(25) In — 'Anthony Udayar's case (I)', the view taken was that if force in excess of that required to constitute the offence of rioting is used, separate sentences can be inflicted. There, the offences under consideration were of S. 323, I. P. C. and S. 24 of the Cattle Trespass Act. Force was required for the commission of the latter offence, and hurt for the commission of the former offence. Wallace J. held that if after using force to commit the offence of S. 24 of the Cattle Trespass Act further force is used which causes pain, separate sentences for the two offences can be inflicted. Similar view was expressed by Davis, C. J. in — 'Haji Lal Bakhsh v. Emperor', (Z 4).

(26) In — 'Kunnammal Mayan v. Emperor', AIR 1927 Mad. 970 (Z 12) the view taken in the case of — 'Bishna (Z 7)', was accepted though not without a good deal of hesitation. A Division Bench composed of Beasley, C. J. and Bardswell, J. preferred the view of Wallace J. in 'Anthoni Udayar's case', (I) to that of Curgenven J. in 'Kunnammal's case', (Z12) in 'Sothavalan v. Rama Kone', (H). There separate sentences under Ss. 147 and 323 read with S. 149 were maintained and it was held that S. 71 had no application. The Court dissented from the view taken in the case of 'Bishna (Z7)'. The same Court in — 'In re Ponniah Lopes', AIR 1934 Mad 388 (Z13) followed the case of 'Nilmony Poddar (Z3) and 'Kiamuddi (Z8)' and dissented from —'Queen Empress v. Bana Punja', (F). The Court held that the offence of S. 147 is included in the offence of Ss. 323/149 and that to punish a person separately for them is to punish him twice. The Court further held that since the interpretation of S. 149 by the Judicial Committee in the case of 'Barendra Kumar Ghosh (E)' the view taken in the case of 'Bisheshar (A)' and the view taken by Tottenham J. in 'Nilmony Poddar's case', (Z3) cannot be accepted as correct. With respects, I do not know how the interpretation has at all affected that view. It was pointed out by Yorke J. in the case of 'Raghubar (B)' that it has not affected it at all. Section 71 says nothing about separate or distinct or specific offences.

(27) The conclusions at which I have arrived are in conformity with the view that prevailed in this Court up to 1952. They militate against some decisions of other High Courts, particularly Calcutta, Nagpur & Lahore High Courts, but I respectfully differ from those decisions.

(28) The applicants were rightly sentenced separately under the various sections. There is nothing illegal in the sentences. The application is dismissed.

A/R.G.D. Application dismissed.

A. I. R. 1953 ALL. 520 (Vol. 40, C. N. 250)

(LUCKNOW BENCH)

P. L. BHARGAVA J.

The State through Ruppa, Applicant v. Rakshpal Singh and another, Complainant-Opposite Party.

Criminal Ref. No. 53 of 1952, D/- 19-11-1952.

Evidence Act (1872), S. 32 (2) — "Whose attendance cannot be procured without an amount of delay or expense."

Where the injury report prepared by the Medical Officer is proved by his compounder it is admissible under S. 32 (2) if the attendance of the Medical Officer cannot be procured without delay and expense.

(Para 7)

B. N. Roy, for Applicant; Shiva Raj Singh Chauhan, for Opposite Party Nos. 1 and 2.

CASES CITED:
(A) ('25) AIR 1925 All 413: 26 Cri LJ 551
(B) ('36) AIR 1936 All 363: 37 Cri LJ 424

ORDER : Rakshpal Singh 'alias' Rajpal Singh and his brothers, Rampal Singh and Ram Singh, along with their father, Makrand Singh, were prosecuted for an offence punishable under S. 325, read with S. 34, Penal Code for voluntarily causing grievous hurt to Ruppa, the complainant. The accused persons were tried by an Honorary Special Magistrate of first class at Hardoi. The Magistrate found Rampal Singh and Ram Singh not guilty and acquitted them; but he came to the conclusion that Rakshpal Singh alias Rajpal Singh and Makrand Singh had committed an offence punishable under S. 323, Penal Code and as such the case against them was triable by a Panchayati Adalat. In this view of the case, he transferred it to the Panchayati Adalat for disposal.

(2) Against the order of the Magistrate, Rakshpal Singh and Makrand Singh filed a revision in the Court of the Sessions Judge of Hardoi. The learned Sessions Judge was of the opinion that the order of the Magistrate directing the transfer of the case to the Panchayati Adalat was illegal and liable to be set aside. Accordingly, he made this reference.

(3) The reference has been supported by the learned Counsel appearing on behalf of the complainant; but it has been opposed on behalf of the accused persons.

(4) As stated above, the accused persons were being prosecuted for an offence punishable under S. 325/34, Penal Code. It is not disputed that the offence under the said section was triable by the Magistrate himself. In order to prove that the accused had caused grievous hurt to the complainant and had thereby committed an offence under section 325/34, Penal Code, besides the oral evidence, the injury report prepared by the Medical Officer, who had examined the complainant, was also produced. The Medical Officer was not available to prove the injury report as he had proceeded to England on long leave. Consequently, to prove the injury report the compounder, in whose presence the injury report had been drawn up, was examined. He stated that the injury report had been drawn up and signed by the Medical Officer.

The statement was made by him with reference to the original injury register, which he had brought with him and of which the injury report on the record was a carbon copy. The learned Magistrate was of the opinion that the injury report was not proved according to law and as such there was no evidence on the record to show that any of the injuries inflicted upon the complainant was a grievous hurt. In this view of the matter he rejected the injury report and held that Rakshpal Singh and Makrand Singh were guilty of an offence under S. 323, Penal Code. Having come to this conclusion, in view of the provisions of S. 56, U. P. Panchayat Raj Act, he transferred the case to the Panchayati Adalat.

(5) The learned Sessions Judge held in revision that the injury report had been duly proved and it was admissible in evidence under S. 32(2), Evidence Act and that the trial Court was wrong in recording a finding of guilty under S. 323, Penal Code and then transferring the case to the Panchayati Adalat.

(6) On behalf of the complainant, it has been argued that the learned Magistrate was wrong in holding that the injury report had not been proved and as such it was inadmissible in evidence; and that, apart from the injury report, there was ample evidence on the record to show that the complainant had received grievous hurt. In support of his first contention, learned counsel for the complainant has relied upon the provisions of S. 32(2), Evidence Act; and also upon a decision of this Court in —'Mohan Singh v. Emperor', AIR 1925 All 413(A), where it was held that a 'post mortem' report is admissible in evidence under S. 32(2), Evidence Act as being a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty. The Civil Surgeon in that case could not be examined to prove the report as he was dead. Section 32, Evidence Act provides that the

"statements, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases

(1) ....

(2) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him....."

(7) In the present case, it cannot be disputed that the attendance of the Medical Officer, who had proceeded to England on long leave, could not be procured without delay and expense, which, in the circumstances of the case, would have been unreasonable. The Medical Officer had examined the complainant when he was admitted to the hospital of which he was incharge, in the discharge of his professional duty and he had noted injuries in the injury register maintained by him. The compounder stated before the Court that the injury report had been prepared by the Medical Officer and it bore his signature; that he had brought the original injury report register, of which the injury report on the record was the carbon copy of the relevant entries; and that the injuries were examined in his presence. This statement of the compounder clearly proved the injury report on the record; and the injury report having been proved it was admissible under S. 32(2), Evidence Act. In my opinion, therefore, the learned Magistrate was wrong in holding that the injury report had not been proved in accordance with law.

(8) Learned counsel for the accused persons relied upon —' Bechan Prasad v. Jhuri', AIR 1936 All 363(B), wherein in the absence of the sworn testimony of the doctor a letter containing his opinion was held to be inadmissible. The letter stands on a different footing and it cannot stand any comparison with the injury report or the 'post mortem' report. The

principle of 'Mohan Singh's case', (A), is applicable to the present case where the question was about the admissibility of an injury report prepared in the course of business and in the discharge of professional duty.

(9) In support of his next contention learned counsel for the complainant has pointed out that, apart from the injury report, there is on the record the statement of the complainant to the effect that his rib was fractured in consequence of the assault on him by the accused persons, and the statement of the compounder that the eleventh rib of the complainant had been fractured and he used to bandage the injury. The compounder produced the bed head ticket of the complainant from the hospital records. He further stated that for about three weeks the complainant was unable to move about from his bed. Under the circumstances there could be no doubt that the complainant had received a grievous hurt. The case, therefore, obviously fell within the purview of S. 325, Penal Code; and as such it was triable by the Magistrate himself.

(10) The view taken by the learned Magistrate was, therefore, untenable and he was wrong in holding that the offence with which the accused persons were charged was only an offence under S. 323, Penal Code. That being so, the order of transfer of the case to the Panchayati Adalat was clearly illegal.

(11) I, therefore, accept this reference and set aside the order passed by the Magistrate on 15-12-1951, so far as it directs the transfer of the case against Rakshpal Singh 'alias' Rajpal Singh and Makrand Singh to the Panchayati Adalat. The case will now go back for retrial to the District Magistrate of Hardoi who will transfer the same for disposal to any other Magistrate competent to try the same.

B/V.R.B. Reference accepted.

A. I. R. 1953 ALL. 522 (Vol. 40, C. N. 251)

AGARWALA J.

Bibi Iftikhar Jahan Begum and others, Plaintiffs-Appellants v. Balwant Singh and others, Defendants-Respondents.

Second Appeal No. 2605 of 1946, D/- 3-3-53.

Landlord and tenant — Sir plots — Transfer — (Muhammadan Law — Sharers).

Transfer of joint Sir plots by Muhammadan widow — She not obtaining possession of exproprietary rights in such plots over six months — Share of the widow ceased to be Sir and became 'khalsa' land over which the transferees could remain in possession only as 'khudkasht' holders — Other heirs were entitled to joint possession along with the transferees over the entire Sir plots with a right to have their shares demarcated in the revenue Court. AIR 1952 All 251 (FB), Rel. on. (Para 6)

Syed Sadiqali and Gopal Behari, for Appellants; B. Dayal, for Respondents.

CASE CITED

(A) ('52) AIR 1952 All 251: 1951 All LJ 687 (F B)

JUDGMENT : This is a plaintiffs' appeal arising out of a suit for exclusive possession by ejectment of the defendants or in the alternative for joint possession with the defendants over three Sir plots. The suit has been dismissed by both the Courts below. The facts briefly are as follows :

(2) One Mohammad Ismail Khan was a cosharer in a zamindari property in which the three Sir plots in dispute were situated. On his death the property devolved upon his widow, Bilqis Jahan Begam, defendant 16, his son Iftikhar Ahmad Khan, defendant 15, and his two daughters, the plaintiffs-appellants. On 31-5-1935 Bilqis Jahan Begam, the widow, executed a sale deed of the aforesaid plots in favour of the defendants-respondents, first party. The widow's share, according to the Mohammadan law, exceeded the area thus transferred by her. But she had no right to transfer the entire area of the three plots which were the joint Sir of all the heirs of Mohammad Ismail Khan. Bilqis Jahan Begam was in possession of the entire property on her own behalf as well as on behalf of other heirs because she had been appointed guardian of the property of the other heirs who were her minor children. By the sale she transferred the possession over the plots to the transferees. She also executed a deed of relinquishment with regard to her exproprietary rights and did not claim exproprietary rights in the plots sold by her for more than six months. Her exproprietary rights, therefore, became extinguished after the expiry of six months from the date of sale.

(3) When one of the daughters attained the age of majority, she in her own right and as guardian of her younger sister brought the suit, which has given rise to this appeal, in 1944 for the ejectment of the transferees from the aforesaid plots and in the alternative for joint possession over the said plots on the ground that the sale made by their mother did not bind them, and conferred no rights on the transferees so far as the Sir plots were concerned, or, at any rate, their own shares in the Sir plots did not pass to the transferees. The suit was contested by the transferees who pleaded that the plaintiffs could not obtain either exclusive possession or joint possession because they had become cosharers in the plots and they were entitled to remain in exclusive possession of the plots because they had been in peaceful possession for a long time since the date of the sale, and that the plaintiffs could file a suit for partition or for profits. Other pleas were also raised, but we are not concerned with them in this appeal.

(4) The defence case was accepted by the trial Court and the suit was dismissed. The lower appellate Court confirmed the decree of the trial Court.

(5) The only point for determination in the present appeal is whether the plaintiffs are entitled to eject the defendants-transferees or to obtain joint possession with them. The widow being merely a co-sharer was not entitled to sell more than her share in the proprietary right in the plots in dispute. Though she purported to transfer the plots in their entirety, her sale deed would be deemed to be valid to the extent of the share which she could lawfully transfer. The transferees, therefore, acquire the widow's proprietary share in the plots. The widow was not entitled to transfer the Sir rights in the plots. The transferees could not, therefore, become cosharers in the Sir rights in the plots. The widow having

transferred her proprietary rights in the Sir plots was entitled to claim exproprietary rights to the extent of her share in the plots. At the moment of the sale, the position was that the widow became by law an exproprietary tenant in the plots to the extent of her share and the other cosharers in the joint Sir plots were left with Sir rights to the extent of their shares. The widow did not obtain possession of her exproprietary rights in the plots for over six months with the result that her exproprietary rights became extinguished.

(6) The share of the widow in the Sir plots ceased to be Sir and therefore became 'khalsa' land over which the transferees could remain in possession only as 'khudkasht' holders. The remaining portion of the Sir plots appertaining to the share of the other heirs did not cease to be Sir. The appellants are entitled to exclusive possession over that portion, but since there is no demarcation between their share and the share of the widow they are entitled to joint possession along with the transferees over the entire Sir plots with a right to have their share demarcated in the revenue Court. This view is fully supported by a Full Bench decision of this Court in — 'Jokhu Mal v. Gopi Mal', AIR 1952 All 251 (F. B.) (A).

(7) We, therefore, allow this appeal in part and decree the plaintiffs' suit for joint possession over the plots in dispute. They are not entitled to exclusive possession so long as their share in the Sir plots in dispute is not demarcated. The plaintiffs will get half of their costs from the respondents who will bear their own.

C/D.H. Appeal partly allowed.

A. I. R. 1953 ALL. 523 (Vol. 40, C. N. 252)

AGARWALA AND MUKERJI JJ.

Kamla, Applicant v. State through Ram Bahal, Opposite Party.

Criminal Revn. No. 925 of 1950, D/- 6-2-53.

(a) Criminal P. C. (1898), S. 139A — Reliable evidence in support of denial of public right — Patwari's record not mentioning any public right of way — Evidence is reliable — Other public right of way admitted by party, not shown in the patwari's report — Report cannot be considered as reliable evidence — Matter should be decided by Civil Court. AIR 1931 Cal 2 and AIR 1946 Cal 302, Expl .

(Paras 1, 3)

Anno: Cr. P. C., S. 139A, N. 6, 9.

(b) Precedents — Single Judge ruling of its own High Court should be followed and not later Division Bench ruling of another High Court — (Civil P. C. (1908), Preamble).

(Para 2)

Anno: C.P.C., Preamble N. 15.

K. C. Saksena, for Applicant; R. B. Misra, for Opposite Party.

CASES CITED:

(A) ('31) AIR 1931 Cal 2: 128 Ind Cas 810: 32 Cri LJ 189
(B) ('46) AIR 1946 Cal 302: 47 Cri LJ 320
(C) ('39) AIR 1939 All 187: 40 Cri LJ 375

AGARWALA J. : This is a revision arising out of proceedings under S. 133, Criminal P. C. Ram Bahal Tewari complained that the applicant Kamla and others had constructed a drain and a cesspool on a public thoroughfare and thus narrowed and obstructed the passage through which carts and lorries used to pass. A notice under S. 133, Criminal P. C. was issued by the Sub-divisional Officer of Deoria to the applicant and others on which they filed an objection that there was no public thoroughfare at all at the place in question.

Under the provisions of S. 139A, Criminal P. C. the Magistrate is required to hold an enquiry whether there is reliable evidence in support of the denial of the existence of public way. The learned Sub-divisional Magistrate accordingly held a preliminary enquiry as directed by that section. It is admitted before us by learned counsel appearing for the applicant that the only evidence which the applicant could produce before the learned Sub-divisional Magistrate in support of his denial was a copy of the Patwari's record. This record did not contain any entry about the existence of the public way in dispute. If matters had stood at this and there was nothing further to be seen, this document could be considered to be reliable evidence in support of the denial of the right of public way and the Magistrate could very properly have stayed his hands and left the parties to agitate the matter in the civil Court. But as it happened, it was admitted by the applicant that two other roads which admittedly existed at the place were not shown in the document filed by them. This fact takes away all the evidentiary value from the document with the result that no reliable evidence in support of the denial of the right of way is left. In the circumstance, the learned Magistrate was perfectly justified in holding that there was no reliable evidence in support of such a denial.

(2) Against this order the applicant went up in revision to the Additional Sessions Judge. The learned Additional Sessions Judge considered the question whether the copy of the Patwari's records which was adduced in evidence by the applicant was sufficient evidence in support of the denial of the right of way. He referred to —'Satish Chandra v. Krishna Kumar', AIR 1931 Cal 2 (A), in which it was held that the Record of Rights is a very valuable piece of evidence which raises a presumption of correctness of the entries therein. He then referred to a Calcutta case, —'Muzaffar Ahammad v. Khitindra Bhusan', AIR 1946 Cal 302 (B), in which it was held that when the Magistrate comes to the conclusion that there is no reliable evidence in support of the denial, it is not for the High Court to interfere in revision. This Calcutta case was a Division Bench ruling. Lastly the learned Judge referred to a single Judge ruling of this Court, —'Kundan Lal v. Emperor', AIR 1939 All 187 (C). In that case Allsop J. held that unless the evidence produced in support of the denial of the right of way is frivolous, the matter is one which can properly be decided by a competent civil Court. The learned Judge brushed aside the single Judge decision of this Court on the ground that a later Division Bench ruling of the Calcutta High Court favoured the opposite view. In doing so the learned Additional Sessions Judge was obviously in error. Even a single Judge ruling of this Court of an earlier date is binding on the Courts below in preference to a later ruling of another Court. The learned Judge further did not apply his mind to the rulings cited before him.

In fact, the rulings were not contradictory at all. All of them were reconcilable. In — 'AIR 1931 Cal 2 (A)', the Record of Rights did not contain an entry about the existence of the public right of way which was claimed by the applicants. There was nothing to show that the record did not mention even the admitted existing public ways. In those circumstances it was held that the Record of Rights was a reliable piece of evidence in support of the denial of public right of way. The ruling did not apply to the present case, because of the circumstance that admittedly the Record of Rights here did not record the existence of admitted public ways.

(3) In —'AIR 1946 Cal 302 (B), the learned Judges laid down the obvious proposition that where the Magistrate makes an enquiry and comes to the conclusion that there was no reliable evidence in support of the denial, it is not for the High Court to interfere. It does not appear from the report of that case that there was any reliable evidence which the Magistrate refused to take into consideration. The ruling has no application to a case in which there was reliable evidence and it was wrongly omitted to be taken into consideration by the Magistrate. The ruling of this Court in —'AIR 1939 All 187 (C)', was in no way contradictory to the Calcutta case. That case also does not apply to the present case because in that case there was evidence in support of the denial of public way and the evidence was not frivolous. Here, as already stated, there is no reliable evidence in support of the denial.

(4) The result, therefore, is that we find no force in this application. It is accordingly dismissed.

B/R.G.D. Application rejected.

A. I. R. 1953 ALL. 524 (Vol. 40, C. N. 253)

RAGHUBAR DAYAL AND MUKERJI JJ.

Molhar Mal, Applicant v. State through Sm. Krishna Gupta, Opposite Party.

Criminal Ref. No. 405 of 1950, D/- 26-2-53.

(a) Criminal P. C. (1898), S. 250 — Applicability.

Section 250 applies to both summons cases as well as warrant cases. AIR 1927 Oudh 175, Foll.; AIR 1926 All 159, Disting. (Para 4)

Anno: Cr. P. C., S. 250 N. 2.

(b) Interpretation of Statutes — Marginal notes and heading of Chapter.

Marginal notes in an Indian Statute cannot be referred to for the purposes of construing the statute and the title of a chapter cannot be legitimately used to restrict the plain terms of an enactment: AIR 1950 SC 134, Rel. on. (Para 5)

Satyendra Nath Varma, for Applicant; J. R. Bhatt, Asst. Govt. Advocate, for Opposite Party.

CASES CITED:

(A) ('26) AIR 1926 All 159: 23 All LJ 1056: 27 Cri LJ 6
(B) ('50) AIR 1950 SC 134: 1950 SCR 335
(C) ('18) AIR 1918 All 126(1): 40 All 615: 19 Cri LJ 706
(D) ('27) AIR 1927 Oudh 175: 28 Cri LJ 450

R. DAYAL, J.: Molhar Mal filed a complaint under S. 317, I. P. C. against Smt. Krishna Gupta. She was discharged by the Magistrate. The Magistrate ordered the complainant to pay Rs. 50/- as compensation to the accused under S. 250, Cr. P. C. Molhar Mal went up in revision to the Sessions Judge, who referred the case to this Court, recommending that the order for the payment of compensation be set aside as S. 250, Cr. P. C. could not apply to the trial of warrant cases, and, therefore, the Magistrate could not order the payment of compensation to the accused in case he found the complaint to be false and frivolous or vexatious. He relied on the case of Harihar Dat v. Maksud Ali', AIR 1926 All 159 (A).

(2) When the matter came up before an Hon'ble Judge of this Court, it was considered of sufficient importance and was therefore referred to a Division Bench, and hence this case is before us.

(3) Mr. Sateyndra Nath Verma was requested by the learned single Judge to appear in support of the reference. He has appeared before us and has referred us to the various cases having a bearing on this point.

(4) Sub-section (1) of S. 250, Cr. P. C., empowers a Magistrate who discharges or acquits all or any of the accused triable by him in a case instituted upon complaint or upon information given to a police officer or to a Magistrate and considers the accusation to be false and either frivolous or vexatious to call upon the complainant to show cause why he be not ordered to pay compensation to the discharged or acquitted accused. It does not restrict this power of the Magistrate to summons cases alone. It gives this power in all cases concerning offences triable by a Magistrate. There, therefore, does not seem to be any good reason why the applicability of S. 250 be restricted to summons cases alone.

(5) The fact that S. 250 is in Chapter XX with the heading "Of the trial of summons cases by Magistrates" cannot control the meaning of the expressions used in the section itself. It has been pointed out in — 'Income-tax Commr. v. Ahmedbhai Umarbhai & Co.', AIR 1950 SC 134 (B) that

> "marginal notes in an Indian Statute cannot be referred to for the purposes of construing the statute and that the title of a chapter cannot be legitimately used to restrict the plain terms of an enactment."

Even if it was possible to take the help of the heading of the chapter in view of any possible ambiguity in the expressions used in section 250, Cr. P. C., that would not have been very helpful in view of the fact that a sub-heading appears just before S. 250 and this sub-heading is "Frivolous accusations in summons and warrant cases." This should make it clear in case headings and sub-headings could be a guide, that the intention of the legislature was that the provisions of S. 250, Cr. P. C., were applicable to cases of frivolous accusations, whether they were made in summons cases or in warrant cases. The reason for the location of S. 250 in Chapter XX and for the existence of the sub-heading seems to be that in the Codes of Criminal Procedure in force prior to 1891 sections corresponding to S. 250 of the present Criminal P. C., were applicable to summons cases only. The amendment made in 1891 introduced the significant words that the Magistrate was to consider the payment of compensation in certain cases against a person accused of any offence triable by a Magistrate. The section seems to have remained in its original place

because it had to remain in either of the chapters belonging to summons cases or warrant cases and preferably it had to remain in the chapter which came first in the Act. The Legislature, therefore, gave the sub-heading in order to make its application to both kind of cases clear.

(6) The case of 'AIR 1926 All 159 (A)' is distinguishable. In that case, the complaint was under Ss. 395, 323 and 315, I. P. C. The Magistrate discharged the accused, finding that no case had been made out against him and then ordered the payment of compensation to the accused. Sulaiman, J., as he then was, held that the case was not triable as a summons case or as a warrant case and what the learned Magistrate could have done was to make an enquiry under Chapter XVIII of the Code of Criminal Procedure as two of the offences were triable by a Sessions Court alone. The order of discharge, therefore, was an order under S. 209, Cr. P. C. Holding so he held:

"When an accused is discharged under that section, an order for compensation cannot be made against a complainant."

The learned Magistrate in his explanation suggested that the discharge was under section 253, Cr. P. C.

Sulaiman, J. did not agree with this suggestion and further observed:

"Assuming, however, that the discharge was under section 253, Cr. P. C., I would still be of opinion that the order, when issued, was illegal. That order, contained as it is in section 250 which occurs in Chapter XX, must be confined to a trial of summons cases. There is no such similar provision in Chapter XXI which deals with the trial of warrant cases. This view finds support from the case of — 'Hait Ram v. Ganga Sahai', AIR 1918 All 126 (1) (C)."

The point whether the provisions of S. 250 were applicable to summons cases alone was not really before the Court for consideration in that case and, so far as these observations go, we are not prepared to agree with them in view of the clear expressions used in section 250.

(7) In 'AIR 1918 All 126 (1) (C)', it was not held that S. 250, Cr. P. C., applied to summons cases alone. What was held was that the Magistrate in that case could act under Chapter 18, Criminal P. C., and, therefore, neither S. 250 nor S. 253 could be applied.

(8) The case of — 'Paighambar v. Emperor', AIR 1927 Oudh 175 (D)' takes the same view of S. 250, Cr. P. C., as we have done and interprets the case reported in 'AIR 1926 All 159 (A)', in the same manner.

(9) In view of the above, we hold that the learned Magistrate was right in taking action under S. 250, Cr. P. C., in ordering the complainant to pay compensation to the accused when the Magistrate discharged the accused of the offence under S. 317, I. P. C., which was triable by him as a warrant case. We, therefore, reject the reference.

B/G.M.J. Reference rejected.

A. I. R. 1953 ALL. 525 (Vol. 40, C. N. 254)

BRIJ MOHAN LALL J.

Ramai and others, Applicants v. State through Pram Hans Singh, Opposite Party.

Criminal Misc. Case No. 267 of 1953, D/- 28-1-1953.

Criminal P. C. (1898), Ss. 345 (5A) and 561A — Power to permit compounding of offences.

The power to permit compounding of offences conferred by S. 345 (5A) can be exercised during the pendency of the revision only and cannot be exercised after disposal of the revision. Nor can such permission be granted under S. 561A.

(Paras 4 and 6)

Anno: Cr. P. C., S. 345 N. 16.

P. N. Katju, for Applicants.

JUDGMENT: This purports to be an application under S. 345 (5A), Criminal P. C.

(2) Six persons were convicted by a Magistrate Ist Class of Gorakhpur of offences punishable under Ss. 147, 323 and 447, I. P. C. They preferred an appeal which was heard by the learned Additional Sessions Judge of Gorakhpur. He set aside the conviction under S. 447, I. P. C. but maintained the convictions under the remaining two sections. Thereafter a revision was preferred to this Court which was rejected.

(3) An application has now been presented jointly on behalf of the complainant and the convicted persons praying that the offence under S. 323, I. P. C. may be permitted to be compounded. No such request is made in respect of the offence under S. 147, I. P. C. for the obvious reason that that offence is not compoundable. Sub-section (5A) of S. 345, Cr. P. C. lays down that:

"A High Court acting in the exercise of its powers of revision under S. 439 may allow any person to compound any offence which he is competent to compound under this section".

(4) A plain reading of this section makes it clear that this power can be exercised only while the Court is acting in the exercise of its power of revision under S. 439, Cr. P. C. The Court begins to so act from the time it admits the revision and continues to exercise the revisional power till the revision is disposed of. The moment the revision is decided the Court becomes 'functus officio'. In other words, the power can be exercised during the pendency of the revision only. It will, therefore, follow that this Court has no jurisdiction left now to entertain an application for compounding the said offence.

(5) It is argued that sub-s. (5A) is a newly inserted section which was enacted by Act 18 of 1923 with a view to grant special jurisdiction to this Court. The obvious reason for enacting this provision of law was that while jurisdiction to permit compounding of offences was conferred by sub-s. (5) on an appellate Court, there was no express provision empowering a Court of revision to accord similar permission. To fill up this lacuna sub-s. (5A) was enacted. It could not have been the intention of the Legislature to confer a power on this Court to sanction the compounding of offences even after the dismissal of the revision. By entertaining this application the Court will be entertaining a second revision after disposing of the first. This is not permissible under the law.

(6) Reliance was also placed on S. 561A, Cr. P. C. which empowers this Court to

"make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice".

But this section also does not cover a case like the present one. The sanction for compounding the offence is not needed to give effect to any order passed under the Criminal Procedure Code, nor is it needed to prevent the abuse of the process of the Court. Nor can it be argued that this order is needed to secure the ends of justice. Justice has already been done and the guilty have been punished. The real reason why the parties

want to compound the offence is that the stigma which attaches to the convicted persons as a result of the conviction may be removed and better relations may be established between the parties in future. The object may be laudable but certainly it cannot be contended that it will secure the ends of justice.

(7) Having given the matter my best consideration and having heard learned counsel for the parties I am of the opinion that there is no jurisdiction left in this Court to sanction such a compromise.

(8) The application is rejected.

B/G.M.J. Application rejected.

A. I. R. 1953 ALL. 526 (Vol. 40, C. N. 255)

B. D. MUKERJI J.

Poshaki and another, Convict-Appellants v. State.

Criminal Appeal No. 1082 of 1950, D/- 23-10-1952.

(a) Evidence Act (1872), S. 27 — "Distinctly" — Meaning of.

The law expects a good deal of precision in regard to the statement which police officers wish to bring on the record under the enabling provisions of S. 27. 6 All 509 (FB), Rel. on. (Para 8)

Anno: Evidence Act, S. 27 N. 9.

(b) Evidence Act (1872), S. 27 — Information by two accused.

Once property has been discovered in consequence of information received from a suspected person, it cannot be rediscovered in consequence of information received from another suspected person. It is possible to prove the statement of that accused who comes first on the scene and whose statement leads to the discovery first of all: AIR 1922 Lah 315 and AIR 1925 Nag 407, Rel. on. (Para 9)

Anno: Evidence Act, S. 27 N. 10.

(c) Evidence Act (1872), S. 9 — Identification parades.

One witness made four mistakes and identified three correctly while the other made four mistakes and identified four correctly.

Held that the value of this identification was very poor and it would be very unsafe to rely on this identification for purposes of upholding the conviction. (Para 5)

Anno: Evidence Act, S. 9 N. 5.

Bishun Chandra Sexena, for Appellants; T. N. Madan, for the State.

CASES CITED:

(A) ('45) AIR 1945 Oudh 235: 46 Cri LJ 629
(B) ('84) 1884 All WN 229:
6 All 509 (FB)
(C) ('22) AIR 1922 Lah 315: 23 Cri LJ 22
(D) ('25) AIR 1925 Nag 407: 27 Cri LJ 60

JUDGMENT: This is an appeal by two persons, Poshaki who has been convicted under S. 395, I. P. C. and sentenced to six years' R. I. and Azimullah who has been convicted under S. 412, I. P. C and sentenced to three years' R. I.

(2) The facts which give rise to this appeal, briefly stated, are as follows: On the night between 8th and 9th August 1949 near about midnight a dacoity was committed in the house of one Rewaram by 14 or 15 persons. Rewaram's house is situate in village Gahlol within the police station, Sahaswan in the district of Budaun. A first information report was made on the morning of the 9th at 11-30 by Rewaram himself. The police station where the report was made was four miles from village Gahlol. In this first information report Rewaram gave no names because he was unable to identify anyone, taking part in this dacoity, as having been known to him from before. Rewaram also gave the details of the property which had been taken away from his house. From the list it appears that the bulk of the looted property consisted of clothes and some ornaments. A sum of Rs. 600/-, in ten and five rupee notes, was also alleged to have been looted.

(3) As a consequence of the information received by the police of the dacoity at Rewaram's house investigation followed and ultimately six accused persons stood their trial before the learned Sessions Judge of Budaun. The learned Judge after a consideration of the evidence, adduced in the case, acquitted four out of the six accused before him, and convicted the two appellants in the manner indicated earlier. The two appellants before me were arrested on 13-8-1949 from their residential village of Barni which is not far from village Gahlol—the scene of the dacoity.

(4) The prosecution put forward two types of evidence against the two appellants—one consisted of the usual identification by witnesses and the other was the proof of a statement by the accused to the investigating officer which led to the discovery of a well which, in term, yielded a box from which certain articles were recovered—articles which were identified at the trial to belong to the complainants. In the latter group also fall two other recoveries which were made by the police as a consequence of what the two appellants are alleged to have told the police. In the case of Poshaki appellant, it related to the discovery of a Kuthia (some kind of earthen receptacle) from which two female dhotis were recovered and in the case of Azimullah, which led to the discovery of a golden nose-ring.

(5) I shall first dispose of the evidence of identification, Poshaki was identified by only two witnesses, Gangaram and Hetram. Gangaram made four mistakes and identified three correctly while Hetram made four mistakes and identified four correctly. The value of this identification, therefore, is, in my judgment, very poor and it would be very unsafe, to rely on this identification for the purposes of upholding the conviction of the appellants before me. The identification parade at which the aforementioned witnesses identified the accused was conducted on 26th October. There was, therefore, a long gap between the date of the dacoity and the identification parade. Further, Gangaram in the first round made one mistake and in the third round he made three mistakes. That indicates that by the time he was having his third round he was relying completely on chance and not on memory.

(6) The position in regard to Hetram is no better. He picked out Poshaki in the second round and in that very round he made one mistake. Then in the third round he made three mistakes and in the fourth round he identified nobody correctly but made one mistake.

(7) I shall now take up the other evidence against the appellants. According to the prosecution both Poshaki and Azimullah, made a

statement to Head Constable, Mujibullah P. W. 26, in the presence of the Station Officer. Mujibullah gives a synopsis of the statement in his deposition. What he says is this:

"On the directions of S. O. I went with Patra alias Azimullah and Poshaki accused to a jungle beyond Mohaloli. Patra told me that he and Poshaki had brought a box and put it in a well. Poshaki also gave the same information. These accused brought me to a place at some distance from a well. I put Patra accused at that place in the jungle and I and witnesses went to the well with Poshaki and Poshaki took us there. He told us that the box was there in the well. Then I put Poshaki away and brought Patra and on the well he gave the same information. Then a 'ghotakhor' went inside the well and he brought out a box therefrom. That is Ex. 7. I prepared recovery list therefor which is Ex. P 16."

(8) From the statement of this witness, it would appear that information in regard to the well and what was inside the well was conveyed to the police, more or less, jointly by the two appellants. The actual well was, however, pointed out by the accused one by one—first by Poshaki and subsequently by Azimullah. The recovery list which is Ex. P. 16 records this:

".....First Azimullah aforesaid accused pointed out a well lying between the villages of Mahmudpur and Gaichulyan. Later on Azimullah was moved away from that neighbourhood and Poshaki pointed out the same well in the presence of the witnesses aforesaid. Accordingly both of them pointed out the same well subsequently."

It would, therefore, appear that there is an inconsistency between what was recorded by Mujibullah in Ex. P 16 and what was stated by him in court. Exhibit P 16 does not make a record of 'that information' given by the accused which related 'distinctly' to the fact thereby discovered. There is also a variation, in regard to which the two accused first pointed out the well in the version recorded in Ex. P 16 and the version given in court.

The prosecution led evidence to prove the statement made by the accused presumably under S. 27, Evidence Act. On account of the variation in the two versions, one recorded in Ex. P 16 and the other as stated in court, it becomes a bit suspicious, in my opinion, as to what exactly did the accused say. Be that as it may, Mr. Saksena, appearing for the appellant Poshaki, has argued that it was not open to the prosecution to rely on S. 27, Evidence Act, to prove the discovery as against either of the two appellants. Mr. Saksena's contention was that S. 27 has to be strictly construed and that it refers only to a discovery that is made as a result of the statement of 'one' particular individual and it does not contemplate the proof of successive recoveries of the same thing being proved as a result of successive statements by different accused persons.

In support of this contention of his he points out that the words used in the section are "Information received from a person". He, therefore, says that the section contemplates the action of an individual. In support of his contention he relies on the decision of — 'Puttu v. Emperor', AIR 1945 Oudh 235 (A). In this case Misra and Kaul JJ. as Judges of the Chief Court of Oudh held that

"Section 27 ought to be construed strictly. The use of the word "a person" in singular, in Section 27, is somewhat significant. The word was used in singular designedly because the joint statement of a number of persons cannot be said to be an information received from any particular one of them. When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, it is impossible to treat the discovery as having been made from the information received from each one of them."

The learned Judges relied on an observation of Straight J. made in — 'Queen Empress v. Babu Lal', 6 All 509 (B). The observation of Straight J. on which reliance was placed is in these words:

"It is not a proper course, where two persons are being tried, to allow a witness to state "they said this", or "they said that" or "the prisoner then said". It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strict precision should be enjoined on the witness so that there may be no room for mistake or misunderstanding.....In detailing statements of this kind which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point and the witness refused to be more explicit, the Judge should have paid no attention to it."

The above quoted observations of Straight, J. indicate that the law expects a good deal of precision in regard to the statement which police officers wish to bring on the record under the enabling provisions of S. 27, Evidence Act. The evidence in regard to the statements made by Azimullah or Poshaki which led to the discovery is, in my judgment, thoroughly unsatisfactory because it lacks precision. The statement ascribed to the accused as recorded in Ex. P 16, if strictly construed, could not be said to contain such information as related distinctly to the discovery of the incriminating article and, therefore, in my judgment, it did not strictly fall within the ambit of S. 27, Evidence Act.

(9) Mr. Saksena also relied on two other decisions in support of his contention—one was the case of — 'Budha v. Emperor', AIR 1922, Lah 315 (C) and the other — 'Kudaon v. Emperor', AIR 1925 Nag 407 (D). In the former case a learned Single Judge of the Lahore High Court held that:

"Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of section 27 of the Evidence Act."

In the second case, namely, the Nagpur case which again is a decision by a learned Single Judge, this was what was held:

"Section 27 must be very strictly construed. Where one accused has agreed to point out a place where a fact would be discovered in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in police custody."

On the authority of the two aforementioned decisions, one of the Lahore High Court and the other of Nagpur, it is possible to prove the statement of that accused who comes first on the scene and whose statement leads to the discovery first of all. With respect I am of the same opinion and I would have given effect to the law so stated, if it was possible for me to be certain as to which of the two appellants made the first statement which led to the discovery first of the well and subsequently to the box, but, as I have already stated earlier, the prosecution have not been able to prove who was the accused who made the statement first or who first showed the well because, as I have already noticed, there is a grave contradiction about it. The result, therefore, is that I have got to discard the evidence of the recoveries as against both the appellants.

(10) There is to be noticed the discovery which was made of two pieces of dhotis from Kuthia—a discovery made as a consequence of the pointing out of appellant Poshaki; the dhotis which were recovered, do not, in my opinion, tally with the description of the dhotis given in the first information report and therefore, this can be of no value to the prosecution.

(11) Appellant, Azimullah, is alleged to have pointed a place from where a 'bulak' was recovered. This 'bulak' (gold nose pendant) is different from the gold nose pendant (item 25 of the list of stolen property) lost by Rewaram. The description of the gold nose pendant in the list of property is given at p. 4. "Gold nose pendant, studded with stones weighing seven rattis—Rs. 8/-" while gold nose pendant that was discovered has been described as follows: "Gold nose pendant of "Dal" design, studded with a red stone in the middle weighing about four annas." In my judgment, therefore, the ornament that was recovered on 13-8-1949 was not the article that had been lost by Rewaram in the dacoity. It is, however, interesting to note that this article was identified by some witnesses as belonging to Rewaram.

(12) The result, therefore, is that, in my judgment, there is not enough evidence against either of the two appellants to justify their conviction. I, therefore, allow the appeal, set aside their convictions and sentences. Poshaki is said to be on bail. He need not surrender to his bail. His bail bonds are cancelled. Azimullah appellant will be set at liberty forthwith unless he is wanted for some other offence.

C/D.H. Appeal allowed.

A. I. R. 1953 ALL. 528 (Vol. 40, C. N. 256)

BRIJ MOHAN LALL J.

Raghu, Applicant v. Panchaiti Adalat, Opposite Party.

Civil Misc. Writ No. 103 of 1952, D/- 4-3-53.

U. P. Panchayat Raj Act (26 of 1947), S. 64 (b) — "Value thereof".

The Panchayat Court can entertain a suit for possession of movable property and also for the price thereof. It is not necessary that the suit should be for the price of that movable property only in respect of which specific delivery could be ordered by the Panchayat Court. (Para 4)

Hriday Nath Seth, for Applicant.

JUDGMENT: This is an application under Article 226 of the Constitution in respect of a Panchayat Raj matter.

(2) It appears that two buffaloes and four bullocks owned by one Shitla Prasad died in his village which is situate within the circle of Panchayati Adalat Barchauli in the district of Jaunpur. The skins of the said animals were taken away by the Chamars of the village under a village custom. Shitla Prasad brought a suit against them in the Panchayat court alleging that although the skins could, under the said custom, be taken away by the defendants, the custom required them to pay the price thereof. The defence was that the defendant had the right to take away the skins without making any payment. The Panchas enquired into the particulars of the custom and came to the conclusion that payment had to be made. They decreed the suit brought by Shitla Prasad. A revision was preferred by the defendants, but it was rejected by the learned City Munsif of Jaunpur. The defendants have now come up to this Court.

(3) It is contended on their behalf by their learned counsel that the suit was not cognizable by the Panchayat court. Reference is made to S. 64 (b), Panchayat Raj Act (26 of 1947), which says that the jurisdiction of a Panchayati Adalat shall extend to suits "for the recovery of movable property or for the value thereof". It is argued that the word "thereof" suggests that if the plaintiff can institute a suit for the recovery of a certain movable property, he can also maintain a suit for the price thereof, but if the circumstances are such that a suit for the recovery of the specific movable property cannot be brought, no suit for its price can be entertained by the Panchayati Adalat. It is pointed out that since the defendants' right to appropriate the skins is undisputed, and since no suit for the recovery of the skins could be brought by the plaintiff, he could not institute a suit for the price of the skins also in the Panchayati Adalat.

(4) Having given my best consideration to this contention, I am of the opinion that S. 64 (b) does not admit of such a restricted interpretation. There is nothing in the language of the statute to lend support to the contention that if on account of any contract between the parties or by reason of custom or for any other reason a claim for recovery of specific movable property cannot be brought, the suit for its price is also excluded from the jurisdiction of the Panchayat court. Suppose A purchases some edible article from B on credit and promises to pay the price after a fortnight. Within this period he consumes the article. After the expiry of this period, 'B' cannot possibly bring a suit for the return of the commodity itself because it exists no more. If the argument of the learned counsel for the applicant is correct he cannot sue for its price also. This could never have been the intention of law. As I read the relevant clause I interpret it to mean that the Panchayat Court can entertain a suit for possession of movable property and also for the price thereof. It is not necessary that the suit should be for the price of that movable property only in respect of which specific delivery could be ordered by the Panchayat Court.

(5) In the circumstances, I am of the opinion that the suit was cognizable by the Panchayat court. There is no force in this petition. It is hereby rejected.

B/V.S.B. Petition rejected.

A. I. R. 1953 ALL. 529 (Vol. 40, C. N. 257)

AGARWALA AND CHATURVEDI JJ.

Subedar Dubey, Defendant-Appellant v. Madho Dubey and another, Plaintiffs-Respondents.

Second Appeal No. 929 of 1947, D/- 5-1-1953.

(a) Contract Act (1872), S. 55 — Sale of land — (Evidence Act, S. 114).

In contracts for sale of immoveable property, time is ordinarily not considered to be of the essence of the contract unless there is an agreement to the contrary. In such cases, reasonable time is to be presumed to have been intended to be fixed by the parties. The presumption cannot be said to have been rebutted where there is no specific clause suggesting that the period mentioned in agreement was intended to be of the essence of the contract. (Delay of one day held immaterial and plaintiff held entitled to have the contract performed). AIR 1915 PC 83, Relied on. (Paras 6, 8)

Anno : Contract Act S. 55 N. 5; Evi. Act, S. 114 N. 35.

(b) Debt Laws — Regulation of Agricultural Credit Act (14 of 1940).

There is nothing in the Act to prevent the vendors from applying for the extension of time fixed in the permission which was granted to them previously. Further, there is nothing in the Act to prevent the vendors from making a fresh application for permission to sell in view of the fact that the sale deed in favour of the vendees has to be declared to be void: AIR 1950 All 692, Explained. AIR 1938 All 432 and AIR 1947 All 431, Distinguished. (Para 11)

Krishna Shanker, for Appellant; Harnandan Pd. and N. P. Asthana, for Respondents.

CASES CITED :

(A) ('15) AIR 1915 PC 83: 40 Bom 289 (PC)
(B) ('50) AIR 1950 All 692
(C) ('38) AIR 1938 All 432: 1938 All LJ 569
(D) ('47) AIR 1947 All 431: 1947 All LJ 196

AGARWALA J.: This is a defendant's second appeal arising out of suit for specific performance of a contract of sale. The facts are very brief.

(2) On 30-9-1944, Narsingh Dubey and Singhasan Dubey, defendants first set and respondents in this appeal, entered into a contract of sale in respect of a fixed rate tenancy plot no. 1719 of 16 biswas area in village Manikpur in the district of Ghazipur, with Pt. Madho Dubey and Pt. Mahesh Dubey, plaintiffs-respondents. The sale deed was to be executed for a consideration of Rs. 900/- out of which Rs. 125/- were paid as earnest money. One of the terms of the agreement was that the vendors would obtain permission for sale from the Sub Divisional Officer as required by law and that within a week of their securing permission they would execute a sale deed in favour of the plaintiffs for the unpaid purchase money. It was further stipulated that in case the vendors failed to execute the sale deed & have it registered within the time fixed, the vendee would have the right to have the sale deed executed by the vendors and to have it registered according to law and that in case the vendee failed to get the sale deed effected within the stipulated time and prevaricated, they would forfeit the right to the return of the earnest money. The U. P. Agriculturist Credit Act, 1940 prohibits transfer of protected lands without the permission of the Sub Divisional Officer.

(3) The vendors obtained the necessary permission on 15-11-1944. Plaintiff No. 1 was then at Calcutta and plaintiff No. 2 who seems to have got information of the fact that the permission had been granted wired on the same date to plaintiff No. 1 for sending the balance of the purchase money. The money was remitted without delay from Calcutta by plaintiff No. 1 to plaintiff No. 2 under an insured cover on 17-11-1944. It was, however, received by plaintiff No. 2 at his village on 23-11-1944. It may be noticed that one week after the grant of the permission expired on 22-11-1944. Plaintiff No. 2 then, as shown by his statement on oath, asked the defendants vendors to execute the sale deed. But they did not agree and instead they executed the sale deed in favour of Subedar Dubey appellant and Kanhaya Lal pro forma respondent for Rs. 1200/- on 25-11-1944. Plaintiff No. 2 made an application to the Sub-Registrar on the same date asking him not to register the sale deed and asked the appellant and Kanhaya Lal not to purchase the property as it had been contracted to be sold to the plaintiffs. The protest was unheeded and the sale deed was duly registered in favour of the appellant and Kanhaya Lal respondent. The plaintiffs then brought this suit on 7-12-1944 for specific performance of their contract.

(4) The vendors did not make any appearance, but the vendees, contested the suit on the ground 'inter alia' that they were transferees for value without notice of the contract for sale and, secondly, that the plaintiffs themselves were not in a position to pay the purchase money, within one week of the permission being obtained as provided for in the agreement of sale. According to them, the period, of one week provided for in the agreement was of the essence of the contract. The trial court accepted the defence and dismissed the plaintiff's suit. The lower appellate court held against the defendants and decreed the suit.

(5) In this second appeal before us, it has been urged that time was of the essence of the contract and that the plaintiffs, not having shown their readiness to have the sale executed in their favour on payment of the balance of the purchase money and not being in a position to pay the purchase money within the stipulated period could not maintain the suit. We are of opinion that this contention has no force.

(6) It is well settled that, in contracts for sale of immoveable property, time is ordinarily not considered to be of the essence of the contract unless there is an agreement to the contrary. Time is considered to be of the essence in mercantile contracts because prices may vary from day to day, nay even from hour to hour. That is not so in the case of prices of immoveable properties. In such cases, reasonable time is to be presumed to have been intended to be fixed by the parties. In the present case, the presumption cannot be said to have been rebutted as there is no specific clause suggesting that the period of one week was intended to be of the essence of the contract.

(7) In a similar case, the Privy Council held that a period of two months stipulated in an agreement for sale was not of the essence of the contract, vide —'Jamshed Khodaram Irani v. Burjorji Dhunjibhai', AIR 1915 PC 83(A). Their

Lordships pointed out that S. 55, Contract Act, does not lay down

"any principles which differ from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time."

(8) Time not being of the essence of the contract in the present case, it was immaterial that there was delay of one day in the plaintiffs going to the vendors and requesting them to execute the sale deed in their favour. It may be noticed that as soon as the permission was obtained by the vendors, plaintiff No. 2 asked plaintiff No. 1, who was at Calcutta, to send the money immediately. Plaintiff No. 1 sent the money under an insured cover. If the place or residence of the parties had not been a village, the amount would have been received within the stipulated time. But as it was a village more than ordinary time was taken for the insured cover to reach the hands of plaintiff No. 2. As soon as the money was received by him, he asked the vendors to execute the sale deed in their favour. The plaintiffs were, therefore, not guilty of any laches. In our opinion, there was no breach of the contract on the part of the plaintiffs and they were entitled to have the contract performed according to its terms.

(9) The next point that has been raised before us by learned counsel for the appellant is that without the permission of the Sub Divisional Officer the vendors not being permitted by S. 12 of the aforesaid Act to make a voluntary alienation without the permission of the Sub Divisional Officer, the Court is powerless to order specific performance of the contract.

(10) It is further pointed out that the permission granted being for the sale to be made within fifteen days only, the permission had expired before the suit was instituted, and as such also, specific performance could not be decreed. In our opinion, this argument also has no force.

(11) Permission to sell is obtained under S. 24 of the Act. That section requires that an application for permission will be made by the proprietor, who wishes to make a permanent alienation of the whole or any part of the protected land, to the Assistant Collector in charge of the Sub-division in which his protected land or that part of it which is assessed to the largest amount of local rate, is situated. The Assistant Collector shall make such inquiry as appears necessary and shall decide the application in accordance with rules made by the Provincial Government in this behalf. An enquiry was made, and it was found that it was a case in which permission was to be granted and the permission was actually granted. In accordance with their contract the vendors were bound to execute the sale deed in favour of the plaintiffs. In executing the sale deed in favour of the appellant and Kanhaya Lal pro forma respondent, they committed a breach of the contract. The vendees took the sale as found by the court below and which finding has not been challenged before us, with notice of the contract in favour of the plaintiffs. Their sale deed is, therefore, liable to be set aside at the instance of the plaintiffs. There is nothing in the Regulation of Agricultural Credit Act to prevent the vendors from applying for the extension of time fixed in the permission which was granted to them on the 15th November 1944. Further, there is nothing in the Act to prevent the vendors from making a fresh application for permission to sell in view of the fact that the sale deed in favour of the vendees has to be declared to be void. There being no absolute prohibition from making a permanent alienation of a protected land, it is open to the court to do what justice requires, that is, if it is found that the plaintiffs are entitled in law to have the contract of sale performed, to order its performance subject to such condition as may be found necessary to impose so that the law may be complied with. The only condition, which is necessary to lay down in decreeing the plaintiffs' suit for specific performance seems to be to require that, before the sale deed is executed, permission of the Sub-Divisional Officer shall be obtained.

(12) Learned counsel for the appellant has referred us to a decision of a learned Judge of this Court in —'Raj Bahadur Singh v. Ram Sumiran Misra', AIR 1950 All 692(B). The facts of that case were similar to the facts of the present case. It was held by the learned Judge that the plaintiff could not be granted the relief of specific performance of a contract of sale of the land because in doing so the court would be acting contrary to the provisions of s. 12 of the Act. Apparently, it was not urged before the learned Judge that the decree could be made conditional upon the permission of the Sub-Divisional Officer being first obtained. So far as the judgment of the learned Judge goes, namely, that if an unconditional decree for specific performance were passed, it would be contrary to the provisions of S. 12 of the Act, we are in entire agreement. But it appears to us that if a conditional decree were to be passed, there would be nothing in it which would contravene any provision of the Act. Reference was also made to two cases referred to in the judgment of the learned Judge. These are —'Hakim Enayat Ullah v. Khalil Ullah Khan', AIR 1938 All 432(C) and —'Sri Narain Dube v. Jang Bahadur', AIR 1947 All 431(D). Both these cases are cases in which an unconditional decree for specific performance of the contract had been passed and was to be executed according to its terms. In 'Enayat Ullah's case', the execution of the decree according to its tenor would have been contrary to the provisions of S. 7, Encumbered Estates Act, which lays down that a landlord could not alienate his land without the sanction of the Collector. In 'Sri Narain Dube's case' also there was an unconditional decree for specific performance of a contract of sale and it was held that the decree could not be executed in view of s. 12, Regulation of Agricultural Credit Act. The question whether a conditional decree avoiding conflict with the provisions of the two Acts viz., the Encumbered Estates Act & the Regulation of Agricultural Credit Act, could be passed was not raised in either of the two cases. We are of opinion that these two cases do not decide the point which falls to be considered in the present case.

(13) The result, therefore, is that we allow this appeal in part, modify the decree of the court below and direct that the plaintiffs' suit for specific performance of the contract of sale be decreed subject to the condition that permission for making the transfer is given by the Sub Divisional Officer.

(14) Defendants Nos. 1 and 2, vendors, are directed to apply to the Sub Divisional Officer to grant them fresh permission for the execution of the

sale deed in favour of the plaintiffs or in the alternative to extend the period of permission which was granted by nim by his order dated 15-11-1944.

(15) Defendants Nos. 1 and 2 will make the necessary application to the Sub Divisional Officer within three months of this date. On their failure to do so, the plaintiffs will be entitled to make the necessary application to the Sub Divisional Officer on behalf of defendants Nos. 1 and 2. If the time for the execution of the sale deed is extended or a fresh permission is granted by the Sub Divisional Officer, the sale deed shall be executed by defendants Nos. 1 and 2 in favour of the plaintiffs in accordance with the terms of the contract of sale dated 30-9-1944.

(16) On failure of the defendants to execute the sale deed in favour of the plaintiffs, the sale deed shall be executed by the court on behalf of defendants Nos. 1 and 2 in favour of the plaintiffs.

(17) The declaration granted by the court below that the sale deed dated 25-11-1944 in favour of defendants Nos. 3 and 4 is null and void shall stand.

(18) The plaintiffs shall be entitled to get their costs of both the courts below from the appellant. The costs of this appeal shall be borne by the parties.

(19) If the time is not extended or a fresh permission is not granted by the Sub Divisional Officer, the plaintiffs' suit shall stand dismissed and in that event parties shall bear their own costs in all the courts.

B/H.G.P. Order accordingly.

A. I. R. 1953 ALL. 531 (Vol. 40, C. N. 258)

SAPRU AND CHATURVEDI JJ.

Firm Dewan Sugar Mills, Applicant v. The Government of the State of Uttar Pradesh and others, Opposite Party.

Civil Misc. Writ Nos. 119 and 120 of 1952, D/- 5-3-1953.

Constitution of India, Arts. 226 and 136 — Labour Appellate Tribunal deciding that there is no question of law — Writ application is not maintainable — (Labour (Appellate) Tribunal Act (1950), S. 7) — (Civil P. C. (1908), S. 9).

Before a writ of certiorari can be granted to quash the decision of an inferior Court within its jurisdiction, the applicant must show that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Once it has been established that the Court had jurisdiction but, while exercising it, made a mistake, the wronged party cannot ask the High Court to set matters right, as a Court having jurisdiction can decide rightly as also wrongly. (Para 5)

Where the question before the Labour Appellate Tribunal is not whether the strikes were legal or illegal or whether the employers had acted legally or illegally in dismissing the employees but whether the appeal preferred by the employers was a competent one; the Labour Appellate Tribunal has to decide the question, not as a collateral and extrinsic issue but as a direct and intrinsic issue, whether the appeal raised any substantial question of law or not. Its decision of this question, right or wrong, does not give the High Court writ jurisdiction under Art. 226 of the Constitution. AIR 1953 All 260; AIR 1952 SC 319, Relied on. (Para 5)

The applicants have another remedy open to them, namely, that of preferring an application for special leave to appeal against the judgment of the Labour Appellate Tribunal to the Supreme Court. (Para 7)

Anno: Civil P. C., S. 9 N. 53.

Brij Lal Gupta, for Applicant; Shanti Bhushan, for Opposite Party and Gopalji Mehrotra, for the State.

CASES CITED:

(A) ('52) 1952-2 Lab LJ 579 (Bom)
(B) ('52) AIR 1952 Mad 659: 1952-2 Mad LJ 805
(C) ('52) AIR 1952 SC 319: 1952 SCR 696 (SC)
(D) ('53) AIR 1953 All 260: 1953 All LJ 29

SAPRU, J.: These are two applications under Art. 226 of the Constitution and the applicants have claimed various reliefs which are mentioned in the applications. In writ No. 119 of 1952 the applicant is Firm Dewan Sugar Mills and in writ No. 120 of 1952 the applicant is the Dewan Sugar & General Mills Ltd. The last opposite party in writ no. 119 is the Company, whereas in writ No. 120 the last opposite-party is the Firm. The opposite-parties 6 to 20 in both the writs are the employees of the Mills which was managed until 30-6-1951 by the Firm and thereafter by the Company which is the petitioner in Writ No. 120.

(2) Between the employees and the management some differences arose so much so that the employees went on strike on 20-1-1951. The employers served four notices on them between 20-1-1951 and 23-1-1951 reminding them that the strikes were illegal and that they would be liable to dismissal if they did not stop the strike. By these notices, twenty-four hours were given to the employees to resume their duties if they wanted to continue in the service of the Company. On 24-1-1951 the services of the employees were terminated in terms of the standing order. Thereafter, the employees appear to have reconsidered the position and they called off the strike unconditionally on 27-1-1951. Subsequent to this, i.e., on the 28th January 1951, the employees were given to understand by the Company that they would be re-employed by it. There is a controversy between the employees and the Company as to whether this re-employment constituted a continuation of their old employment or was a fresh employment on a temporary basis.

(2) The sugar season came to an end about the end of April. On 24-4-1951, the employees were informed by their employers that their services would not be required thereafter as their conduct had been unsatisfactory and they had been engaged only on a temporary basis. On the service of this notice, the employees presented to the Regional Conciliation Board an application on 2-5-1951 requesting the Board to take up the matter. The intervention of the Board proved ineffective and thereafter the State Government had to refer the matter to the adjudication of Shri M. P. Vidyarthi, Regional Conciliation Officer, Meerut. This officer gave his award on 2-7-1951.

Shortly put, his conclusions were that the dismissal on 24-4-1951 of the employees by the management was unjustified and illegal. He, therefore, declared that they had not been legally dismissed and were entitled to the wages

during the period of enforced unemployment. In arriving at his findings, the adjudicator took into consideration the statement of local officials who had not been subjected to any cross-examination by the management. It is not denied that the attention of the management was not drawn to this evidence at all.

(3) On the basis of this circumstance, as also certain other circumstances, the employers went in appeal to the Labour Appellate Tribunal. This appeal was preferred by them under S. 7 of the Industrial Disputes (Appellate Tribunal) Act, 1950. The Labour Appellate Tribunal came to the conclusion that the appeal preferred by the management could not be entertained by them as no substantial question of law was raised by it. It is against that order of the Labour Appellate Tribunal that the applicants have come up in the exercise of our writ jurisdiction to this Court.

(4) The question which we have, therefore, to consider is whether the decision of the Labour Appellate Tribunal dismissing the appeal which was preferred by the employers is one against which a writ can be directed by this Court. Learned counsel for the applicants has argued that it was not within the competence of the Labour Appellate Tribunal to decide finally whether an appeal lies to it or not so as to preclude this Court from interfering with its decision, should it come to the conclusion that that decision is, in fact, erroneous. Learned counsel for the applicants contends that the point raised by the applicants raised a substantial question of law upon which the jurisdiction of the Labour Appellate Tribunal depended and that the Labour Appellate Tribunal has wrongly decided that question. Reliance has been placed by him upon a case, — 'P. S. Pandit v. Labour Appellate Tribunal of India at Bombay', 1952-2 Lab L J 579 (Bom) (A), and he has referred to the discussion of this question by Tendolkar J. at pages 581 and 582 of that Journal.

(5) Reference was also made by learned counsel for the applicants to a case — 'Rangannathan v. Madras Electric Tramways (1904) Ltd.', AIR 1952 Mad 659 (B). On the basis of that case, learned counsel has argued that the question whether there is a substantial question of law involves a collateral question and not a part of the very issue which the Labour Appellate Tribunal in this case had to enquire. It has been contended that inasmuch as S. 7, Industrial Disputes (Appellate Tribunal) Act, 1950, merely confers a conditional jurisdiction on the Tribunal, it could not by wrongly deciding the question of jurisdiction raised appropriately or deny to itself a jurisdiction which it possessed or did not possess.

We may say that we are not impressed with this argument. The law on this point has been laid down by the Supreme Court in — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi', AIR 1952 S C 319 (C). That decision is binding on this Court. The law as laid down by their Lordships of the Supreme Court is that before a writ of certiorari' can be granted to quash the decision of an inferior Court within its jurisdiction, the applicant must show that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Once it has been established that the court has jurisdiction but, while exercising it, made a mistake, the wronged party cannot ask this Court to set matters right, as a court having jurisdiction can decide rightly as also wrongly. Reliance has however been placed by learned counsel upon the following observations of the Supreme Court :

> "Like all courts of appeal exercising general jurisdiction in civil cases, the respondent has been constituted an appellate court in the words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a court of appeal has not only jurisdiction to determine the soundness of the decision of the inferior court as a court of error, but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties. Such jurisdiction is inherent in its very constitution as a court of appeal. Whether an appeal is competent, whether a party has 'locus standi' to prefer it, whether the appeal in substance is from one or another order and whether it has been preferred in proper form and within the time prescribed, are all matters for the decision of the appellate court so constituted."

Learned counsel contends that these observations were made by the Supreme Court with respect to a tribunal of the amplest power, namely, that of the Custodian General. His contention is that the powers of the Labour Appellate Tribunal are of a circumscribed nature and that these observations cannot have any application to that tribunal. We are unable to accept that argument as entirely correct. It will be noticed that Mahajan J., who delivered the judgment of the Supreme Court, specifically remarks that the question whether an appeal is competent or not is a proper matter for the decision of the Appellate Tribunal. The question before the Labour Appellate Tribunal in this case was not whether the strikes were legal or illegal or whether the employers had acted legally or illegally in dismissing the employees but whether the appeal preferred by the employers was a competent one; and for that the Labour Appellate Tribunal had to decide the question, not as a collateral and extrinsic issue but as a direct and intrinsic issue, whether the appeal raised any substantial question of law or not.

(6) In the case of —'Sundar Lal Saxena v. Hindustan Commercial Bank Ltd.', AIR 1953 All 260(D), it was held that where the jurisdiction of the court below depended, not upon some preliminary proceedings, but upon the existence of some particular fact, then by deciding that collateral fact in a wrong manner the court could not assume jurisdiction which it did not possess. The question whether any substantial question of law was raised by the appeal before it was not however a collateral matter but was one of the issues which the Labour Appellate Tribunal had to decide. For these reasons, we think that this case is covered by the authority of the judgment of the Supreme Court referred to by us, as also by the case reported in 'AIR 1953 All 260(D)'. This being our view, it is unnecessary to consider the other questions which have been raised by these writ petitions.

(7) Before we part with this case, we may point out that the applicants had another remedy open to them, namely, that of preferring an application for special leave to appeal against the judgment of the Labour Appellate Tribunal to the Supreme Court. It cannot be said that the Supreme Court's discretionary power to grant special leave cannot be regarded as an effective remedy which the petitioners could have resorted to.

(8) For the reasons given above, these applications are dismissed with costs.

A/R.G.D. Applications dismissed.

A. I. R. 1953 ALL. 533 (Vol. 40, C. N. 259)

RAGHUBAR DAYAL AND MUKERJI JJ.

Bankey Lal, Appellant v. Narendra Singh and others, Respondents.

Second Appeal No. 131 of 1948, D/- 27-2-53.

(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 7 — Section does not divest applicant of ownership of property. (Para 10)

(b) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9(4) — Scope.

Section 9(4) creates no bar or disability in respect of property to which claim could have been laid by a person under some other law. (Para 10)

(c) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 10 — Scope.

Section 10 is indicative of the desire of the Legislature to, as far as possible, bring into the scope of the Encumbered Estates Act proceedings all property which belonged to the landlord. (Para 10)

(d) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11(3) — Scope.

The Section is confined in its operation only to claims made. In the event of there being no claim made in respect of any property, the fact that certain properties are mentioned in the list of properties as the properties of the applicant does not by itself bring into being any kind of a decree of the Special Judge which has the effect of a decree of a competent Court. (Para 10)

(e) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11 — No claim made — Suit for partition — Bar of — (Hindu Law — Partition).

Where after an application under S. 4 of the Act is made by a person a son is born to him and the son brings a suit for partition after a decree is passed under S. 14 of the Act, there being no determination of the son's claim in regard to the share claimed at partition, his claim cannot be barred under S. 11. (Para 10)

(f) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 19(2) — "Found".

Unless and until there is a judicial findings by the special Judge that a particular item or items of property are liable to attachment, sale or mortgage in satisfaction of the debts of the applicant, it cannot be said that all controversy in regard to the ownership of that property or in regard to claims in respect of that property must be deemed to be at rest. (Para 10)

Brij Lal Gupta, for Appellant; H. P. Gupta, for Respondents.

MUKERJI, J.: This is a defendant's appeal arising out of a suit for partition. The appeal came up before a learned single Judge who has referred it to a Bench for decision because of the importance of the question of law that arises for determination in the case.

(2) The facts giving rise to the appeal, very briefly stated, were these. One Lachhman Singh married twice and the two wives were named Savitri and Sarwati; they are both alive. He also had a son Narendra Singh who was the plaintiff in the suit. Narendra Singh was born sometime roundabout the year 1940 — the exact year of his birth is however not given in the pleadings of the parties to this case. On the aforesaid composition of the family, Narendra Singh claimed one-fourth share in the family properties by right of his having an interest in the properties by being born into this family.

In the year 1936, Lachhman Singh made an application under S. 4 of the Encumbered Estates Act, he having been encumbered with debts and his property also having been encumbered with his private debts. The proceedings under the Encumbered Estates Act continued in accordance with the provisions of that Act and a decree under S. 14 of that Act was made by the Special Judge and subsequent to such decree being passed, the decree was transmitted to the Collector for the purposes of liquidation in accordance with the provisions of the Encumbered Estates Act.

It appears that the suit, out of which this appeal has arisen, was filed by Narendra Singh on 25-4-1944, that is to say long after the application under S. 4, Encumbered Estates Act, had been made by his father Lachhman Singh. It also appears that the suit was filed after the decree contemplated by S. 14 of the Encumbered Estates Act had been passed by the Special Judge and sent to the Collector for liquidation purposes. The case of Narendra Singh was a simple case of an after-born son claiming his share in the family property by virtue of his birth.

(3) Several defences were raised; but the most material defence was that the plaintiff could claim no partition in the present case, because the property in respect of which he sought partition had been made the subject of proceedings under the Encumbered Estates Act and had in a sense "vested" in the Collector for the purposes of liquidating the debts which had been incurred by Lachhman Singh before the birth of the plaintiff. It was further contended on behalf of the defence that the decree which had been pronounced under S. 14, Encumbered Estates Act, was a bar to the present suit.

(4) The trial court gave effect to the defence contention and dismissed the plaintiff's suit.

(5) An appeal was preferred by the plaintiff to the lower appellate court which reversed the decision of the trial court and decreed the plaintiff's suit for partition. The operative portion of the lower appellate court's decree is in these words:

"The plaintiff-appellant has a 1/4 share in the property in suit and that the plaintiff is entitled to separate possession of his share after partition of the property in suit. The house property shall be divided according to law by the Civil Court, the Munsif of Fatehbad, and the 'zemindari' property by the revenue court."

The view which the lower appellate court took was that the decree under S. 14 of the Encumbered Estates Act did not operate as a bar to the plaintiff's suit. The lower appellate court further pointed out the fact that the view of the trial court that S. 7(3), Encumbered Estates Act, had the effect of vesting the property in the Collector

was incorrect. The lower appellate court consequently felt no difficulty in decreeing the plaintiff's suit in the terms which we have quoted earlier.

(6) Defendant Banke Lal, who was a creditor of the plaintiff's father Lachhman Singh in the Encumbered Estates Act proceedings, feeling dissatisfied with the decision of the lower appellate court, has preferred this second appeal.

(7) Mr. Brij Lal Gupta, appearing on behalf of the appellant, has contended that the decision of the lower appellate court was contrary to law because the effect of the provisions of the Encumbered Estates Act was to deprive the plaintiff of the right to seek partition in respect of the properties which were the subject-matter of proceedings before the Special Judge and then before the Collector in liquidation. Mr. Gupta sought support for his contention from the provisions of Ss. 4, 7, 8, 9(4), 10 and 11(2) of the Encumbered Estates Act. He also relied on the provisions of S. 19(2) of the Act to reinforce the contention, which he mainly founded on the sections enumerated first. We have closely examined these provisions and we may at the outset state, that we shall refer to them in greater detail later, and that we are unable to accept the contention of Mr. Gupta to the effect that the proceedings initiated by Lachhman Singh under the Encumbered Estates Act defeated the right of the plaintiff to seek partition in respect of the family property to a share of which he was entitled the moment he was born.

(8) That an after-born son is entitled to claim partition from his father and other co-parceners of joint family property, is beyond controversy. What is further beyond controversy is that a father can make an alienation of family property without there being legal necessity if he is the sole surviving co-parcener at the moment of the transfer, and that an after-born son cannot challenge such an alienation. Another proposition of Hindu law which we consider it is necessary to record at this stage is that a Hindu son is liable, because of his pious obligation, to pay the debts of his father, such debts as are not tainted with immorality; and that at a partition between a father and a son or sons the debts incurred by the father before the partition have got to be taken into account at the time of the partition and unless provision is made for those debts, debts which are not tainted with immorality at the time of the partition, then such a partition is deemed not to be a 'bona fide' partition.

From the aforementioned propositions it would appear that in this case the plaintiff, who was an after-born son, had the right to seek partition of the family property; it is also clear that the partition that was to be made in this case had to take into account the debts incurred by the father before the son was born or before partition was sought by him, if those debts were not tainted with immorality. The right of the plaintiff to seek partition can only be defeated if the provisions of the Encumbered Estates Act so defeat them; otherwise there was nothing either in the facts of the case or in the Hindu law to defeat his right.

(9) We have stated earlier that we would revert to the provisions of the Encumbered Estates Act to which reference was made by learned counsel for the appellant in order to see whether or not those provisions, in effect, either directly or indirectly, barred the plaintiff's right.

(10) Section 4 of the Encumbered Estates Act under which the application was made by Lachhman Singh, has in a proviso to it the following:

> "Provided also that no application by a member of a joint Hindu family shall be entertained, unless
> (a) all the members of such family join and the fact is stated in the application, or
> (b) the applicant makes in the application an express declaration of his intention of separating from the joint family and states the names and addresses of the remaining members of the family and the share which the applicant would be entitled to get on partition of the family property:"

On the strength of this proviso, it was contended that where there were other members forming a joint Hindu family along with the applicant, then it was obligatory on the applicant to disclose the fact and either to make other members of the family co-applicants with him or to express his unqualified intention to separate from the family, thereby placing the controversy in regard to the debts of the applicant as also the properties to which the applicant could lay claim completely within the jurisdiction of the Special Judge. It was further contended that S. 7 of the Act indicated that the intention of the Act was for the Special Judge to deal with the property which the applicant alleged to be his. This is fairly clear from the words used in S. 7.

What was further contended, however, was that S. 7, in effect, divested the owner of his proprietary interest in the property which he showed as his property in the schedule attached to his application. We are unable to see such a consequence flowing from the provisions of S. 7. Section 7 undoubtedly places certain restrictions on the rights of ownership possessed by the applicant in respect of the properties which he discloses as his properties in his application under S. 4, but the section does not "divest" the applicant of the ownership of that property. Reliance was placed particularly on cl. (4) of S. 7, which is set out thus

> "Any transfer made in contravention of the provisions of this section shall be void"

to show that ownership of the applicant was divested. We are of the opinion that this clause has no such effect. In our view, this clause indicates, if anything, the fact that the entire rights which an owner possesses in property were not taken away by the section or the sub-clause. Section 8 of the Act enjoins upon the applicant to submit within a period to be fixed, full particulars regarding his public and private debts as also the nature and extent of his property, as also such property which is liable to attachment and sale under S. 60, Civil P. C.

Section 9(4) provides for an apportionment of debts and property in the case of an application by a member or certain members of a joint Hindu family. This provision, again, only indicates the desire of the Legislature to bring into liquidation such property as belongs to the landlord or such property as by investigation in those proceedings is held to belong to the applicant. This provision creates no bar or disability in respect of property to which claim could have been laid by a person under some other law.

Section 10 makes provision, in the nature of a counter-part, whereby every claimant referred to in section 9 is called upon to file a written statement of his claim and give full particulars not only of his claim but also so far as is known to him or can be ascertained by him of the nature and extent of the landlord's proprietary rights in land and the nature and extent of the landlord's property other than proprietary rights in land. This provision, again, is indicative of the desire of the Legislature to, as far as possible, bring into

the scope of the Encumbered Estates Act proceedings all property which belonged to the landlord.

Section 11 provides for the publication of a notice in the specified manner specifying the property mentioned by the applicant under S. 9 as also, the property mentioned by a claimant under S. 10. By sub-cl. (1) of S. 10 it is in effect provided that any person having any claim to the property mentioned in such notice shall within a period of three months from the date of the publication of the notice in the Official Gazette, make an application to the Special Judge stating his claim, and the Special Judge shall determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant.

There is a proviso to this which, in effect, gives the claimant, who fails to make the application within the period of three months from the date of the publication of notice in the Official Gazette, the right to make the application up to a certain stage, provided he could satisfy the Special Judge that he had sufficient cause for not making the application within the period prescribed. The Special Judge then is enjoined to determine all claims 'made' under this section before he proceeds to determine the amount due to any creditor under S. 14. This section clearly indicates that in the event of there being before the court a controversy in regard to any item of property or any items of properties, then the Special Judge has to determine that question and has got to come to a finding as to whether or not these properties belong to the applicant.

In the event of there being a decision by the Special Judge, the decision is given the force of a decree of a competent court. Sub-clause (3) of this section makes it perfectly clear to us that in the event of there being no claim made in respect of any property, the fact that certain properties are mentioned in the list of properties as the properties of the applicant does not by itself bring into being any kind of a decree of the Special Judge which has the effect of a decree of a competent court. Counsel for the appellant contended that that was so and the basis of his contention lay in the fact that the non-appearance of an objector or the non-preference of an objection had the effect of a kind of constructive 'res judicata' in regard to the matter.

We are unable to interpret the provisions of section 11 in this manner. In our judgment, if there is a determination of the rights in regard to property, then the section makes specific provision to give that adjudication the effect of a decision of a civil court of competent jurisdiction. The section is silent in regard to the effect that is to follow the absence of a claim by a person during those proceedings. The fact that the section is confined in its operation only to claims made is obvious by the use of the word 'made' in clause (3) of S. 11 itself. To hold otherwise, would be to read into the section very much more than is either expressed there or is meant by it.

In this case there was no determination of the claim of the plaintiff in regard to the share that he now claims at partition and consequently, in our judgment, his claim could not be barred by anything in S. 11, Encumbered Estates Act. Learned counsel for the appellant, lastly, relied on the provisions of S. 19 (2). The words of S. 19 (2) are these:

"The Special Judge shall inform the Collector of the nature and extent of the property mentioned in the notice under section 11 which he has found to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicant".

Learned counsel argued that once the Special Judge has informed the Collector, as he must be deemed to have done in this particular case, then all controversy in regard to the ownership of that property or in regard to claims in respect of that property must be deemed to be at rest so long as that property has not passed through the stage of attachment, sale or mortgage. in satisfaction of the debts of the applicant. This argument of learned counsel overlooks the word "found" which, in our judgment, clearly indicates that unless and until there is a finding, a judicial finding and not a finding by implication, by the Special Judge that a particular item or particular items of property are liable to attachment, sale or mortgage in satisfaction of the debts of the applicant, the bar which is sought cannot be invoked.

(11) From what we have stated earlier it appears to us that the plaintiff's right to seek partition was not in jeopardy in any sense by the father having initiated proceedings under the Encumbered Estates Act. In our judgment, the plaintiff was entitled to seek his share, — the share to which he was under the Hindu law entitled, — namely, a fourth share in the family properties. The lower appellate court has given him a decree to that effect, but the plaintiff is equally liable under the Hindu law for the debts incurred by his father prior to his birth as also prior to the date on which the plaintiff sought partition, of course such debts as were not tainted with immorality.

We, therefore, consider it proper to grant a preliminary decree for partition to the plaintiff of a fourth share in the family property. The plaintiff of course will be liable to the extent of his share in the debts incurred by the father prior to the partition. The question whether any of these debts are tainted with immorality or not, will undoubtedly be decided by proper proceedings when it is raised.

(12) In the result, we dismiss this appeal, but, with the modification that we have indicated above. Under the circumstances of this case we direct that the parties shall bear their own costs in this Court.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 ALL. 535 (Vol. 40, C. N. 260)

AGARWALA AND CHATURVEDI JJ.

Lakshmi Narain, Defendant-Appellant v. Mst. Aparna Devi, Plaintiff-Respondent.

Second Appeal No. 1072 of 1947, D/- 6-1-1953.

Stamp Act (1899), S. 35 — Suit on original consideration — (Evidence Act (1872), S. 91) — (Negotiable Instruments Act (1881), S. 4).

Promissory note under-stamped — Promissory note and transaction of loan taking place simultaneously — Promissory note held was mere collateral security — Suit on basis of original loan held maintainable — S. 91, Evidence Act, not applicable. Case law discussed. (Para 23)

Anno: Stamp Act, S. 35 N. 12; Evidence Act, S. 91 N. 9; N. I. Act, S. 4 N. 10.

N. P. Asthana and K. B. Asthana, for Appellant; Prem Narain Shukla, for Respondent.

CASES CITED:

(A) ('31) AIR 1931 All 183: 1931 All LJ 64 (FB)
(B) ('43) AIR 1943 All 220: 1943 All LJ 189 (FB)

(C) ('46) AIR 1946 All 126: 228 Ind Cas 551 (FB)
(D) ('14) 42 Ind App 142 (PC)
(E) ('18) AIR 1918 PC 146: 46 Ind App 33 (PC)
(F) ('34) AIR 1934 Rang 389: 12 Rang 500 (FB)
(G) ('28) AIR 1928 All 641: 26 All LJ 952 (FB)
(H) ('46) AIR 1946 All 150: 1945 All LJ 483
(I) ('52) AIR 1952 All 509: 1952 All LJ 168
(J) ('52) AIR 1952 All 877: 1952 All LJ 303

AGARWALA, J.: This is a defendant's second appeal arising out of a suit for recovery of money. The plaintiff-respondent claimed a sum of Rs. 1,500/- on the basis of a promissory note dated 8-9-1941 executed by the defendant-appellant in favour of the plaintiff's father, Chandra Shekhar, for a sum of Rs. 1,250/- with interest at 6 per cent per annum. In the alternative it was pleaded that the plaintiff was entitled to the decree claimed on the basis of the original loan of Rs. 1,250/- which was advanced to the defendant-appellant before the promissory note was executed by the defendant for the amount of the loan. It was admitted in the plaint that the promissory note bore a stamp of one anna and was, therefore, under-stamped. The receipt accompanying the promissory note was, however, duly stamped.

(2) In defence, the defendant admitted that the sum of Rs. 1,250/- was borrowed by him from the plaintiff's father but it was pleaded that the promissory note was executed simultaneously with the advance of the loan and the loan having been made on the basis of the promissory note which embodied all the terms of the contract of loan and which was not admissible in evidence, the suit was not maintainable on the basis of the original loan. The trial Court dismissed the suit on the ground that the transaction of loan was simultaneously made with the execution of the promissory note and that all the terms of the transaction of loan were embodied in the promissory note, with the result that the terms of the contract of loan could only be proved by the production of the promissory note, which could not be done because it was insufficiently stamped. The lower appellate Court, however, took a contrary view. It held that although the transaction of the loan and the execution of the promissory note took place simultaneously nevertheless, when the promissory note could not be relied upon because it was insufficiently stamped, it was a mere collateral security and the plaintiff could sue on the basis of the original loan. The lower appellate Court, therefore, decreed the suit.

Against this decree the defendant has appealed to this Court and the sole question for determination is whether the plaintiff-respondent is entitled to sue on the basis of the original loan when the contract of loan was simultaneously made with the execution of the promissory note and the loan was given on the basis of the promissory note which was intended to be by way of a collateral security. The promissory note was in the following terms:

> "We Lakshmi Narain, Rama Shankar, and Kundan Lal Avasthi having borrowed Rs. 1,250/- from Chandra Shekhar Vaid Aganhotri for the purpose of depositing the pre-emption money, agree that we shall, on demand, pay the said amount with interest at the rate of 8 per cent. per annum to the said creditor. Therefore this promissory note has been executed, so that it may remain as 'sanad' (evidence) and may be of use when needed.
>
> Dated: 8th September, 1941."

(3) On the point under consideration there has been considerable divergence of judicial opinion. In —'Nazir Khan v. Ram Mohan', AIR 1931 All 183 (FB) (A), a suit was brought for the recovery of a loan on the allegation that the loan had been advanced on foot of a promissory note. The claim was based on the original contract of loan because the promissory note being insufficiently stamped could not be admitted in evidence. In defence the taking of the loan as alleged by the plaintiff was denied. It was pleaded that a sum of Rs. 50/- alone was borrowed which had been repaid. The Full Bench held that: (a) where there was a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note was given as a collateral security, the creditor could sue for the recovery of money on the original cause of action even if the promissory note was not, for any reason, admissible in evidence; (b) but where the making and handing over of the promissory note and the advance of the loan were part and parcel of the same transaction, this could not be done.

(4) The Full Bench made a distinction between a case where a transaction of loan was antecedent to the execution of the promissory note and a case in which the two transactions were simultaneous.

(5) In a subsequent Full Bench case in — 'Sheo Nath Prasad v. Sarjoo Nonia', AIR 1943 All 220 (FB) (B) it was held that it was immaterial that the promissory note and the loan of money were part and parcel of the same transaction and were made simultaneously, and that even in such a case a promissory note ordinarily and presumably is given as a conditional payment or as a collateral security and the advance of the loan was a distinct and separate cause of action by itself which could be sued upon and proved by other evidence, even though the promissory note was not admissible in evidence. The facts of the case were that a loan was alleged to have been advanced simultaneously with the execution of the promissory note. The promissory note was inadmissible in evidence because of insufficiency of stamp. The defendant denied the taking of the loan. Two leading judgments were delivered, one by Dar, J. and the other by Mathur, J. Dar, J. held:

(a) When a promissory note is given in consideration of an advance of a loan, the presumption is that the promissory note is given in conditional payment of, or as collateral security for, the loan;

(b) It makes no difference if in relation to a loan of money a promissory note is given subsequently to the advance of the loan or contemporaneously with the loan as a part of the loan transaction with the avowed object of creating evidence of the loan;

(c) If the promissory note is not admissible because of insufficiency of stamp, the loan can be proved by other evidence and S. 91 does not operate as a bar to such proof.

(6) The learned Judge also expressed his opinion that in cases in which a promissory note is given in consideration of a loan, the promissory note does not express all the terms of the loan.

(7) Mathur J. agreed with the conclusions of Dar, J. but rested his decision on the fact that usually the promissory note does not contain all the terms of the contract of loan.

(8) Collister and Bajpai, JJ. agreed generally with Dar and Mathur, JJ.

(9) The matter again came up for decision in another Full Bench, — 'Major Mistri v. Binda Devi', AIR 1946 All 126 (FB) (C). In that case the plaintiff lent a sum of four hundred rupees to the defendant. Simultaneously with the loan, the

defendant gave the plaintiff an ordinary promissory note. The plaintiff did not exhibit the promissory note in the plaint, because it was insufficiently stamped. The defendant admitted that he borrowed the sum of four hundred rupees from the plaintiff but he urged that the promissory note not being admissible in evidence, the suit was not maintainable. It was observed by the Full Bench that

"in a case of simultaneous loan and promissory note, where the plaintiff's cause of action on the promissory note fails, his cause of action in debt, in the absence of special circumstances, survives."

(10) It may be noted that in the last Full Bench case, the Full Bench apparently did not consider that it would make any difference whether the promissory note contained all the terms of the loan or not. The Full Bench based its decision upon the view that the advance of the loan was a separate cause of action from the execution of the promissory note. It did not base its decision upon the fact whether the promissory note contained all the terms of the contract of loan or not. This decision is fully in keeping with the two pronouncements of the Privy Council which have been brought to our notice.

(11) In — 'Payana Reena Saminathan v. Pana Loana Palaniappa', 41 Ind App 142 (PC) (D), a promissory note was given in lieu of a liability which was created contemporaneously by an award and the action on the promissory note failed on the ground of material alteration in the promissory note. In a second suit brought for the recovery of money due on the award it was held that the award could be proved.

(12) In — 'Sadasukh Janki Das v. Kishen Pershad', AIR 1918 PC 146 (E), a suit on the basis of hundis failed because their due execution could not be proved. Lord Buckmaster, however, in delivering the opinion of the Board, observed:

"It would, of course, have been open to the plaintiffs had they thought fit to have framed their case in an alternative form, and to have sued both on the hundis and alternatively upon the consideration."

(13) It is true that when the loan is advanced on the basis of a promissory note which is intended to be merely by way of conditional payment or as collateral security, all the terms of the contract are not 'usually' contained in the promissory note.

(14) The terms of the contract in such a case would be as follows:

(a) A certain sum of money is advanced by A to B.
(b) The advance is by way of loan.
(c) B promises to pay to A an equivalent sum of money with or without interest.
(d) The amount is payable on demand.
(e) The promissory note is to be given as a conditional payment or by way of collateral security only for the advance of the loan.

(15) Now promissory note is an instrument in writing containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to or to the order of, a certain person, or to the bearer of the instrument (S. 4, Negotiable Instruments Act). A promissory note, therefore, need only contain terms (c) and (d) mentioned above. It need not contain any other term. It may contain terms (a) and (b) also as in the case of the pronote in dispute but it seldom, if ever, embodies the term (e) mentioned above. This was pointed out by Page, C. J. in the Full Bench case of — 'Chit Maung v. Roshan N. M. A. Kareem Oamer & Co.', AIR 1934 Rang 389 (FB) (F);

"Now, in my experience it rarely, if ever, happens that the whole of the terms of the agreement under which a loan is made are embodied in a promissory note or other negotiable instrument given to the lender by the borrower except in cases in which the parties contract that the negotiable instrument shall itself be the consideration for the loan, and the lender is content to accept the negotiable instrument in satisfaction of the debt whether or not negotiable instrument is dishonoured at maturity or is otherwise unenforceable. In cases in which the parties agree that the negotiable instrument shall be taken as conditional payment only and not in accord and satisfaction of the original debt, I have myself never known or heard of an instance in which 'that term' of the agreement has been embodied in the negotiable instrument."

(16) But with all respect one may be permitted to ask as to what would happen if the term that the promissory note is to be given as a conditional payment or by way of collateral security only were also to be recorded in the promissory note. Would the loan be provable by evidence other than by the production of the promissory note or not? It would be anomalous indeed if the loan can be proved when the promissory note does not expressly say that it was executed by way of conditional payment or as collateral security merely and not in absolute discharge of the loan, but the loan cannot be proved when express mention is made of the aforesaid nature of the promissory note. Whether the promissory note recites this fact or not, the presumption of law, in the absence of contrary evidence, is that a promissory note is by way of conditional payment or as collateral security merely and not in absolute discharge of the loan. Where this term is not mentioned in the promissory note, it can be implied. The mention or non-mention of the said term in the promissory note should not, therefore, make any difference.

(17) We think that the true reason why a contract of loan is provable by evidence other than that of the promissory note when the promissory note is given by way of conditional security or as collateral security merely for the loan, is not that all the terms of the contract of loan are not embodied in the promissory note and consequently S. 91, Evidence Act, is not applicable. The real reason is that S. 91 has no application to such a case at all and it is immaterial whether all the terms of the contract of loan are embodied in the promissory note or not.

(18) Section 91, Evidence Act, runs as follows:

"When the terms of contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or to such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

(19) The important words in the section are "reduced to the form of". The word 'reduced' is used generally in two senses; (1) putting some person or thing to an inferior rank or position and (2) changing the form or order of a thing.

Obviously the word 'reduced' in S. 91 is not used in the first sense. It is used in the second sense. When we speak of reducing a thing to another form or order what we mean is that the previous form or order of the thing has been changed into that other form or order. For instance, we speak of reducing grain into flour or reducing a thing into pulp. When a certain thing is reduced to another form or shape or order the previous form of the thing merges into the new form or order: it does not still continue to exist separately.

To our minds S. 91 has reference to a case in which the document in which the terms of an oral agreement are embodied, is intended to replace the original contract. It is only then that it can be said that the original contract has been 'reduced' to the form of a document. Section 91 has no application when such is not the intention. It has no application when the intention is that the original cause of action should survive and subsist even though its terms have been embodied in a document. The expression "reduced to the form of" is not used in the sense of merely "mentioned or noted in". The mere fact, therefore, that certain terms of an oral contract are mentioned or contained in a document does not always mean that the oral contract cannot be proved otherwise than by the document itself. It will depend upon what the intention of the parties was in mentioning the terms of an oral agreement in a document. If the intention was that the document alone hence forward should govern the relations between the parties, the oral contract has merged in the document and has been superseded by it and obviously the document alone is to be looked into and oral evidence of the original transaction cannot be adduced. But if such was not the intention S. 91 should not and does not debar the proof of the original contract. In our opinion S. 91 is not a technical rule but embodies a rule of intention.

Whenever the terms of the contract are merely mentioned in a document for a mere collateral purpose and the document is not intended to be a substitute for or in replacement of the original contract, the document is not one to which the provisions of S. 91 apply. For instance, where the terms of an oral family settlement are embodied in an application made to a revenue Court but which application is not registered and is merely intended to give information to the Court that the parties had arrived at a settlement, the application is not a document contemplated by S. 91, Evidence Act, vide — 'Ram Gopal v. Tulshi Ram', AIR 1928 All 641 (FB) (G).

(20) A promissory note is, normally, by its very nature a document which is not intended to take the place of an oral contract of loan, but is a document which is merely by way of collateral security or as conditional payment. The loan still subsists, unless there is a contract to the contrary. On the other hand when a bond is taken for a loan, the loan usually merges in the bond and ceases to exist independently of it.

(21) In Chitty on Contracts (16th Edition) pp. 652 and 653 it is stated:

> "If the loan is secured by a covenant in a deed, the speciality merges the simple contract, and the lender can only sue on the speciality covenant; if there is a promissory note he will during the currency of the note be estopped from suing otherwise than in accordance with its terms; but after it has become due, he can sue on the note, and add a claim for money lent, and the promissory note may be used as evidence in support of money lent."

(22) In Halsbury's Laws of England (Hailsham Edition) Vol. VII at page 242, it is stated:

> "If a bill of exchange or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended till the maturity of the instrument in the hands of the creditor. If the security is paid when it becomes due, this is equivalent to payment of the original debt, & if it is paid in part, the original debt is discharged 'pro tanto'. If the instrument is dishonoured, payment of the original debt may be enforced as if no security had been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor's remedy continues to be suspended."

(23) It is clear that a promissory note or other negotiable instrument may be taken in supersession of or, absolute discharge of, an oral debt. But in the absence of the evidence to the contrary, the presumption is that it is as a conditional payment or as a collateral security only. Where it is in absolute payment or discharge of oral debt, the document alone can be used to prove the terms of the debt because in that case the debt has been "reduced to the form of a document". But where the document is not taken in absolute discharge or in satisfaction of the debt, the debt has not been "reduced" to the form of a document and therefore S. 91 is no bar to the proof of the debt otherwise than by production of the document. It is conceded on all hands that where a promissory note is taken in lieu of a pre-existing debt, it is usually taken merely by way of collateral security, and in such a case where the promissory note cannot be produced, the original oral contract of loan may be proved by other evidence. This was so held even in — 'AIR 1931 All 183 (F. B.) (A)'. But since then it has been held that it makes no difference whether the contract of loan is simultaneously made with the execution of the promissory note or precedes it.

(24) Learned counsel for the appellant relied on three decisions of this court — 'Râm Nath v. Bhagwati Prasad', AIR 1946 All 150 (H), — 'Kanhai Lal v. Brij Nandan', AIR 1952 All 509 (I), and — Lila Singh v. Chhajju Singh', AIR 1952 All 877 (J).

(25) In 'Ram Nath's case, (H)', the suit was for recovery of a sum of money on the allegation that the defendant had borrowed the principal amount on the basis of a promissory note from the predecessor-in-interest of the plaintiff and that the promissory note had been assigned by the holder thereof in favour of the plaintiff. It was held that since the promissory note contained all the terms of the loan, the plaintiff was unable to prove the original loan when the promissory note could not be produced in evidence being insufficiently stamped. This decision was given before the Full Bench decision reported in — 'AIR 1946 All 126 (C)', came into existence and must be held to have been overruled by it.

(26) In — 'AIR 1952 All 509 (I)', Dayal, J. followed 'Ram Nath's case (H)', and no reference was made at all to 'Major Mistri's Full Bench case, (C)'. In — 'AIR 1952 All 877 (J)', the plaintiff sued on the basis of a loan. The defendant denied the taking of the loan. It was found that a promissory note was also executed simultaneously with the loan but that it was insufficiently stamped. It was observed that since the promissory note contained an unconditional undertaking to pay the amount, this undertaking could not be

proved by oral evidence because of the bar of S. 91, Evidence Act. With great respect we find ourselves unable to agree with this dictum as the unconditional undertaking to pay the amount is merely one of the terms of the contract of loan and S. 91 admittedly has no application when all the terms of the contract are not reduced to the form of a document. This decision in the aforesaid case is directly in conflict with the ruling of the Full Bench reported in — 'Sheo Nath Prasad v. Sarjoo Nonia', (B) (ubi supra) which does not seem to have been cited. 'Major Mistri's Full Bench case, (C)', (ubi supra) was distinguished on the ground that in that case the taking of the loan was admitted.

Assuming that the Full Bench decision was not binding because of this distinction, the 'ratio decidendi' of the Full Bench case was not based upon the circumstance that the taking of the loan was admitted. It was based on a general ground, namely that the taking of the loan and giving of the promissory note were two different causes of action and the admissibility of the promissory note merely disabled the plaintiff from suing upon the promissory note, but did not prevent him from suing upon the separate and distinct cause of action on the advance of the loan.

(27) We think that when a promissory note is not taken in discharge of an oral contract of loan but is taken only by way of conditional payment or collateral security, as it will be presumed to have been so taken unless there is a contract to the contrary, S. 91 has no application to the case and the terms of the original contract of loan can be proved if the promissory note is not admissible in evidence or for any other reason cannot be proved. The facts that the promissory note was executed simultaneously with the advance of the loan or that the loan was advanced on the basis of the promissory note or that the promissory note contained all the terms of the contract of loan are all immaterial, provided only that the promissory note is not in absolute discharge of the original contract of loan.

(28) A promissory note or other negotiable instrument is taken in discharge of a loan only when the contract is that the debtor will not be liable if the promissory note or other negotiable instrument could not be enforced. It is to such cases that illustration (b) to S. 91 applies.

(29) There is no force in the appeal.

(30) There is a cross-objection with regard to costs. The lower Court did not award costs to the plaintiff. We are unable to say that the lower Court did not exercise its discretion properly. The cross-objection is dismissed.

(31) In the result we dismiss the appeal with costs. But in the circumstances of the case, we make no order as to costs of this appeal.

B/D.H. Appeal dismissed.

A. I. R. 1953 ALL. 539 (Vol. 40, C. N. 261)
(LUCKNOW BENCH)
MUKERJI J.

S. Gurnam Singh, Applicant v. State through Municipal Board, Rae Bareli, Complainant-Opposite Party.

Criminal Revn. Nos. 174 to 176 of 1952, D/- 29-1-1953.

Municipalities — U. P. Municipalities Act (2 of 1916), S. 155 — Circumstantial evidence pointing to only conclusion that it was accused only to whose interest it was to introduce goods within municipal limits without payment of octroi duty — Accused held liable under S. 155 — (Evidence Act (1872), S. 105). AIR 1936 All 88, Disting. (Para 4)

Anno: Evidence Act, S. 105 N. 2.

J. N. Tandon, for Applicant; R. B. Bisaria, for Opposite Party.

CASES CITED:
(A) ('36) AIR 1936 All 88: 37 Cri LJ 358
(B) ('44) AIR 1944 Oudh 210: 45 Cri LJ 466

ORDER: These are three connected applications in revision by S. Gurnam Singh who has been convicted in three cases under S. 155, Municipalities Act and sentenced to pay a fine of Rs. 35/- each in two cases and a sum of Rs. 30/- in another case.

(2) The allegation of the Municipal Board was that Gurnam Singh owned a truck which bore registered No. USU 166 and that on this truck Gurnam Singh brought into the Municipal limits of Rae Bareli old furniture and ballies which were liable to octroi duty on three different dates, namely, 12th May, 13th May and 22nd May, 1951, without paying the necessary duty. The case of the Municipal Board further was that the driver of the truck was attempted to be stopped at the octroi barrier for the collection of duty but he told the person in charge that the necessary duty would be paid by Gurnam Singh, later, and on this assurance the person in charge of the octroi barrier let the truck with the goods pass.

(3) The defence of Gurnam Singh was that he did not bring into the Municipal limits goods chargeable with octroi duty on the dates on which he was alleged to have brought them. The defence version was disbelieved by both the Courts below who found that the truck did bring on the three dates articles belonging to Gurnam Singh from Fursatganj Aerodrome where Gurnam Singh had admittedly purchased a large stock of old furniture and ballies.

(4) Learned counsel appearing for Gurnam Singh has argued these revisions mainly on the question of law. His submission was that there being no evidence on the record to indicate either that Gurnam Singh brought the goods within the municipal limits or in any manner aided or abetted their entry into the municipal limits, he could not be convicted under the provisions of S. 155, Municipalities Act. Reliance was placed by learned Counsel on the decision of — 'Emperor v. Ram Narain', AIR 1936 All 88 (A). In this case Niamatullah J. held that the words of S. 155 were not comprehensive enough to justify the conviction of the proprietor of a firm to which dutiable articles are consigned unless it is shown by evidence that the proprietor of the firm himself introduced or did some act amounting to abetment of introduction within the limits of the Municipality goods on which duty should have been paid.

It was on the strength of this observation that learned Counsel submitted that in the case before me there was no such evidence and therefore he claimed an acquittal. In the cases with which I have to deal there is in my judgment circumstantial evidence which points to one and only one conclusion, namely that it was Gurnam Singh and no one else to whose interest it was to introduce the goods into the municipal limits of Rae Bareli without payment of octroi duty. This becomes clear from the fact that the truck on which the goods were being carried belonged to Gurnam Singh; the driver who was driving the truck was in the

employ of Gurnam Singh: the goods which were consigned were of the same description as the goods which Gurnam Singh admittedly had purchased at a sale sometime back: it was clear from the evidence that Gurnam Singh had been "introducing" or bringing into the municipal limits similar goods from Fursatganj Aerodrome. From the aforementioned circumstances the conclusion to my mind is irresistible that it was Gurnam Singh who was primarily instrumental in getting the goods into the municipal limits. The fact that octroi was not paid is admitted.

In similar circumstances a Bench of the Oudh Chief Court held that the owner, although not actually transporting goods himself, can be made liable under the provisions of S. 155, Municipalities Act. This decision is reported in — 'Emperor v. Gopal Krishna', AIR 1944 Oudh 210 (B). At page 212 it was pointed out that a proprietor could be convicted in a case in which the circumstances showed that he must of necessity have taken part in evading payment of duty through the instrumentality of his servants or labourers. The decision in — 'Emperor v. Ram Narain', (A) by Niamatullah J. was also noticed by the Bench of the Oudh Chief Court and their Lordships pointed out the distinction that existed between the case which was before Niamatullah J. and the case with which they were concerned. In my judgment the decision in — 'Emperor v. Gopal Krishna', (B) by the Chief Court applies more appropriately to the cases before me and I am in respectful agreement with the views expressed by the learned Judges in that case.

(5) In the result I am of the opinion that there is no substance in either of these three revisions and I accordingly dismiss them.

C/V.R.B. Revisions dismissed.

A. I. R. 1953 ALL. 540 (Vol. 40, C. N. 262)
(LUCKNOW BENCH)
P. L. BHARGAVA J.

Jian and others, Applicants v. Sudhanshu Kumar, Complainant-Opposite Party.

Criminal Revn. No. 320 of 1951, D/- 20-11-52.

Criminal P. C. (1898), S. 145 (5) — Finding about existence of dispute.

Where the Magistrate decides the question of possession under S. 145 (4), it is not necessary for him at that stage to consider the question or to record a finding about the existence of any dispute likely to cause a breach of the peace unless it is asserted or attempted to be proved by any party or any person interested that no such dispute existed. (Para 5)

Anno: Cri. P. C., S. 145, N. 49.

S. M. Yusuf, for Anwarul Hasan, for Applicants; Ram Asrey Misra, for Opposite Party.

ORDER: This is an application in revision. It arises out of proceedings under S. 145, Cr. P. C. The proceedings were initiated by Sudanshu Kumar against Jian and others, who have filed this application before me. The complainant alleged that he was in possession of a plot of land No. 140/1, situate in village Dirwa, police station Itaunja, district Lucknow, and the opposite parties were attempting to dispossess him from the said plot.

(2) The trial Court found that Sudanshu Kumar was in possession of the plot in dispute and directed that he should be put in possession thereof. This order was not properly worded. Having found that Sudanshu Kumar was in possession, the Magistrate should have directed that he should continue in possession of the plot in dispute until eviction therefrom in due course of law and all disturbance of possession should have been forbidden until such eviction.

(3) The matter was taken in revision to the Court of Session and the learned Sessions Judge accepted the finding of the trial Court that Sudanshu Kumar was in possession of the plot in dispute. Another question which was raised before the learned Sessions Judge was that there was no proper preliminary order under cl. (1) of S. 145, Criminal P. C. That objection was also overruled.

(4) Jian and others have now come to this Court in revision and it has been argued on their behalf that there was no definite finding by the Magistrate about the existence of any apprehension of a breach of the peace and that the Magistrate should have recorded a finding to that effect before making the final order in the case. Before assuming jurisdiction under S. 145, Criminal P. C., a Magistrate ought to be satisfied from a police report or other information that a dispute likely to cause a breach of the peace existed concerning any land etc., and after he was so satisfied he had to make a preliminary order under cl. (1) of S. 145, Criminal P. C. It appears from the record that there was a report of the station officer of police station Itaunja showing that there was an apprehension of a breach of the peace over the possession of plot No. 140/1 and its crop between two parties. On the basis of that police report the Magistrate had jurisdiction to initiate proceedings under S. 145 and to make a preliminary order under cl. (1) thereof. This he had done; and I can find nothing wrong with the order which had been made.

(5) After the preliminary order under cl. (1) of S. 145, Criminal P. C. had been made, the Magistrate had to call upon the parties to file written statements of their respective claims as regards the fact of actual possession of the subject of the dispute and thereafter the question of possession had to be investigated in the manner provided in cl. (4) of S. 145 of the Code. That clause provides that the Magistrate shall without reference of the merits or the claim of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence as he thinks necessary and if possible decide whether any and which of the parties was on the date of the order aforementioned in such possession of the subject.

All this the Magistrate has done and determined that Sudanshu Kumar, who had moved the Court for proceedings under S. 145, Cr. P. C., was actually in possession of the plot in dispute. It was not necessary for the Magistrate to consider the question or to record a finding about the existence of any dispute likely to cause a breach of the peace at that stage. That would have been necessary if any party who had been called upon to appear before the Magistrate or any other person interested was able to show that no such dispute as aforesaid existed. There is nothing on the record to show that at any subsequent stage the present applicants made any such assertion or attempted to prove that there was no longer any dispute likely to cause a breach of the peace. That being so, it was not at all necessary for the Magistrate to have recorded any finding to the effect that there was a dispute likely to cause a

breach of the peace before making the final order in the case.

(6) I can find nothing wrong with the order passed by the trial Court except that it should have been worded in terms of cl. (6) of S. 145, Criminal P. C., that is to say, it should have been declared that Sudanshu Kumar was entitled to retain possession over the land in dispute until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction. As there was nothing on the record to show that Sudanshu Kumar had actually been dispossessed no order was necessary for the restoration of his possession.

(7) I, therefore, reject this revision but make an order that Sudanshu Kumar shall be entitled to retain possession over the plot in dispute until evicted therefrom in due course of law and the present applicants will not be entitled to disturb his possession until such eviction.

B/V.R.B. Revision dismissed.

A. I. R. 1953 ALL. 541 (Vol. 40, C. N. 263)
(LUCKNOW BENCH)

MALIK C. J.

Nageshar Tewari, Plaintiff-Appellant v. Dwarka Prasad and others, Defendants-Respondents.

Second Appeal No. 413 of 1945, D/- 18-12-52.

(a) Limitation Act (1908), Arts. 142 and 144 — Property X included in suit for partition — Decree for share — Property X escaping actual partition with result that in final decree no mention of property X made—Other co-sharers in possession of property X before suit, continuing in possession — Second suit for partition of property X held did not lie — Other co-sharer held to be in adverse possession. **(Para 4)**

Anno: Lim. Act, Arts. 142 and 144 N. 38.

(b) Civil P. C. (1908), S. 100 — Question of fact — That property is not joint family property is a finding of fact. **(Para 5)**

Anno: C.P.C., Ss. 100-101 N. 37.

(c) Civil P. C. (1908), O. 2, R. 2 — Suit for partition of joint family property — Cause of action is one and same — Every item of property must be included. **(Para 7)**

Anno: Civil P. C., O. 2, R. 2 N. 17.

(d) Civil P. C. (1908), O. 2, R. 2 — Relinquishment or omission to sue for any portion of claims, includes accidental or involuntary omission, as well as acts of deliberate relinquishments. 1944 Oudh WN 23 and 11 Moo Ind App 551 (PC), Rel. on. **(Para 8)**

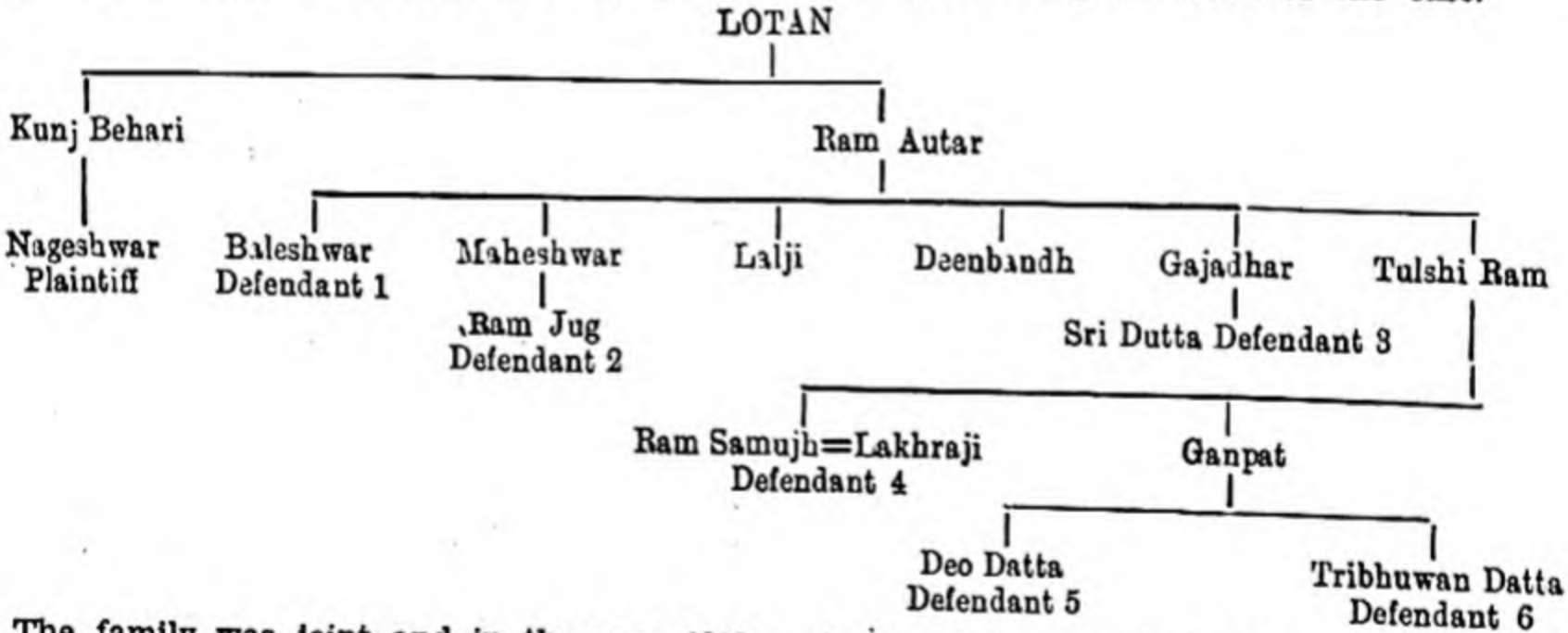
Anno: C.P.C., O. 2, R. 2 N. 10, 12.

S. C. Das, for Appellant; A. N. Shukla, for Respondents.

CASES CITED:

(A) ('12) 17 Cal WN 521: 16 Ind Cas 383
(B) ('24) AIR 1924 All 902: 46 All 822
(C) ('31) AIR 1931 Bom 114: 129 Ind Cas 737
(D) ('36) AIR 1936 Mad 699: 164 Ind Cas 717
(E) ('10) 7 Ind Cas 289: 32 All 625
(F) ('44) 1944 Oudh WN 23
(G) ('66-67) 8 WR 3: 11 Moo Ind App 551 (PC)

JUDGMENT: This is a plaintiff's suit (appeal?) against a decision of the lower Court dismissing the plaintiff's suit for partition of four plots in which the plaintiff claimed that he had underproprietary rights. The plots in dispute are Nos. 725, 730, 739 and 856. A small pedigree will help in understanding the facts of the case.



(2) The family was joint and in the year 1913 Kunj Behari filed a suit No. 16 of 1913 against the sons & grandsons of Ram Autar, Ram Autar having died, for a partition. The plaintiff alleged that he formed a joint Hindu family with the defendants and the properties in suit were joint family properties. The suit was decreed on 28-4-1913, and the plaintiff was given a decree for partition of a one-half share in the properties specified in the first list. It may be mentioned that the contesting defendants had denied that the family was joint and had pleaded that Ram Autar had separated and that they were in adverse possession of the properties in the first list.

(3) Plot No. 856 was included in the first list and the plaintiff was given a decree for a half share in the said properties. The other items in that list were partitioned but somehow this plot was left out with the result that in the final decree for partition plot No. 856 was not mentioned at all and it was not divided. The plaintiff never got the decree amended nor did he ever get possession of the plot. On the question of possession learned Munsif held as follows:

"The plaintiff has utterly failed to prove possession within limitation."

Both the Courts, however, by reason of the fact that the plaintiff was a co-sharer, expressed the opinion that the defendants had to prove ouster and, in the absence of proof of ouster, adverse possession was not established even though they may have remained in possession of the plot for a long time. The plaintiff's claim with respect to this plot was, however, dismissed by reason of the provisions of S. 47, Civil P. C.

(4) Learned counsel has urged that the plaintiff had a recurring cause of action for partition and that the mere fact that his client had not taken advantage of the previous partition decree did not debar him from filing a fresh suit for partition.

If the plaintiff's title to the property had been recognised and he had been in actual possession of the plot he might have had a recurring cause of action, but his suit for partition in 1913 was based on title and he got a decree. On the same cause of action and on the basis of the same title he cannot now bring a separate suit. I am not inclined to agree with the lower Courts that in the circumstances of the case set out by them in their judgments the defendants could not be deemed to have prescribed a title as against the plaintiff by lapse of time. Even in the suit of 1913 the defendants had claimed that they were in adverse possession of the property. Their plea no doubt failed and the suit was decreed, but even after the decree they remained in possession and they have been in possession from 1913 right upto the date when the suit was filed in 1945. In my view the plaintiff had no right to bring a second suit and his claim in respect of this plot was rightly dismissed.

(5) As regards plot No. 739, the plaintiff claimed that this was joint family property as it had been purchased by Ram Autar on behalf of the joint family under a sale deed Ex. A1, dated 6-1-1883. The lower Courts have recorded a finding that this plot is not included in the sale deed and that the plaintiff had failed to prove that it was joint family property. This is a finding of fact. The plaintiff's claim with respect to this plot must, therefore, also fail.

(6) As regards the two plots Nos. 725 and 730, the plaintiff's suit had been dismissed by reason of the provisions of O. 2, R. 2, Civil P. C. Learned counsel has urged that the plaintiff was entitled to a partial partition and that the mere fact that he had left out some properties in the previous claim his right to a share therein and a right to bring a second suit for partition was not barred. His further contention is that O. 2, R. 2, Civil P. C., only applies to a case of deliberate omission & not to a case of an accidental mistake. Reliance is placed on a decision of the Calcutta High Court in — 'Mansaram Chakravarti v. Ganesh Chakravarti', 16 Ind Cas 383 (Cal)(A). In that case a suit for partition of properties was filed on behalf of the plaintiff and the suit was decreed. Certain plots were not included in the previous suit for partition and in respect of those plots a second suit was filed. The question formulated by the learned Judges, Sir Ashutosh Mookerjee and Mr. J. Beachcroft, was as follows:

> "The question, therefore, arises, whether one of the two tenants-in-common, who has sued for partition of a part of the properties jointly held by them, is at liberty to bring a suit for partition of the remainder of the properties."

It may be open to tenants-in-common to have each item of property partitioned at their choice. The point has not arisen in this case and I need not therefore express any opinion.

(7) Learned counsel has, however, relied on certain observations in the body of the judgment to the effect that when a plaintiff sues for partition of a part of the joint property it is open to the defendant to take exception to the scope of the suit and to insist upon the inclusion of all properties jointly owned by the parties, and that if he fails to take exception to the scope of the suit, the inference is legitimate that the properties not included are by consent of parties left joint. With great respect to the learned Judges I am not inclined to agree with the view expressed by them. It may as well be assumed that the plaintiff having omitted to include a certain item of property in his claim he was not claiming that that property was joint family property and as the defendants were also of the same view that it was not joint family property they did not raise the plea that the suit was a suit for partial partition and must fail.

In case of a tenant-in-common it may not be possible to say that the cause of action for partition of every item of the property arises at the same time but in a suit where a member of a joint Hindu family to break up the joint status wants the joint family property to be divided the cause of action for partition is one and the same and he must, therefore, include every item of the property in his claim. No case has been cited at the Bar but some assistance may be drawn from a decision of this Court in — 'Darbari Lal v. Gobind Saran', AIR 1924 All 902 (B), where it was held that on the death of a Hindu widow if a reversioner challenges the alienation made by her & claims possession of the property transferred by her the cause of action is the death of the widow and only one suit is maintainable for recovery of the entire property, though the widow might have transferred them under various documents. To the same effect is the decision of the Bombay High Court in — 'Anant Subrao v. Mahableshwar Bhat Gurunath Bhat', AIR 1931 Bom 114 at P. 116 (C). A claim for partition in this suit arose by reason of Ram Autar's desire to break up the joint status and to get his half share in the property. It cannot be said that in such a suit there was a separate cause of action for each item of joint family property.

(8) Coming to the next question whether a suit would be barred under O. 2, R. 2, Civil P. C., if the plaintiff had made accidental omission. A large number of cases have been cited on the point. It is not necessary to discuss them all. In the case before me the plaintiff had not pleaded that he did not know that the plots that he was now claiming were joint family property. His case was that by accident these plots were left out in Kunj Behari's suit in the year 1913. The language of O. 2, R. 2, is as follows:

> "Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of this claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

There is some divergence of opinion on the point whether the sub-rule would apply to a case where a plaintiff had no knowledge of the facts. It has been held in some cases that where the plaintiff did not know the facts and was, therefore, not in a position to put forward the claim it could not be said that he had omitted to sue in respect of any portion of his claim. Learned counsel has cited in support of his contention the case of — 'Venkata Chandikamba v. Veswanadhamayya', AIR 1936 Mad 699 (D), and several other cases of other High Courts.

The point is also covered by a Division Bench ruling of this Court in — 'Batul Kunwar v. Munni Lal', 32 All 625 (E). In that case Stanley, C. J., and Griffin J., held that if the plaintiff was not aware of his rights at the time when he filed the previous suit it could not be said that he had made an omission with regard to a portion of his claim. It is not necessary in this case to express any opinion on the point as this is not a case where the plaintiff has alleged that he was not aware of his legal rights. The allegation in the plaint was that he by accident (sahwan) left out from his previous suit the four plots now claimed by him. That point is covered by a decision of this Court in — 'Ganga Narain v. Misir Ramesh Chand', 1944 Oudh W. N. 23 (F), and I agree with respect with the opinion expressed in that case. Reliance was placed on a decision of their Lordships of the

Judicial Committee in — 'Moonshee Buzloor Ruheem v. Shumsheroonnissa Begum', 11 Moo Ind App 551 (P. C.) (G), where their Lordships had said:

"If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been reason for enacting it. The words of the law, are, "If a plaintiff relinquish or omit to sue for any portion of his claims". It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment."

These observations as well as the decision mentioned above fully cover the point raised and the plaintiff must, therefore, be deemed to be debarred under O. 2, R. 2, Civil P. C., as he must be deemed to have knowledge of his rights and had by mistake omitted to claim any relief with regard to these plots.

(9) The result, therefore, is that this appeal must fail and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 ALL. 543 (Vol. 40, C. N. 264)

AGARWALA AND CHATURVEDI JJ.

Sm. Ram Katori, Petitioner v. The Rent Control & Eviction Officer, Agra and another, Opposite Party.

Civil Misc. Appln. No. 23 of 1952, D/- 20-2-53.

(a) Houses and Rents — U. P. Rent Control and Eviction Act (3 of 1951), S. 1 — Validity — (Constitution of India, Art. 19 (1) (f)).

The U. P. Rent Control and Eviction Act (3 of 1951) is not inconsistent with the provisions of Article 19 (1) (f) of the Constitution and is not void. AIR 1952 All 703 (FB), Foll. (Para 3)

(b) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 17 — Rules framed under, R. 7 — Interpretation.

Where the owner is in occupation of a portion of the accommodation and the other portion falls vacant on a tenant vacating it, the owner shall under Rule 7 be consulted and the portion, which has fallen vacant, shall 'so far as possible' be allotted in accordance with the wishes of the owner, that is to say, to the owner for his personal use or to a tenant of his own choice. But if the Rent Control and Eviction Officer is satisfied that the owner does not want to live in the accommodation himself but wants to let it out to persons surreptitiously, he will be justified in allotting the vacant portion to some one else. (Para 6)

B. N. Mehrotra, for Applicant; P. N. Bakshi and Standing Counsel, for the Opposite Party.

CASE CITED

(A) ('52) AIR 1952 All 703: 1952 All LJ 208 (FB)

AGARWALA J.: This is a petition under Art. 226 of the Constitution, praying that the order of allotment of the petitioner's house passed by the Rent Control and Eviction Officer, Agra, on 6-7-1951, in favour of Govind Ram opposite-party be quashed and that an 'ad interim' injunction be issued staying the operation of the said order pending the disposal of this petition.

(2) The petitioner is the owner of house No. 3456/3557 situate in mohalla Gulabkhana, Agra. According to her, she purchased it in 1948 for her residence. At the time of purchase, the whole house was in occupation of a tenant. The house fell vacant in January, 1951, when the upper portion of that house was allotted to her by the Rent Control and Eviction Officer and the lower portion was thereafter allotted to one Jiwat Ram but Jiwat Ram vacated it soon after and then the petitioner occupied the lower portion also. On 19-1-1951, the Rent Control and Eviction Officer without consulting the petitioner, allotted the said lower portion to Govind Ram opposite party No. 2. On 22-1-1951, the petitioner applied to the Rent Control and Eviction Officer, Agra, for the allotment of the lower portion to her as she wanted it for her own use. The Rent Control and Eviction Officer, however, rejected her application and confirmed his previous order of allotment in favour of Govind Ram on 28-2-1951. Against this order, the petitioner moved the Commissioner in revision and the Additional Commissioner of Agra, by his order dated 18-4-1951, set aside the order of the Rent Control and Eviction Officer and directed him to make a fresh allotment after consulting the petitioner. The Rent Control and Eviction Officer, however, after consulting the petitioner, again confirmed his previous order. A revision against this order to the Commissioner was dismissed.

(3) In this petition, it was urged on behalf of the petitioner that the last order of the Rent Control and Eviction Officer, in which he confirmed his previous order allotting the lower portion of the house to Govind Ram, was void and should be quashed. Two grounds have been urged.

The first ground taken is that the U. P. Rent Control and Eviction Act (Act No. 3 of 1951) is void because it is inconsistent with the provisions of fundamental rights contained in Article 19(1) (f), Part III of the Constitution. This question has been decided by this Court and it has been held that the Act is not inconsistent with the provisions of the aforesaid Article of the Constitution and is not void, vide, — 'Raman Das v. The State of U. P.', AIR 1952 All 703 (F.B.) (A).

The second ground urged is that the order of the Rent Control and Eviction Officer was contrary to R. 7 of the Rules framed by the Provincial Government under S. 17, U. P. (Temporary) Control of Rent and Eviction Act, 1947. Rule 7 runs as follows:

"7. Where a portion of accommodation falls vacant and the owner is in occupation of another portion thereof, the District Magistrate shall, before making the allotment order, consult the owner and shall, so far as possible, make the allotment in accordance with the wishes of the owner."

(4) The petitioner being already in occupation of the upper portion of the house, the rule, no doubt, applied to her case. The District Magistrate was, therefore, bound before making the allotment order, not only to consult the owner but also, "so far as possible", to make the allotment in accordance with the wishes of the owner. In his order, the Rent Control and Eviction Officer has stated that the petitioner did not require the lower portion of the house for her own use because she had let out a portion of the upper portion itself to another tenant, namely, Shrimati Tulsa. He has further stated that Govind Ram's needs were greater and that the upper portion is quite independent and separate from the lower portion as the approach to the upper portion is by a staircase which can be used from outside and one can go up without passing through the lower

portion of the house. After stating these reasons the Rent Control and Eviction Officer observed:

"As such, therefore, it is not necessary that her wishes should have been taken into account because I interpreted the rules correctly."

No doubt, apparently, the Rent Control and Eviction Officer did not mean what he said. He obviously meant that, after having consulted her wishes, it was not possible to make the allotment in her favour. The rule requires that the wishes of the owner should be respected "so far as possible".

(5) The rules, framed under S. 17 of the Act, provide for three cases in which the wishes of the owner in matters of allotment can be respected: The first case arises when the owner is not in occupation of the accommodation at all but some other tenant was in occupation of it and the whole accommodation falls vacant on the tenant vacating it. In this case, Rule 6 provides that the District Magistrate may permit the landlord to occupy the accommodation when he is satisfied that it is 'bona fide' needed by the landlord for his own personal occupation. If the Rent Control and Eviction Officer finds that the owner does not 'bona fide' need the accommodation for his personal use, he may refuse to allot it to the owner.

(6) The second case arises when the owner is in occupation of a portion of the accommodation and the other portion falls vacant on a tenant vacating it. Rule 7 provides that, in such a case the owner shall be consulted and the portion, which has fallen vacant, shall 'so far as possible' be allotted in accordance with the wishes of the owner, that is to say, to the owner for his personal use or to a tenant of his own choice. The words "so far as possible" are important. The Rent Control and Eviction Officer has not an absolute discretion in the matter. He is directed to make the allotment ordinarily according to the wishes of the owner. The reason is that since the owner is in occupation of a portion of the house, he may be disturbed by the person whom he may not like to come and occupy another portion of the same accommodation. Ordinarily, if the owner objects to the allotment being made to a particular person, the Rent Control and Eviction Officer will not make the allotment to that person. When the owner wishes to bring the remaining portion for his own occupation; the Rent Control and Eviction Officer will ordinarily allot the accommodation to the owner. Under R. 7, it is not required of him to investigate whether the accommodation "is bona fide needed by the landlord for his own personal occupation." This is a requirement under Rule 6 which applies to cases when the owner is not in occupation of any portion of the accommodation. But if the Rent Control and Eviction Officer is satisfied that the owner does not want to live in the accommodation himself but wants to let it out to persons surreptitiously, he will be justified in allotting the vacant portion to some one else. When the owner wishes that the allotment be made to a tenant of his own choice, the wishes shall ordinarily be respected by the Rent Control and Eviction Officer.

(7) The third contingency provided for by the rules is contained in Rule 8 which deals with accommodations which were not let out in the ordinary course before January, 1951. We are not concerned with that contingency in the present case as the accommodation was let out in 1948 when the petitioner had purchased the house. The finding of the Rent Control and Eviction Officer, in the present case, shows that the accommodation, which had fallen vacant, was not needed by the petitioner for her own personal use, but that she wanted to let it out to persons surreptitiously. The petitioner did not mention that the accommodation may be let out to a particular person of her own choice. In these circumstances, the Rent Control and Eviction Officer could validly allot it to a third person, namely to Govind Ram who was the only person before him. One Badhawa Mal wanted the house to be let out to him at a very late stage but he did not state that he was the person whom the petitioner wanted to occupy the portion. We do not think that, in the circumstances of the present case, we would be justified in interfering with the order of the Rent Control and Eviction Officer.

(8) The petition has no force and is dismissed, but in the circumstances of the case we make no orders as to costs.

A/V.S.B. Petition dismissed.

A. I. R. 1953 ALL. 544 (Vol. 40, C. N. 265)

MALIK C.J. AND AGARWALA J.

Sudhakar Rao and others, Appellants v. Radha Krishna Das, Respondent.

First Appeal No. 22 of 1943, D/- 17-2-1953.

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 14(7) — Decree for pendente lite and future interest.

Under S. 14(7) the Special Judge can decree pendente lite and future interest on the total amount of principal and interest found due to the creditor. (Para 1)

Janaki Prasad and S. N. Gupta, for Appellants; K. N. Agarwala, for Respondent.

AGARWALA J.: This is an appeal by the landlord-applicants arising out of Encumbered Estates proceedings. The learned Special Judge passed a decree for Rs. 39,840/- with pendente lite and future interest at 3 per cent. per annum in favour of the respondent-creditor. This amount of Rs. 39,840/- consisted of Rs. 30,000/- as principal and the rest as interest. The only contention raised before us in this appeal is that the learned Special Judge was not justified in decreeing pendente lite and future interest on the total amount of Rs. 39,840/- but that he should have allowed interest on the principal amount of Rs. 30,000/- only. This contention has no force. Section 14 (7) clearly authorises the Special Judge to pass a decree for the amount found due by him with pendente lite and future interest. The amount that the learned Special Judge is required to find is the amount due, i.e. principal and interest, up to the date of the application, vide Cl. 2 of S. 14, U. P. Encumbered Estates Act. Interest is clearly awardable on the total amount which is found due to a creditor from the landlord-applicants up to the date of the application made by the landlord-applicants. This amount obviously includes both principal and interest.

(2) There is no force in this appeal and it is dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1953 ALL. 545 (Vol. 40, C. N. 266)

DESAI AND BEG JJ.

Har Murat, Applicant v. The State.

Criminal Revn. No. 689 of 1951, D/- 13-3-1953.

(a) U.P. Food Grains Movement Control Order (1949), Cl. 3(ix) — Clause does not contain any mandatory provision — It only contains saving provision. (Para 1)

(b) U.P. Foodgrains Movement Control Order (1949), Cl. 3(vii) — "Carrying".

Taking back rice from mill amounts to "carrying." (Para 2)

†(c) U.P. Foodgrains Movement Control Order (1949), Cl. 3(vii) — Constitutionality — (Constitution of India, Art. 19(1)(g) and (6)).

Even if Cl. 3(vii) restricts the right guaranteed by Article 19, the restriction is reasonable and therefore the provision is not unconstitutional. (Para 3)

†(d) U.P. Foodgrains Movement Control Order (1949), Cl. 3(vii) — Constitutionality — (Constitution of India, Art. 14).

Clause 3(vii) does not make an arbitrary and unreasonable distinction between carriage by rail or motor vehicle and carriage by other means. It is, therefore, not unconstitutional. Case law discussed. (Para 7)

Sripati Narain Singh, for Applicant; J. R. Bhatt, A. G. A., for the State.

CASES CITED:
(A) (1898) 170 US 283: 42 Law Ed 1037
(B) (1911) 220 US 61: 55 Law Ed 369
(C) (1910) 216 US 400: 54 Law Ed 536
(D) (1907) 204 US 36: 51 Law Ed 357
(E) (1912) 226 US 184: 57 Law Ed 180
(F) (1910) 218 US 36: 54 Law Ed 921
(G) ('51) AIR 1951 SC 41: 1950 SCR 869
(H) (1907) 207 US 79: 52 Law Ed 111
(I) (1916) 240 US 342: 60 Law Ed 679
(J) (1910) 217 US 114: 54 Law Ed 688
(K) (1907) 207 US 338: 52 Law Ed 236
(L) (1915) 239 US 33: 60 Law Ed 131
(M) (1924) 264 US 292: 68 Law Ed 690.

DESAI J.: This is an application by Har Murat in revision against his conviction and sentence under S. 7, Essential Supplies (Temporary Powers) Act, 1946, for infringement of cl. 3 (IX) of the U. P. Foodgrains Movement Control Order, 1949. There is no controversy about the facts; it has been proved that the applicant drove a motor truck containing twenty-four bags of rice from village Gharawal to village Malvan, both places being within Mirzapur district, on 5-4-50. By that act the applicant did not contravene clause 3 (ix) of the Foodgrains Movement Control Order. Clause 3 (ix) of the Order does not contain any mandatory provision; it only mentions a saving provision. It is therefore meaningless to talk of contravention of the provision of clause 3 (ix). Really it is clause 3 (vii) that the applicant is said to have infringed. That provision is to the effect that

"no person shall carry....by rail nor motor vehicle any of the foodgrains mentioned in column 1 of.....Schedule I from any place in the United Provinces to any other place in the United Province."

(2) The plea that S. 7, Essential Supplies Act, is 'ultra vires' has been abandoned in view of this Court's decision that it is not 'ultra vires'. Mr. Sripati Narain Singh urged that the applicant did not "carry" rice because he was only taking it back from a mill. The rice belonged to Kesri Singh Jaiswal, who was also the owner of the truck, and the applicant was Kesri Singh's servant employed to drive the truck. Even if the applicant had taken the rice from Kesri Singh Jaiswal's house to a mill and was taking it back after getting certain operations done upon the rice, it does not mean that he was not "carrying" it from one place to another. There is no justification for saying that taking back does not amount to "carrying".

(3) Next it was urged that cl. 3 (vii), Foodgrains Movement Control Order, is unconstitutional inasmuch as it contravenes Arts. 14 and 19 (g) of the Constitution. The provision simply forbids the carriage of some foodgrains from one place to another in the United Provinces; it does not affect the right of any person to practise any profession or to carry on any occupation, trade or business. A person can practice any profession or carry on any occupation, trade or business even if he is forbidden to carry by rail or motor certain foodgrains from one place to another in the United Provinces. But even if it be said that the provision restricts this right of every citizen guaranteed by Art. 19 (G) the restriction is reasonable and in the interests of the general public.

Article 19 does not affect the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of the right to practise any profession or to carry on any occupation, trade or business, in the interests of the general public; see sub-article (5). It was in the interests of the general public that certain restrictions have been imposed by the State Government on the movement of some foodgrains by certain means. Neither is the carrying of all foodgrains from one place to another place forbidden, nor is the carrying of rice from one place to another by any means prohibited. The prohibition is only on the carriage of rice by rail or motor vehicle; the carriage of rice by carts or on heads or on animals is not at all prohibited.

Further there is a provision in the Order that it will not apply to the movement of any foodgrains under a permit issued by the State Government or the Commissioner for Food and Civil Supplies. If any person wants to carry rice by rail or motor from one place to another in the United Provinces, he can do so after obtaining a permit. There is nothing to show that there are difficulties or obstacles in the way of obtaining permits. I am, therefore, of the opinion that even if the provision restricts the right guaranteed by Article 19, the restriction is reasonable and therefore the provision is not unconstitutional.

(4) The provision is said to be unconstitutional also on the ground that it makes invidious discrimination between carriage by rail or motor vehicle and carriage by other means. A person who carries rice by rail or motor, without a permit, from one place to another in the United Provinces is rendered punishable while another carrying rice in the same circumstances, but on a cart or on head is not rendered punishable. There certainly exists this distinction, but every provision which makes a distinction between one class and another is not necessarily unconstitutional. The constitutional requirement that nobody shall be denied the equality before the law is not always infringed by a provision involving a classification. The equality before the law is satisfied if the same means and methods are applied impartially to all the constituents of each class so that the law shall operate equally and uniformly to all persons in similar circumstances; it does not prohibit legislation which is

limited in the objects to which it is directed; see — 'Jessie Norton Torrence Mogoun v. Illinois Trust and Savings Bank', (1898) 42 Law Ed 1037 (A).

The equal protection clause does not take away from the States the power to classify in the adoption of police laws and admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore purely arbitrary; see — 'Lindsley v. Natural Carbolic Gas Co.', (1911) 55 Law Ed 369 (B). Day J. said in — 'Southern Rly. Co. v. Greene', (1910) 54 Law Ed 536 at p. 539 (C) that

> "the equal protection of the laws means subjection to equal laws, applying alike to all in the same circumstances."

The selection, or classification,

> "in order to become obnoxious to the 14th Amendment, must be arbitrary and unreasonable; not merely possibly, but clearly and actually so"; see — 'Bachtel v. Wilson', (1907) 51 Law Ed 357 at p. 359 (D).

The power of classification must have a wide range of discretion and is not reviewable unless palpably arbitrary; — 'Toyata v. Territory of Hawai', (1912) 57 Law Ed 180 (E). The "equality before the law" clause does not restrain the normal exercise of Governmental power but only abuse in the exercise of such authority and is not offended against simply because some inequality may be occasioned as a result of the exercise of the power to classify; — 'Louisville and Nashville Rail Road Co. v. Melton', (1910) 54 Law Ed 921 (F).

(5) Fazl Ali J. said in — 'Charanjit Lal v. The Union of India', AIR 1951 SC 41 (G) that:

> "The presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles" (page 45).

This principle, certainly holds good in respect of a legislation enacted after the Constitution came into force. The question of applying presumption cannot arise in respect of legislation enacted before the Constitution came into force because at the time of its enactment there was no question of its being in accord with the Constitution. But even in respect of a legislation enacted before the Constitution, if a state of facts can be conceived which would make it consistent with the Constitution, the existence of those facts will be assumed and it would be for one attacking it as being inconsistent with the Constitution to prove that those facts did not exist.

> "A general law must be judged by public facts, but a specific adjudication may depend upon many things not judicially known. Therefore, the law must be sustained on this point unless the facts offered in evidence clearly show that the exception cannot be upheld."

Where the local facts are not before the Court, the Court cannot say that the legislature could not have been justified in thus limiting its action. See — 'Inter-state Consolidated S. R. Co. v. Commonwealth of Massachusetts', (1907) 52 Law Ed 111 (115) (H). In — 'Lindsley v. Natural Carbolic Gas Co.', (B) (Supra), it was laid down:

> "when the classification in such a law is called in question, if any state of facts reasonably can be conceived, that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

It makes no difference that the facts may be disputed or their effect opposed by argument; — 'Johan W. Rast v. Van Demand & Lewis Co.', (1916) 60 Law Ed 679 at p. 687 (I), Harlan J. said in — 'South Western Oil Co. v. State of Texas', (1910) 54 Law Ed 688 (694) (J), that it is not important that the Court should certainly know "what were the special reasons or motives inducing the state to adopt the classification" because it

> "will assume that the State has in good faith sought, by its legislation to protect or promote the interests of its people."

(6) Even when a Court is required to analyse the grounds for the classification it should bear in mind that all that is required for a classification to be valid is that it must have relation to the purpose of the legislature and that logical appropriateness of the inclusion or exclusion of objects or persons or exact wisdom or nice adaptation of remedies is not required; — 'Heath and M. M. Co. v. Worst', (1907) 52 Law Ed 236 (244) (K). The Legislature may disguise degrees of evil and adapt its legislation accordingly; — 'Truax v. Raich', 60 Law Ed 131 (L) and — 'Radice v. New York', (1924) 68 Law Ed 690 (M).

(7) Regarding the provision of cl. 3 (vii) of the Order in the light of the law stated above, I find that it is not established clearly to infringe the "equality before the law" clause. One can conceive of intelligible reasons for distinguishing between persons who carry rice from one place to another by rail or motor vehicle and persons who carry it by other means. Apparently there is nothing arbitrary or unreasonable in the distinction between the two classes of persons. The Government might have forbidden the carriage of certain foodgrains by rail or motor vehicles because they are the means generally adopted for purposes of trade or for carriage of large quantities of foodgrains or for carriage of foodgrains to distant places. The Government certainly did not want to prohibit the carriage of foodgrains over short distances for objects unconnected with trade or of foodgrains in small quantities so as not to interfere with the proper distribution and supply of the foodgrains.

They had to allow the carriage of foodgrains from the place where they are grown to the place where they are to be stored, or from a shop to the place of consumption. For these purposes, normally the foodgrains would be carried in carts or on animals or on head. The Government might have thought that they could keep an effective check over the distribution and supply of foodgrains if they were carried by carts or on animals or on head but not if carried by rail or motor vehicles. They might have thought that the carriage of foodgrains in large quantities or to distant places would interfere with proper distribution and supply of foodgrains, but not the carriage of small quantities or to places in the vicinity and could have reasonably thought that rail and motor vehicles are the usual means for carrying large quantities or to distant places.

Thus the distinction between the carriage by rail or motor vehicle and the carriage by other means is intelligible and not absolutely devoid of sense or arbitrary. The applicant has failed to show that the clause under consideration makes an arbitrary and unreasonable distinction between carriage by rail or motor vehicle and carriage by other means. It is, therefore, not unconstitutional.

(8) No other question was raised. I would, therefore, maintain the applicant's conviction and sentence and dismiss the application.

(9) N. BEG J.: I agree.

A/V.R.B. Application dismissed.

A.I.R. 1953 ALL. 547 (Vol. 40, C. N. 267)

MALIK C. J. AND AGARWALA J.

Madhua Nand and others, Appellants v. Suresha Nand and others, Respondents.

Second Appeal No. 620 of 1942, D/- 19-2-1953.

(a) Civil P. C. (1908), S. 9 — Rights to specific relief — (Specific Relief Act (1877), S. 42).

A suit for a declaration that a certain revenue decree is not binding on the plaintiffs and that the defendants were not entitled to exercise the rights in respect of the property owned by the plaintiffs falls within the purview of S. 42 of the Specific Relief Act and is of a civil nature. (Para 5)

Anno: C. P. C., S. 9 N. 21, Specific Relief Act, S. 42 N. 4.

(b) U.P. Land Revenue Act (3 of 1901), S. 207 — "Person."

The word "person" in S. 207 can have no reference to person not party to the case before the revenue Court. (Para 5)

(c) Civil P. C. (1908), S. 11, Explanation VI — Representative suits.

Where the previous suit was not representative and the persons sought to be bound by the decision arrived at in that case cannot be deemed to have been represented in that litigation, Explanation VI to section 11 can have no application. (Para 6)

Anno: C. P. C., S. 11 N. 59a.

S. P. Sinha, for Appellants; R. C. Ghatak, for Respondents.

CASES CITED:

(A) ('33) AIR 1933 PC 183: 56 Mad 657 (PC)

(B) ('38) AIR 1938 All 523: 1938 All LJ 680

AGARWALA J.: This is a defendants' appeal arising out of a suit for a declaration that a certain decree of the revenue court dated 27-2-1938 obtained by the appellants was void and not binding on the plaintiffs-respondents and the defendants second set who are arrayed as respondents. The facts briefly stated are as follows:

(2) The defendants first set are residents of village Gheri, and the plaintiffs and the defendants second set are residents of an adjoining village Thapli. Both these villages are situated in the district of Garhwal. In the revenue settlement which was made sometime in 1936 Gheri people claimed a right to graze their cattle in a plot of land which was included within the boundaries of the village Thapli and prayed that the plot be included within the boundaries of their village Gheri. The Settlement Officer considered the claim and held that the plot of land over which grazing rights were claimed should be attached to village Gheri and made the entries accordingly. In appeal, the Commissioner overruled the decision of the Record Officer. The Gheri people then filed a suit in the revenue court for a declaration of their rights. In this suit they failed to implead some of the residents of village Thapli. Some of the persons who were impleaded as defendants in that suit died and their heirs were not brought on the record.

The suit was referred to arbitration at the instance of some of the parties to the suit but not all. The plaintiffs of the present suit were no parties to the agreement of reference to arbitration. The arbitration award was partly in favour of the plaintiffs of that suit. The revenue court passed a decree in terms of the award. Further appeals and a revision were unsuccessful. Then the suit giving rise to the present appeal was filed in the civil court for a declaration that the decree obtained by the appellants from the revenue court was not binding on the plaintiffs or the defendants second set on the ground, 'inter alia', that the plaintiffs not being parties to the reference to arbitration were not bound by the result of the previous suit.

(3) The defence to the suit was that the suit was not cognizable by the civil court and further that in any event the decree of the revenue court was binding on the plaintiffs and the defendants second set.

(4) The trial court dismissed the suit holding that the case was not cognizable by the civil court. In appeal the lower appellate court reversed the decree of the trial court and decreed the plaintiffs' suit.

(5) In this second appeal by the defendants first set it was urged that the suit was not of a civil nature and was not cognizable by the civil court. This contention has no force. The suit was for a declaration that a certain revenue decree was not binding on the plaintiffs and that the defendants-decree-holders were not entitled to exercise the rights in respect of the property owned by the plaintiffs and the defendants second set. This suit was clearly one which fell within the purview of S. 42, Specific Relief Act, and was of a civil nature. The contention of the learned counsel for the appellants was that S. 207 of the Land Revenue Act barred the suit in the civil Court. Under S. 203 of the Act, any dispute pending before the officers mentioned in that section may, with the consent of the parties, be referred to arbitration and the officer concerned may pass a decree in terms of the award given by the arbitrator. Section 207 then provides:

"Such decision shall be at once carried out, and shall not be open to appeal unless the decision is in excess of, or not in accordance with the award, or unless the decision is impugned on the ground that there is no valid award in law or in fact:

and 'no person' shall institute any suit in the civil court for the purposes of setting it aside or against the arbitrators on account of their award."

Reliance is placed upon the expression "no person" and it is urged that it includes every person whether he was a party to the proceedings before the revenue court or not. In our opinion, this contention is unfounded. The word "persons" in S. 207 must have reference to the persons before the revenue court and parties to the case before that court. It can have no reference to persons who were not parties to the case. The plaintiffs in the present case were not parties to the agreement of reference in the case in which the decree in dispute was obtained. Section 207 in our opinion did not debar them from claiming the right which they do in the present suit.

(6) It was next urged that, though the plaintiffs were not themselves parties to the reference in the revenue court, they were still bound by virtue of the provisions of Explanation 6 to S. 11 Civil P. C. This contention also is, in our opinion, untenable. Explanation 6 to S. 11 refers to a case in which the person sought to be bound by the decision is deemed to be represented in the previous suit by virtue of proceedings having been taken under O. 1, R. 8, Civil P. C. or otherwise; vide —'Kumaravelu Chettiar v. T. P. Ramaswami

Ayyar', AIR 1933 PC 183 (A) and — 'Narhari Shastri v. Basudeo Namburi', AIR 1938 All 523 (B). Where the previous suit was not representative and the persons sought to be bound by the decision arrived at in that case cannot be deemed to have been represented in that litigation, Explanation VI to section 11 can have no application.

(7) No other point was raised. There is no force in this appeal, and we dismiss it with costs.

(8) There is a cross-objection with regard to the costs not allowed to the respondents by the lower appellate court. The lower appellate court has had full discretion in the matter of awarding costs and no principle of law is involved. We do not see any force in the cross-objection which is also dismissed.

B/V.R.B. Appeal and cross-objection dismissed.

A.I.R. 1953 ALL. 548 (Vol. 40, C. N. 268)
(LUCKNOW BENCH)
MUKERJI J.

Malhoo Mian Abdul Ghani, Applicant v. State through Municipal Board, Bahraich, Complainant — Opposite Party.

Criminal Revn. No. 209 of 1952, D/- 30-1-1953.

Municipalities — U. P. Municipalities Act (2 of 1916), Ss. 185, 178, 2(2) and 2(14).

A chabutra which was a kachcha construction made ahead of the pucca chabutra & which was a separate entity raised directly adjacent to the public road, even if it might be in the nature of trespass or a nuisance, cannot be considered as a building or part of the building so as to come under S. 2(2) or S. 2(14), in respect of which notice is obligatory under S. 178 and if any person makes such an alteration without giving the requisite notice, he does not become liable to punishment under S. 185.

(Para 4)

N. Banerji for applicant; R. N. Misra, for Opposite Party.

CASE CITED:

(A) ('45) AIR 1945 All 232: ILR (1945) All 267

ORDER : Malhoo Mian Abdul Ghani was prosecuted by the Municipal Board of Bahraich under Ss. 185, 186 and 265/306, Municipalities Act for having made a Kachcha chabutra in front of his shop. As a result of this prosecution the trial Court awarded a sentence of fine to the extent of Rs. 10/- only on the applicant.

(2) It appears that on 6-6-1951, the Municipal Board of Bahraich served a notice on the applicant to demolish a certain chabutra which he had constructed without permission of the Board and which according to the view of the Municipality was not only a trespass but was also a nuisance. The applicant was required to remove the various constructions within three days of the receipt of the notice. The notice was received by the applicant on 10-6-1952, and on 12th June, the applicant replied saying that the chabutra in respect of which the notice had been served on him was an old chabutra and that it did not in any manner cause any obstruction nor was it a nuisance. The Municipal Board apparently was not satisfied by the answer which the applicant gave and they chose to prosecute the applicant under the sections which I have already noted earlier in this judgment.

(3) After the applicant had been convicted by the Bench Magistrate of the second class he preferred an appeal to the Sessions Judge of Bahraich. The appeal was heard by the learned Assistant Sessions Judge who found the applicant not guilty of offences under Ss. 186 and 265/307 Municipalities Act, but found him guilty of an offence punishable under S. 185 of the Act.

(4) The only question which fell for determination in the case was whether the chabutra in dispute could come within the definition of "a building" or "a part of a building" within the meaning of these words in the Municipalities Act. Section 2(2) of the Act defines "building" in these words:

" 'Building' means a house, hut, shed or other roofed structure, for whatsoever purpose and of whatsoever material constructed, and every part thereof, but shall not include a tent or other such portable temporary shelter".

"Part of a building" has been defined by S. 2(14) and the definition is in these words:

" 'Part of a building' includes any wall, under ground room, or passage, verandah, fixed platform, plinth, staircase or door step attached to, or within the compound of an existing building or constructed on ground which is to be the site or compound of a projected building".

The learned Magistrate Sri Sheo Prasad made a local inspection and had very rightly put the inspection note on the record of this case. From the inspection note it appears that the chabutra in dispute lay in front of the shop of the applicant and it abutted the road. It was a kachcha construction which was made ahead of the pucca chabutra which was adjacent to the applicant's building. From the inspection note it appears that this chabutra could not in any sense be a part of building. This construction was of a purely temporary nature and had been made not inside the compound of an existing building nor on ground which was to be the site or compound of a projected building. It apparently was separate entity raised directly adjacent to the public road. It may have been in the nature of a trespass or a nuisance, but we are not concerned with that aspect of the matter so far as this prosecution goes. In order to incur the penalty prescribed under S. 185, Municipalities Act, the erection or material alteration has got to be made in a building or a part of a building — if any one makes such an alteration without giving the requisite notice under S. 178 then he becomes liable to punishment under S. 185. Under S. 178 before a person begins a construction within the municipal limits of a building or a new part of a building or starts to re-erect or make a material alteration in the building or wishes to make or enlarge a well, he has to give notice of such intention to the Board. From what I have stated in regard to the topography of the chabutra it appears to me that this construction could not come within any of the things mentioned in S. 178, in respect of which it was obligatory on a person to give notice to the Municipal Board. I may here mention that Bennett J. took a similar view to what I have taken of the chabutra in question in the case of — 'Brijnandan Prosad v. Emperor', AIR 1945 All 232 (A). Bennett J. pointed out that a chabutra does not come

within the definition of S. 2(2) unless it could be considered as a part of the house. He doubted whether a chabutra could ever be considered a part of a house.

(5) In my judgment the conviction of the applicant under S. 185, Municipalities Act was unjustified. I accordingly allow this application, and set aside his conviction and sentence. The fine, if paid, shall be refunded.

B/H.G.P. Application allowed.

A.I.R. 1953 ALL. 549 (Vol. 40, C. N. 269)

DESAI J.

Amjad Husain, Appellant v. State.

Criminal Revn. No. 249 of 1953, D/- 5-3-1953.

Penal Code (1860), S. 170 — "Particular office."

What is meant by "any particular office" is "any specified office" regardless of whether such an office exists or not. There can certainly be a particular office though it does not exist. AIR 1941 Nag 321, Rel. on. (Para 1)

Anno: Penal Code, S. 170 N. 1.

B. S. Darbari, for Appellant.

CASE CITED:

(A) ('41) AIR 1941 Nag 321: 43 Cri LJ 79

ORDER: The applicant has been convicted under S. 170, I. P. C. and sentenced to one year's imprisonment. It has been found by the Courts below that on 29-10-1950 the applicant personated as Assistant Shops and Commercial Establishments Inspector and in that assumed capacity tried to authorise shop-keepers to keep their shops open on a close day (i. e. the day on which under the Shops Act the shops should remain closed) and charged from them one rupee per shop-keeper. This is a finding of fact which ordinarily is not challenged in a Court of revision. It is backed by evidence which the Courts below were fully justified in acting upon. It has come in the evidence of the Shops and Commercial Establishments Inspector that he has no assistant attached to him. It was contended on behalf of the applicant that as the post of Assistant Shops and Commercial Establishments Inspector did not exist in the district, the applicant could not be convicted under S. 170 for pretending to hold that office. In support he referred to note No. 1 to S. 170 in the Law of Crimes by Ratan Lal and Dhiraj Lal Thakur to the effect that "the particular office must be an existing office." The offence of S. 170 is committed when a person pretends to hold any particular office as a public servant, knowing that he does not hold it, and in such assumed character, does or attempts to do any act under colour of such office.

Mr. Darbari referred to the use of the word "particular" and argued that the office must exist. The word used is "particular" and not "exist." What is meant by "any particular office" is "any specified office" regardless of whether such an office exists or not. If a person makes a claim in these words "I hold an office as a public servant" it will not do; he must specify or particularize the office which he claims to hold before he can be found guilty under the section. All that the law requires is that he must specify the office; it does not go further and require that the office must exist. If a person is to be convicted for making a false pretence the false pretence must be of some existing fact in distinction from a mere promise and a mere opinion (see the Criminal Law by Bishop Vol. 2, para 429), but that does not mean that for an offence under S. 170 the office must be existing.

When the applicant pretended to hold the office of Assistant Inspector, he certainly made a false pretence of an existing fact in distinction from a mere promise or a mere opinion. There can be no personating of a person who never existed (see the Criminal Law by Bishop, Vol. I p. 758) but that also does not mean that there can be no pretence to hold an office which never existed. There is a difference between pretending to be a particular person and pretending to hold a particular office. When the offence itself is of pretending to hold a particular office, there is no reason for saying that the Legislature meant to distinguish between a pretence to hold a particular existing office and a pretence to hold a particular non-existing office and to penalise the former and not the latter. I am, therefore, unable to accept the view that the particular office which an accused pretends to hold must exist. There can certainly be a particular office though it does not exist.

(2) Even if the contrary view is accepted as the correct view, there is much to be said in support of the view that when the applicant pretended to hold office of an Assistant Inspector he pretended to hold an existing office because there does exist an office of an Inspector. That office can be said to include the office of an Assistant Inspector also. An Inspector and an Assistant Inspector are both officers in the same office and as the powers of an Assistant Inspector are ordinarily included in the powers of an Inspector the pretence to hold the office of an Assistant Inspector may be said to be the pretence to hold the office of an Inspector. I do not, however, express any definite opinion on this question because I am certain that there is nothing in S. 170 to require the particular office to exist. The case against the applicant was certainly not weaker than that against Bashir Ullah Khan, who simply pretended to be "an officer of the Criminal Investigation Department" and was still convicted under S. 170, vide — 'Bashir Ullah Khan v. Emperor', AIR 1941 Nag 321 (A). There even the office was not specified. Here the applicant specified the office, namely that of Assistant Inspector. His pretence was more specific than it would have been if he had claimed to be an officer of the Shops and Commercial Establishments Department. Had he made that claim, no question would have arisen whether the office that he pretended to hold existed or not. If Bashir Ullah Khan was guilty in that case, the applicant was undoubtedly guilty in the present case.

(3) The applicant was rightly convicted under S. 170, I. P. C. He appears to have made a practice of posing as an Assistant Inspector of Shops and Commercial Establishments and cheating shop-keepers by realising one rupee from each. He cheated a number of shop-keepers openly and had the audacity to repeat the claim even before the Inspector. The sentence of one year's imprisonment inflicted upon him is heavy. But I cannot say that it is so heavy that I should interfere with it in revision.

(4) The application is dismissed.

B/D.H. Application dismissed.

A.I.R. 1953 ALL. 550 (Vol. 40, C. N. 270)
(LUCKNOW BENCH)

MISRA J.

The Chief Inspector of Stamps, U. P., Applicant v. The Sunni Central Board of Waqf, U. P., Opposite Party.

Appln. No. 23 of 1946, D/- 10-10-1952.

Court-fees Act (1870), S. 7 (iv-A) (U. P.) — Instrument securing property.

A will is not an instrument 'securing any property' within the meaning of S. 7 (iv-A) (U. P.). The vesting of the property in the legatees after the death of the testator cannot convert a will which merely constituted a declaration of intention into an instrument securing property by its own force. AIR 1944 All 84, Foll.; AIR 1944 Oudh 29, Ref. (Para 7)

Anno: Court-fees Act, S. 7(iv)(c) N. 26 Pt. 15.

Junior Standing counsel M. M. Lal, for Applicant; P. N. Bhut, for Opposite Party.

CASES CITED:

(A) ('44) AIR 1944 All 84:
ILR (1944) All 133

(B) ('44) AIR 1944 Oudh 29: 211 Ind Cas 432

ORDER: This revision is directed against the order of the learned Civil Judge, Bara Banki, rejecting the report of the applicant, the Chief Commissioner of Stamps, U. P. made in a declaratory suit. The Chief Inspector claimed that the plaint was taxable under S. 7 (iv-A), Court-fees Act and there was a deficiency of Rs. 615/10/- in the court-fee stamp. The plaintiff who is the liquidator of the Bank of Upper India Ltd., prayed for the following reliefs in his suit:

(a) A declaration to the effect that a previous decision of the District Waqf Commissioner, Bara Banki, was ultra vires, erroneous and bad;
(b) A declaration that there is no such waqf as was found by the District Waqf Commissioner, Bara Banki, to have been constituted under the will of Chaudhri Sarafraz Ahmad.
(c) Award of costs of the suit, and
(d) Such further and other reliefs as the nature of the case may justify or demand.

(2) From the allegations contained in the plaint it would appear that Chaudhri Sarfaraz Ahmad who was the taluqdar of Bhilwal, Khanpur and Sikandarpur taluqas within the meaning of the Oudh Estates Act (1 of 1869) executed a will on 3-5-1870, expressing a desire that a sum of Rs. 2000/- per annum should be spent out of the income of the property bequeathed to Chaudhrain Bechunnissa on certain specified objects. It was said that after the death of Chaudhri Sarafraz Ahmad the will failed to take effect in view of the fact that it offended against the provisions of S. 13 of the aforementioned Act, and that the Bank of Upper India, Ltd., became the owner of the properties covered by the will. On account of the claim made by Chaudhri Shafiquzzaman Khan the present taluqdar of Bhilwal, to the effect that the sum of Rs. 2000/- which under the will was to be given for certain specified objects constituted a waqf. A notice under S. 4, Muslim Waqfs Act was issued to the plaintiff and the District Waqf Commissioner in spite of the liquidator's objection came to the conclusion that the claim was correct and the Central Board thereupon issued a notification in the official gazette regarding the existence of the waqf so declared. The liquidator of the Bank of Upper India Ltd. maintained in the present case that this decision was wrong for various reasons. One of the points urged in this connection was that the existence of a waqf and the validity of the will being denied, the District Commissioner of Waqfs had no jurisdiction to decide the matter in controversy, the matter being within the exclusive jurisdiction of the Civil Courts.

(3) The Chief Commissioner of Stamps was of the view that the suit was in effect for cancellation of the decision of the District Commissioner of Waqfs and for declaring void the will which according to him is an instrument securing property within the meaning of S. 7 (iv-A), Court-fees Act. Sub-section (iv-A) applies to suits 'for or involving cancellation of or adjudging void or voidable'—

(a) a decree for money or other property having a market value, or
(b) an instrument securing money or other property having such value.

The applicant considered that the case fell under the second of the two categories mentioned above. In other words he maintained that the decision of the District Waqf Commissioner as well as the will of Chaudhri Sarafraz Ahmad constituted an instrument securing money or securing property.

(4) The learned Civil Judge repelled the contention of the Chief Inspector holding that inasmuch as the Commissioner's decision only interpreted the will and did not by its own force create the alleged waqf, it could not be deemed to be an instrument securing either money or property. This part of the decision of the Court below is no longer disputed. So far as the prayer for a declaration that the will is void is concerned, the learned Civil Judge held that the will being merely a legal declaration of the testator's intention with respect to his properties which he desired to be carried out after his death, it cannot be regarded as an instrument of the nature contemplated by sub-section (iv-A) of Section 7.

(5) It is urged on behalf of the applicant in revision that though it may be possible to hold that the will is a mere declaration of the testator's intention during his life-time, it secures the properties covered by it after the testator's death.

(6) The expression 'will' has been defined by the Indian Succession Act as

"The legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death."

(7) The Oudh Estates Act likewise defines a will as:

"The legal declaration of the intentions of the testator with respect to his property affected by this Act, which he desires to be carried into effect after his death."

In — 'Chief Inspector of Stamps v. Ramesh Chandra', AIR 1944 All 84 (A), a Bench of this Court held that sub-s. (iv-A) does not cover a case where the declaration sought relates to a will. It appears to me that the vesting of the property in the legatees after the death of the testator cannot convert an instrument which merely constituted a declaration of intention into an instrument securing property by its own force. It is true that the law enforces the wishes of the testator after his death but this fact does not alter the legal nature of the testamentary bequest.

(8) I ought to mention that reference was invited on behalf of the applicant to the decision in — 'Ram Narain Singh v. Pancham Singh', AIR 1944 Oudh 29 (B) wherein a will was regarded as an instrument securing property. Inasmuch, however, as this was done on account of the concession made by the other side in that behalf the case loses its importance so far as interpretation of sub-s. (iv-A) is concerned.

(9) I agree with the Court below that the court-fee of Rs. 18/12 paid by the plaintiff on the declaratory relief sought by him was sufficient.

(10) There is no force in this application. It is dismissed with costs.

B/K.S. Revision dismissed

A.I.R. 1953 ALL. 551 (Vol. 40, C. N. 271)

MOOTHAM AND SAPRU JJ.

Raman Lal, Applicant v. Superintendent Octroi Municipal Board, Allahabad and another, Opposite Party.

Writ Appln. No. 307 of 1950, D/- 12-9-1951.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 296 — Rules under — Rr. 159, 161 — R. 159 whether to be construed as forming part of R. 161 — Rules 159 and 161 cannot be construed as though the provision of R. 159 forms the concluding part of R. 161.

(Paras 5, 8)

(b) Constitution of India, Art. 226 — Other remedy open — U. P. Municipalities Act (2 of 1916), S. 160.

An importer who is not satisfied with an assessment has a right of appeal to the Board, and where the applicant has made no attempt to avail himself of this remedy, and it is not shown that such remedy would not be equally beneficial, convenient and effective, no relief under Art. 226 can be given to the applicant. (Para 3)

S. C. Khare, for Applicant; Harnandan, for Respondents.

MOOTHAM J.: This is an application for a writ or direction under Art. 226 of the Constitution.

(2) The applicant carries on a small manufacturing business in Allahabad and for purposes of this business he purchases scrap iron from persons outside Allahabad. In September 1950, he purchased a quantity of scrap iron from a firm in Amritsar at a cost of Rs. 527/4/9. The scrap iron was sent to Allahabad by goods train and the relevant railway receipt and invoice were sent to the applicant by post. On 16-9-1950, the applicant sent the railway receipt and the invoice to the Superintendent of the Octroi Department of the Allahabad Municipal Board with a request that these documents be stamped by the Octroi authorities in accordance with the prescribed rules and then be returned to him in order that he may obtain delivery of the goods from the railway company and avoid payment of demurrage. The Octroi Superintendent refused, however, to stamp the railway receipt and invoice unless the applicant first paid the amount due by way of octroi on the scrap iron which was assessed by the Octroi authorities for the payment of duty at the value of Rs. 1,506/8/-.

(3) The applicant claims that under the rules the Octroi authorities are bound to stamp and return the railway receipt and invoice to him and are not entitled to make such stamping conditional upon payment of the octroi. The applicant further contends that the basis of assessment adopted by the Octroi authorities is wrong. It is, however, not now in dispute that an importer who is not satisfied with an assessment has a right of appeal to the Board, and as the applicant has made no attempt to avail himself of this remedy, and as it is not shown that such remedy would not be equally beneficial, convenient and effective, it is clear that no relief under Art. 226 can be given to the applicant on this part of his claim, which indeed has not been pressed before us.

(4) The rules relating to the assessment and collection of octroi are to be found in the collection of rules made under the Municipalities Act, 1916, entitled the "Municipal Account Code". Rules 157 to 165 relate to goods imported by railway and the Rules which are important for the present purpose are Rr. 159 and 161. These Rules provide as follows:

"159—"When an importer receives the railway receipt of goods consigned to him by railway, he shall take or send it with the invoice, or in the absence of the latter, with a written declaration of the details of the consignment to the head octroi office, where, if the goods are found to be liable to the payment of octroi, the receipt and the invoice or declaration shall be abstracted into a railway receipt and invoice register, to be kept up in form 52. The railway receipt and the invoice shall be stamped with a municipal stamp, and returned to the importer to enable him to obtain his goods from the railway. The declaration shall be stamped and filed in the head octroi office."

161— "The registration of the consignment having been completed as laid down in R. 159, the octroi superintendent shall determine the octroi leviable and note it on a memorandum which he shall send to the central barrier. The importer shall pay the octroi at the central barrier, the muharrir checking the calculations of the memorandum. On receipt of the octroi the muharrir shall grant a pass to the importer in form 53, leaving the coupon and the third foil blank ....."

(5) Under R. 159, the importer is required to take or send the railway receipt and invoice to the head octroi office where, assuming that the goods are liable to payment of octroi, prescribed particulars of the consignment are to be abstracted from the receipt and invoice and entered in a register in Form 52. The railway receipt and invoice shall then be stamped with a municipal stamp and returned to the importer. Under R. 161, the Octroi Superintendent is to prepare a note of the amount of octroi to be paid and to send it to the central barrier, which is at the head octroi office itself. The importer is then required to pay the octroi at the central barrier, and on payment being made he will receive a pass which will enable him to clear his goods at the railway barrier. 'Prima facie' Rr. 159 and 161 would appear to support the contention of the applicant, namely, that he is entitled to have his railway receipt and invoice stamped with the municipal stamp and returned to him before payment of octroi. It is, however, argued on behalf of the Octroi authorities

that on a proper construction of the two Rules the second provision of R. 159, namely, that

"The railway receipt and the invoice shall be stamped with a municipal stamp, and returned to the importer, to enable him to obtain his goods from the railway."

is a provision which comes into operation only after the provisions of R. 161 have been complied with. In other words, the Rules must be construed as though the provision of R. 159 which we have just quoted forms the concluding part of R. 161.

(6) In support of this argument our attention has been drawn to the form of the "Railway Receipt and Invoice Register", No. 52; and it is said, and correctly said, that certain columns in that register namely column 2 — "Number of Pass", and column 14 — "Octroi actually charged", cannot be completed until after the octroi has been paid. That may be so. But all that is required under R. 159 is that there should be entered in the register only such particulars as can be abstracted from the railway receipt and invoice. Clearly, particulars of the pass and the octroi actually charged cannot be obtained from that source and must be entered in the register subsequently.

(7) Our attention has also been drawn to Form 53 which is a form of pass which is issued on payment of octroi, and it is said that two of the items in this pass, namely, "Description of goods" and "Weight, number or value", can be entered by the Octroi authorities only if they have the railway receipt and invoice before them and that, therefore, it is not the intention that these documents should be returned to the importer until after the pass has been prepared. There is no evidence before us as to the procedure which is actually followed by the Octroi authorities in preparing the pass. But we can see no reason, and indeed it appears to us to be the more probable course, that these particulars are obtained from the "Railway Receipt and Invoice Register". Indeed, another item in Form 53, namely, "Number of item in railway receipt register", makes it reasonably clear that the pass is prepared with reference to that register.

(8) Forms Nos. 52 and 53 do not, therefore, in our opinion, provide sufficient reason for departing from the normal canons of construction in construing Rules 159 and 161. If it had been the intention that the railway receipt and invoice should be returned duly stamped to the importer only after he has paid octroi and received his pass, we should have expected that that would have been made clear in R. 161. In our opinion R. 159 makes it clear that after the requisite particulars have been abstracted from the railway receipt and invoice, these documents are to be stamped with the municipal stamp and returned to the importer for the express purpose, as the Rule itself says, to enable him to obtain his goods from the railway. We are unable to construe the two rules in the manner contended for by the Octroi authorities whose procedure, in this case, is, in our opinion, contrary to the provisions of the Municipal Account Code.

(9) We are, therefore, of opinion that a direction should issue to the Superintendent, Octroi Department, Allahabad Municipality, requiring him, on presentation of the railway receipt and invoice in question, to stamp and return the same to the applicant after the particulars prescribed by Rule 151 (sic) have been abstracted

(10) As the applicant has succeeded on one contention and failed on the other we make no order as to costs.

C/D.H. Order accordingly.

A.I.R. 1953 ALL. 552 (Vol. 40, C. N. 272)

MALIK C. J. AND BRIJ MOHAN LALL J.

Gokul Nathji Maharaj and another, Plaintiffs-Appellants v. Nathji Bhogi Lal, Defendant-Respondent.

Letters Patent Appeal No. 29 of 1944, D/-1-2-1952; from judgment of Mathur J. in Second Appeal No. 972 of 1940, D/- 11-5-1943.

(a) Hindu Law — Religious endowment — Idol — Juristic personality — Consecration — Proof of ceremonies.

It cannot be said that the stone image or image made of wood or of gold or other materials is the real object of worship or the real person owning the property. The real owner of the property is deemed to be God Himself represented through a particular idol or deity which is merely a symbol. (Para 4)

Where an idol had been the object of worship by a large sect of people for over three hundred years and extensive properties were owned by and were in the possession of the said idol:

Held that in the circumstances it was unreasonable to expect that there would be any direct evidence of consecration, nor was it reasonable after such a length of time to require the idol to prove affirmatively that such ceremonies were performed as would entitle it to claim to be a juristic personality. (Para 4)

(b) Hindu Law — Religious endowment — Idol — Self-revealed idol — Consecration.

The question whether a particular idol is or is not duly consecrated must depend upon the religious faith and belief of its followers. From the fact that an idol has been deemed by its followers to be self-revealed it cannot be assumed that no consecration has taken place. (Para 5)

Dr. N. P. Asthana; B. L. Dave & K. B. Asthana, for Appellants; Harnandan Pd. S. C., for Respondent.

MALIK C. J.: This is a plaintiff's appeal against the decree passed by a learned single Judge of this Court allowing a Second Appeal and dismissing the plaintiffs' suit. The plaintiff-appellants are represented by Dr. N. P. Asthana, but learned counsel for the respondent, Sri Harnandan Prasad, states that he has received no instructions from his client. The suit was filed by Shri Thakur Gokul Nathji Maharaj, 'birajman' at Gokul through plaintiff 2, who claimed to be the owner of the property in suit, but to prevent the defendant raising the question whether it was plaintiff 1 or plaintiff 2 who was the owner of the property it was said in the plaint that plaintiff 2 had joined plaintiff 1 also as a co-plaintiff and the suit was, therefore, filed in the name of both the plaintiffs.

The allegations in the plaint were that the land in suit belonged to the plaintiffs and one Dwarka had his house on it: that in the floods of 1924 the house of Dwarka was washed away and in 1933 the defendant took wrong-

ful possession of the materials worth Rs. 100/- lying on the site and built a Dharamshala thereon. The reliefs claimed by the plaintiffs were for removal of the constructions made by the defendant and for vacant possession being given to them; an injunction to be issued to the defendant not to interfere in future with the plaintiffs' possession of the land; Rs. 100/- as damages for the price of the materials unlawfully used by the defendant; and for costs. The plaintiffs' claim for Rs. 100/- was dismissed by the lower appellate Court on the ground that it was not proved that the defendant had utilised any part of the materials of Dwarka's house. The other reliefs were given to the plaintiffs.

(2) In appeal a learned single Judge of this Court held that plaintiff 1 was not a juristic person and could not own property, that plaintiff 2 had no right of ownership and that mandatory injunction could not be granted because the suit was filed almost three years after the constructions were made. He allowed the appeal and dismissed the plaintiffs' suit.

(3) It has been urged by learned counsel for the appellants that as regards the first finding that plaintiff 1 was not a juristic person the learned Judge was clearly in error. The point was very carefully considered by the lower Courts and we must say they wrote excellent judgments and took great care in the consideration of all the materials placed before them. The temple in question is a very old one dating back to some year prior to 1640 A. D.

According to the traditions prevailing in the locality one Shri Ballabhacharya flourished in the sixteenth century of the Christian era. He was a devotee of Lord Krishna and was held in great esteem by the people. He had two sons, one of whom died issueless but the other had seven sons. To these seven grandsons Shri Ballabhacharya gave seven idols as representing Lord Krishna of whom he was a 'Bhakta'. These seven idols which were given to each grandson were installed by them in various parts of northern and western India. To the grandson, Shri Gokul Nathji was given the idol which was installed in Gokul in the temple known under the same name, i. e., Gokul Nathji.

Grandson Gokul Nathji was himself a very pious man and a great devotee of Lord Krishna, so much so that some people started worshipping him as the incarnation of the Lord himself. Gokul Nathji, however, used to worship plaintiff 1 as the idol of Lord Krishna, and some followers, instead of worshipping Gokul Nathji the grandson of Shri Ballabhacharya, worshipped the idol and held that the idol as well as Gokul Nathji and his descendants were the representatives of God. These two sects that grew up were known as the 'Bharuchis' and the 'Nimar Yas'. 'Nimar Yas' worshipped plaintiff 1, while the 'Bharuchis' worshipped Gokul Nathji in his lifetime and after his death they worshipped his clothes, sandals, and such other things as were used by him and enshrined these articles of personal use in a temple.

(4) The defendant challenged the plaintiffs' claim on several grounds but one of the grounds was that plaintiff 1 was not a consecrated idol and was, therefore, incapable of holding properties. There was no serious dispute as to the facts already stated by us above and as a matter of fact those facts have been found by the lower Courts on the evidence available on the record and thus they could not be made subject matter of challenge in this Court in second appeal.

According to the traditions these idols that were handed over by Ballabhacharyaji to his seven grandsons were self-revealed idols of Lord Krishna and it is on that account that the learned Judge came to the conclusion that there could not have been due consecration according to law and it could not be said that the spirit of God ever came to reside in them. As it was pointed out by the learned Munsif in his very careful judgment that according to true Hindu belief the idol is not worshipped as such but it is the God behind the idol which is the object of worship.

The learned Munsif has pointed out that there are elaborate provisions in Hindu Law which enable a stone image or an image made of wood to be changed and replaced by another. It cannot be said that the stone image or image made of wood or of gold or other materials is the real object of worship or the real person owning the property. The real owner of the property is deemed to be God Himself represented through a particular idol or deity which is merely a symbol.

From the evidence it is clear that plaintiff 1 as such a symbol has been the object of worship by a large sect of people known as 'Nimar Yas' for over three hundred years and extensive properties are owned by and are in the possession of the said idol. In the circumstances, we think it was unreasonable for the learned Judge to expect that there would be any direct evidence of consecration, nor is it reasonable after such a length of time to require the plaintiffs to prove affirmatively that such ceremonies were performed as would entitle the plaintiff to claim to be a juristic personality.

(5) From the fact that the idol was said to be self-revealed the learned Judge assumed that there could have been no consecration of it. It is impossible after this length of time to prove by affirmative evidence whether there was or there was no consecration and we have not been referred to any book of authority or any evidence which would go to show that in the cases of idols which were deemed by their followers to be self-revealed no consecration takes place. From the fact and circumstances, however, it is abundantly clear that the idol was duly recognised by all those who believed in it as an idol of Lord Krishna and was worshipped as such. Properties were dedicated to it and properties have been brought to its use through centuries that it has existed.

After all the question whether a particular idol is or is not duly consecrated must depend upon the religious faith and belief of its followers and we have no doubt that all that was necessary to deify it must have been done by those who believed in the said idol. On the facts found by the lower Courts, the lower Courts were right in coming to the conclusion that there was sufficient material for a presumption that plaintiff 1 was a juristic person recognised as such by the followers of that sect and, therefore, capable of owning property.

(6) As regards the claim of plaintiff 2, no doubt some controversy was raised in the trial Court whether the title vested in plaintiff 1 or plaintiff 2. The lower appellate Court held that plaintiff 2 had failed to prove that he was the owner of plaintiff 1 or 'Gaddinashin', but that he had been managing the temple and its affairs since 1916 and was thus the 'de facto Gaddinashin' of the temple. The learned Judge of the lower appellate Court rightly held that as the suit had been filed on behalf of both the plaintiffs it was not necessary to go further into the question about the rival claims between the plaintiffs 'inter se'. The learned Judge has held as follows :

> ".....the determination of this question (whether the owner is plaintiff 1 or plaintiff 2) in this case is otiose, as it is essentially a question between the plaintiffs themselves. At least one of them is such owner."

On the findings recorded by the learned Judge he might as well have held that it was plaintiff 1 who was the owner of the property. The other findings recorded by the learned Civil Judge appear to us to be clear findings of fact based on evidence. The learned Judge held that the land in suit was in the possession of a tenant of the plaintiffs named Dwarka; that this 'kachha' house of Dwarka existed and was in his possession till 1924 when there was a flood and the house was washed away and the land lay vacant; that it was not till 1933 that the defendant took possession of the land and started building Dharmshala; and that there could, therefore, be no question of limitation as the suit was filed in 1936. On these findings the plaintiffs' suit for possession was rightly decreed.

(7) The learned single Judge held that the defendant has not succeeded in proving that the plaintiffs have acquiesced in any way in the building of the Dharmshala and in the circumstances, therefore, there is no reason why the plaintiffs' suit for the other reliefs, except the claim for Rs. 100/- as damages, should not have been decreed.

(8) The result, therefore, is that we set aside the decree of the learned single Judge and restore the decree passed by the lower appellate Court, but as the respondent is not represented before us we make no order as to costs of this appeal.

D/V.R.B. Decree set aside.

A.I.R. 1953 ALL. 554 (Vol. 40, C. N. 273)

DESAI J.

Madan Mohanji Maharaj, Plaintiff-Applicant v. Sunder Lal, Defendant-Opposite Party.

Civil Revn. No. 1093 to 1102 of 1951, D/- 7-9-1951.

Civil P. C. (1908), O. 47 R. 7 — Power of High Court.

The power of reviewing a judgment on the ground of an apparent error on the face of the record, vests in the Court which has passed the order and not in a superior Court. 26 All 572; 31 All 610; 29 All 468, Ref. (Para 4)

Anno: C. P. C., O. 47 R. 7 N. 16.

S. B. L. Gaur, for Applicant.

CASES CITED :
(A) ('04) 26 All 572
(B) ('09) 6 All LJ 884: 31 All 610
(C) ('07) 4 All LJ 439: 29 All 468

JUDGMENT : This and the connected Civil Revisions Nos. 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, and 1102 are from an order of the Civil Judge, Aligarh, refusing to review a judgment of his predecessor. The parties in all the revision applications are same; they relate to different parcels of land. The applicant was the plaintiff before the trial Court and the opposite party was the defendant. Ten suits were instituted under S. 180, U. P. Tenancy Act, in the trial Court which was that of an Assistant Collector, First Class, by the applicant, claiming to be a 'sarbarakar', for ejectment of the opposite party alleged to be a trespasser upon the lands in dispute. The suits were contested by the opposite party on the ground that he, and not the applicant, was the 'sarbarakar' and that he was not liable to be ejected. The trial Court decreed the suits holding that the applicant was the 'sarbarakar' and not the opposite party and that the latter was a trespasser. It did not treat the dispute between the parties as one raising a question of proprietary interest and did not refer it to a civil Court for its finding (as contemplated by S. 286, U.P. Tenancy Act). The opposite party filed appeals from the decrees passed by the Assistant Collector in the Court of the District Judge who transferred them to the Civil Judge. It was contended before the learned Civil Judge on behalf of the applicant that he had no jurisdiction to hear the appeals because no question of proprietary right was decided by the trial Court.

(2) It is laid down in S. 284(4), U.P. Tenancy Act, that an appeal from a decree of a revenue Court passed in a suit in which an issue involving a question of proprietary right has been decided by a civil Court under sub-s. (2), shall lie to the District Judge. The opposite party filed the appeals in the Court of the District Judge purporting to act under this provision. Ordinarily an appeal from a decree passed under S. 180, U.P. Tenancy Act, would lie to the Commissioner, and not to the District Judge. The learned Civil Judge held that he had jurisdiction to hear the appeals and also that the question raised by the opposite party was not a question of proprietary right. He allowed the appeals on the ground that the opposite party was the 'sarbarakar' and not the applicant. The applicant did not file appeals from the decree passed by the learned Civil Judge but instead filed applications for review. The applications were filed before the Civil Judge who had passed the decrees but have been disposed of by his successor-in-office. The review applications were based solely on the ground of an apparent error on the face of the record.

(3) It was contended in the review applications on behalf of the applicant that when the learned Civil Judge held that no question of proprietary right was raised between the parties in the trial Court, no appeal from the decrees passed under S. 180, U. P. Tenancy Act could lie to him and that it was an apparent error on the face of the record for him not only to entertain the appeals but also to decree them. The learned Civil Judge refused to review the decree passed by his predecessor, being of the view that there was no error apparent on the face of the record. The appli-

cant comes to this Court in revision from his orders.

(4) I find that these applications cannot succeed. It was for the learned Civil Judge to decide whether there was any apparent error on the face of the record or not, when he found that there was no apparent error on the face of the record, it would not be competent for this Court to say that there was and to review the decrees passed by his predecessor. The intention of the legislature seems to be that the power of reviewing a judgment on the ground of an apparent error on the face of the record, should vest in the Court which has passed the order and not in a superior Court. The present case must be distinguished from a case in which a Court grants a review, on any ground whatever, or refuses to review on the ground of want of jurisdiction. This Court may revise an order passed by a subordinate Court allowing review even on the ground of an apparent error on the face of the record, or refusing to review on the ground that it had no jurisdiction to review; but the present is not such a case. Here the learned Civil Judge has not refused to review on the ground that he had no jurisdiction to review; he has refused to review on merits on the ground that no case for review was made out. This would be clear from the following observations made by him in his order:

"The contention of the learned counsel for the applicants is not tenable and not so easy as to make it an error apparent on the face of record so as to make the review application entertainable and successful. ***

Whatever the merits of one's (?) opinion may be there can be little doubt that the point is debatable and not free from difficulty. I, for one think there is no difficulty in deciding the points as it has been decided by the learned District Judge and myself and I have not much hesitation in saying that if the point comes up again, I will decide it in the same way. * * *

The applications for review apart from being infructuous are not maintainable as no apparent error on the face of the record has been shown."

If the Court which has passed the order itself says that there was no apparent error on the face of the record, in the very nature of the things, his finding must be held to be final. The very attribute of an error on the face of the record is, that it must be apparent to everyone including the Judge who has passed the order. If the Judge, even on being told that there was an error, holds that there was no error, then even if there was in fact an error, it was certainly not an error apparent on the face of the record. In this view, it would not be open to this Court to say that there was an apparent error in the decrees passed by the learned Civil Judge and to grant review or to remand the cases to him to allow review.

(5) The cases cited by Mr. Gaur are not at all helpful. He has not cited any authority of this Court, or for that matter of any other Court, showing that a High Court can review a judgment of an inferior Court on the ground of an error apparent on the face of the record even though the inferior Court had decided that there was no such error and refused to review. In — 'Ram Lal v. Ratan Lal', 26 All 572 (A) a Bench of this Court held that a High Court cannot revise an order of an inferior Court declining to review its judgment. That case was distinguished in — 'Akbar Khan v. Muhammad Ali Khan', 31 All 610 (B) and — 'Wills v. Jawad Husain', 29 All 468 (C); in both of which it was held that when an inferior Court rejects an application for review on the ground that it had no jurisdiction, its order cannot be revised by the High Court under S. 115, Civil P. C. Both these cases dealt with refusal of an inferior Court to review its previous order on the ground of want of jurisdiction and not on the ground of want of merits. In the case of — 'Akbar Khan' (B) the inferior Court had refused to entertain the application for review on the ground that it did not lie because the same matter was pending for decision before the Court of appeal. That view was wrong and this Court revised its order on the ground that it had failed to exercise the jurisdiction vested in it. It stressed the fact that the inferior Court had not considered whether there were sufficient grounds for a review. In the 'case of Willis' (C) also this Court stressed the fact that the inferior Court had rejected the application for review without going into its merits. That application was rejected on the ground that sufficient court-fee was not paid on the application. Had it dismissed the application for review on merits, this Court would have had no hesitation in rejecting the application in revision. In the present case, the learned Civil Judge has not refused to exercise jurisdiction; he has assumed jurisdiction but refused to review the judgments because he did not find any merits in the applications. His view that there was no error apparent on the face of the record might be erroneous but he was entitled to entertain that view and it cannot be said that he acted illegally or with material irregularity in entertaining it.

(6) Therefore, these applications cannot succeed and are hereby dismissed.

C/V.S.B. Revision dismissed.

A.I.R. 1953 ALL. 555 (Vol. 40, C. N. 274)

AGARWALA J.

State v. Ram Khelawan, Appellant.

Criminal Appeal No. 157 of 1950, D/- 18-5-1951.

(a) Penal Code (1860), Ss. 99, 103, 300 exception 2, 304 — Applicability — Cattle of deceased grazing on preserved grass of accused — Accused rounding up cattle to take them to cattle pound — Deceased forcibly taking away cattle from possession of accused — Deceased though armed with lathi not using it — Accused hitting deceased with lathi on head — Deceased dying as result of injury — Accused held exceeded right of self-defence — Act covered by exception (2) of S. 300 — Conviction should be under S. 304, Part I and not Part II. (Paras 8, 9, 10, 12)

Anno: Penal Code, S. 99 N. 6, S. 103 N. 1; S. 300 N. 19; S. 304 N. 1, 6, 9.

(b) Penal Code (1860), S. 304 Part II — Applicability.

Section 304 Part II can never come into operation when there is an intention to cause such bodily injury as is likely to cause death. (Para 11)

Anno: Penal Code, S. 304 N. 1.

Asst. Govt. Advocate, for the State; P. C. Chaturvedi, for Appellant.

JUDGMENT: This is an appeal by Ram Khelawan against his conviction under S. 304, Part II, Penal Code and a sentence of three years' rigorous imprisonment.

(2) Originally four persons were tried by the learned Sessions Judge. Sheo Ram, Pyarey and Dodwa were acquitted and Ram Khelawan appellant alone was convicted.

(3) The prosecution case was that on 2-8-1949 one Raghunath, Smt. Kanchanya and Nankoo were grazing their cattle on an 'usar' and 'parti' land in village Lachhmanpur. The 'usar' and 'parti' land belonged to the zamindar, Raja Saheb of Asothar, and the cattle of the entire village used to graze on it as a matter of right. When the cattle were grazing Sheo Ram, his sons Pyarey and Ram Khelawan and one Dodwa alias Ram Ratan, a nephew of Sheo Ram, came there and objected to the cattle grazing on a piece of land on which they had their own preserved grass. They then rounded up the cattle of Raghunath and Kanchanya and drove them away towards the cattle pound. Raghunath protested because he said that the cattle were grazing on common 'usar' and 'parti' land and that the accused had no right to object. Upon it Ram Khelawan attacked him with a lathi. Raghunath raised an alarm on which one Pitna deceased came and objected to Ram Khelawan's beating Raghunath. Upon this all the four accused fell upon Pitna and gave him several lathi blows with the result that he dropped down on the ground and died shortly after. A report of this incident was lodged by Raghunath at the police station Tharyaon the same day.

(4) The defence of the accused was that the land on which the cattle were grazing was their special preserve and they had grown their own grass there, that Raghunath and Kanchanya had no right to graze their cattle on the land, that Sheo Ram, Pyarey and Dodwa were not at all present at the time, that Ram Khelawan, however, was present and objected to the grazing of the cattle and rounded them up and when he was proceeding towards the cattle pound Raghunath and Pitna resisted and also attacked him with their lathis and he in self-defence also wielded his lathi.

(5) No injury was proved to have been received by Ram Khelawan appellant. Raghunath received two simple injuries — one a contusion and another an abrasion. Pitna received four injuries — one was contused wound 2" x 1/2" bone deep left parietal region 4" above the left ear, another contusion 2" x 2" on the right temple, third contusion 2" x 2" on the left temple and the fourth contused wound 2" x 1/2" x bone deep on the back and the inner side of the left forearm with fracture of left ulna. In the opinion of the doctor the death of Pitna was due to shock and haemorrhage as a result of the head injuries.

(6) In support of the prosecution case Raghunath, Munwa, Bishwanath, Matroo, Lala, Kanchanya and Nankoo were produced as eye-witnesses. On behalf of the defence one witness only, namely Suraj Bhan Singh, was examined. The learned Sessions Judge arrived at the following findings: (a) that the land in dispute was in exclusive possession of Sheo Ram, father of Raghunath, (sic) and his preserved grass was standing thereon and that Raghunath and Kanchanya had no right to graze their cattle on it; (b) that Ram Khelawan alone had actually participated in the incident and the remaining three accused arrived subsequently; (c) that Raghunath and Pitna were armed with lathis and they had no right to take away the cattle forcibly from the possession of Ram Khelawan and that this action on their part gave a reasonable apprehension in the mind of Ram Khelawan that he might be beaten by Raghunath and Pitna if he did not desist from taking the cattle to the pound; (d) that Raghunath and Pitna did not ply their lathis and caused no injuries to Ram Khelawan and were merely trying to prevent their cattle from being taken away to the cattle pound; (e) that the number and nature of injuries show that the right of self-defence was exceeded.

(7) Upon these findings the learned Sessions Judge acquitted Sheo Ram, Pyarey and Dodwa and convicted Ram Khelawan under S. 304, Part II, Penal Code.

(8) In this appeal the findings of fact arrived at by the learned Sessions Judge have not been challenged before me. What has been urged is that upon these findings the right of self-defence was complete and it was not exceeded. It has been further argued that the sentence is too severe. In my judgment the learned Sessions Judge was right in holding that the right of self-defence was exceeded. It is true that as the cattle were grazing on the land of Ram Khelawan and his father, Sheo Ram, Ram Khelawan had a right to take the cattle to the cattle pound, and Raghunath and Pitna had no right to prevent him from doing so. Their action in forcibly removing the cattle from Ram Khelawan's possession amounted technically to robbery even though the cattle belonged to them. Ram Khelawan, therefore, was entitled under S. 103, Penal Code to prevent this being done and if necessary even to cause injuries to the extent of causing death. But the extent of harm to be caused in defending one's property depends on the circumstances of each case. Unnecessary harm is not permitted to be caused in the exercise of the right of self-defence.

(9) In the present case even though Raghunath and Pitna had lathis they did not use them at all nor threatened Ram Khelawan that lathis would be used. In the circumstances of the case there could be no reasonable apprehension for Ram Khelawan that grievous hurt or death would be caused to him and he was not justified in causing the death of Pitna. I consider that the learned Sessions Judge was right in holding that Ram Khelawan exceeded his right of self-defence.

(10) The learned Sessions Judge has convicted the appellant Ram Khelawan under S. 304, Part II. This is wrong. There appears to be a misapprehension as to the applicability of cl. (2) of S. 304 as I find that in many a case lower Courts have not correctly applied that clause.

(11) Clause (2) of S. 304 applies when the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. This clause, therefore, can never come into operation when there is an intention to cause such bodily injury as is likely to cause death.

(12) In the present case Ram Khelawan hit Pitna with a lathi. He had, therefore, the intention to cause injury and since he hit him

on the head he had the intention of causing such bodily injury as is likely to cause death. As the act was not murder under S. 302 because it was covered by exception (2) of S. 300, the appellant should have been convicted under cl. (1) of S. 304.

(13) It was suggested that the sentence was too severe. I do not agree.

(14) The appeal is dismissed. Ram Khelawan is on bail. He shall surrender immediately and serve out the sentence.

D/D.H. Appeal dismissed.

A.I.R. 1953 ALL. 557 (Vol. 40, C. N. 275)

(LUCKNOW BENCH)

GHULAM HASAN AND BRIJ MOHAN LALL JJ.

Kashi Prasad, Appellant v. Padamjit Singh and another, Respondents.

Ex. Decree Appeal No. 55 of 1948, D/- 9-4-51.

(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 2 (a) — Debt includes decree. (Para 3)

(b) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 7(3) — Bar against execution.

Section 7(3) contemplates that a decree cannot be executed against the landlord's proprietary rights in land mentioned in the notice published under S. 11 between the period of the passing of the order under S. 6 and the making of the declaration by the Collector in accordance with S. 44 that the landlord has ceased to be subject to the disabilities of the sub-section or until the passing of the order by the Special Judge referred to in sub-s. (2), S. 44. Section 7(3) does not say that the decree can be executed subject to the rights of the decree-holder. (Para 4)

H. N. Das and Haider Husain, for Appellant; B. K. Bhargava, for Respondents Nos. 1 and 2.

GHULAM HASAN J.: This appeal by the decree-holder has arisen in the following circumstances:

(2) In 1943 Raja Sir Daljit Singh, the father and grand-father of the respondents 1 and 2 respectively entered into an agreement with the appellant, Pt. Kashi Prasad, for sale of certain villages to him. The Raja did not fulfil his agreement, whereupon Pt. Kashi Prasad filed a suit in 1944 for damages to the extent of Rs. 43,251/13/4 only. This amount included the earnest money which had been paid by Pt. Kashi Prasad to the Raja. On 1-6-1945, the suit was decreed for Rs. 25,000/- only. On 5-1-1948, the decree-holder applied for execution of the decree by sale of the right, title and interest of the judgment-debtors in three villages Andhi, Bechiya Abadi and Balipur. The judgment-debtors objected that the decree could not be executed in view of S. 7, U. P. Encumbered Estates Act. It appears that Raja Daljit Singh applied on 16-10-1935, for relief under the provisions of the U. P. Encumbered Estates Act. The properties including the villages in dispute were gazetted on 23-1-1937 under S. 11 of the Act. The final award (Ext. 1) was passed by the Collector on 15-3-1947. Three main issues were framed by the Execution Court. It was held that the property in suit was shown in the proceedings under the Encumbered Estates Act and the provisions of the Act were applicable to it. It was also held that the decree-holder obtained the decree on the basis of a private debt against the judgment-debtors, but he could not proceed against the said property of the judgment-debtors in view of S. 7, sub-ss. (2) and (3). The result of the findings was that the villages in question could not be attached and sold in execution of the decree. Against this order the present appeal has been filed by the decree-holder.

(3) The points which were decided against the decree-holder by the Court below have been reiterated before us. As regards the first contention that the decree is not a debt within the meaning of S. 2, sub-s. (a) of the Encumbered Estates Act, it would be sufficient to say that the present decree clearly comes within the definition of the word "debt". Debt, according to S. 2 (a), includes any pecuniary liability except a liability for unliquidated damages. It is true that the claim originally put forward by the decree-holder was one which might be called a claim for unliquidated damages, for he not only asked for the refund of the earnest money advanced by him but also claimed damages occasioned by the breach of the agreement. The decree, however, was for Rs. 25,000/- only which is an ascertained sum. The decree is undoubtedly a pecuniary liability and excludes the liability for unliquidated damages. We hold, therefore, in agreement with the view of the Court below that the decree is a debt within the meaning of S. 2 (a) of the Act.

(4) As regards the second contention, we are equally clear that the provisions of S. 7 (3) prevent a decree-holder from executing the decree. Section 7 (1) (a) (b) relates to proceedings and suits in respect of debts incurred before the passing of the order by the Collector under S. 6, but sub-ss. (2) and (3) relate to the decree obtained on the basis of a private debt incurred by the landlord after the passing of the aforesaid order. Sub-section (3) which is material reads as follows:

> "After the passing of the order under S. 6 and until the Collector has declared in accordance with S. 44 that the landlord has ceased to be subject to the disabilities of this sub-section or until the passing of the order by the Special Judge referred to in sub-section 2, Section 44, no decree obtained on the basis of any private debt incurred after the passing of the order under section 6 shall be executed against any of the landlord's proprietary rights in land mentioned in the notice published under section 11 and the landlord shall not be competent, without the sanction of the Collector, to make any exchange or gift of, or to sell, mortgage or lease those proprietary rights, or any portion of them."

A plain reading of sub-s. (3) shows that the sub-section contemplates that a decree cannot be executed against the landlord's proprietary rights in land mentioned in the notice published under S. 11 between the period of the passing of the order under S. 6 and the making of the declaration by the Collector in accordance with S. 44 that the landlord has ceased to be subject to the disabilities of the sub-section or until the passing of the order by the Special Judge referred to in sub-s. (2), S. 44. The section also imposes the disabilities upon landlord to make any exchange or gift of, or to sell, mortgage or lease his proprietary rights, or any portion of them in the land without the sanction of the Collector. A reference to S. 44 will show that the disabilities of the landlord imposed by sub-s. (3) of S. 7 cease

(1) "(a) when the debt has been liquidated under section 23 or section 24;

(b) when a mortgage has been granted under section 25;

(c) when the amount ordered to be paid in instalments under section 27 or section 28 has been paid in full or realized as an arrear of land revenue."

and the Collector is bound by the section to make a declaration to that effect. Admittedly no declaration has yet been made. But, apart from that, we are not concerned in the present case with the removal of the disabilities. It is urged before us that the liquidation scheme has been completed by the Collector and instalments are being realised by the Government along with the Government revenue from the judgment-debtors who are in possession of the property. The learned counsel contends that he desires to sell the right, title and interest of the judgment-debtors in the property such as it is and has no intention to interfere with the scheme of liquidation proposed by the Collector. All that he desires is that when he purchases such an interest he should be allowed to pay instalments in the same manner as the judgment-debtors themselves are required to pay as they are a charge on the property. But to allow him to do so would be to execute the decree which is expressly prohibited by sub-section (3). It is not possible by reason of the provisions of that sub-section to substitute the name of the decree-holder in place of the judgment-debtors as desired by the former to enable him to pay the instalments, for sub-s. (3) fixed a definite period of time, namely, the passing of the order under S. 6 and the declaration by the Collector under S. 44 within which no decree obtained on the basis of any private debt incurred after the passing of the order under S. 6, such as the present decree, can be executed against any of the properties of the landlord mentioned in the notice published under S. 11. Unlike cls. (a) and (b) of sub-section (1) which forbid the pending proceedings to be continued or a fresh suit or other proceedings to be instituted in respect of the debts incurred by the landlord before the passing of the order under section 6, sub-s. 3 creates no bar against the institution of the suit but it imposes a definite disability upon the execution of the decree when obtained to execute it during a specified period. Sub-section (3) does not say that the decree can be executed subject to the rights of the decree-holder. We accordingly hold in agreement with the view taken by the court below that the present decree is not executable. We are informed that the villages Andhi and Bechiya Abadi have already been sold to certain creditors under S. 28 of the Encumbered Estates Act and in respect of the other village instalments have been fixed.

(5) The result is that the appeal fails and is accordingly dismissed with costs.

D/K.S. Appeal dismissed.

A.I.R. 1953 ALL. 558 (Vol. 40, C. N. 276)

MALICK C. J. AND V. BHARGAVA J.

Simbhaoli Sugar Mills Co., Ltd., Applicant v. Commissioner of Sales Tax, U. P. Lucknow, Opposite party.

Misc. Case No. 290 of 1951, D/- 6-4-1953.

(a) Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 11 (2) (b) — "Within thirty days of such refusal."

The words "within thirty days of such refusal" must mean within thirty days of the date when the Revising Authority refused to make the reference and not within thirty days of the knowledge of such refusal. (Para 1)

(b) Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 11 (2) (b) — Exclusion of time taken for filing copies — (Limitation Act (1908), S. 12).

The time taken in filing requisite copies should be excluded in computing the period of limitation prescribed by the section. AIR 1952 All 816, Foll. (Para 2)

Anno: Limitation Act, S. 12 N. 5.

K. C. Mittal, for Applicant.

CASE CITED:

(A) ('52) AIR 1952 All 816: 1952 All LJ 183

MALIK C. J.: This is an application under section 11(2) (b) of the U. P. Sales Tax Act (No. XV of 1948). The order of the Judge (Revisions) Sales Tax, U. P. was passed on 29-11-1950. The applicant then made an application under S. 11 that certain questions may be referred to this Court for decision. This application was dismissed by the Judge (Revisions) Sales Tax, U. P. on 20-8-1951. The office made a report that the application was beyond time and that it should have been filed by 19-9-1951. This office report was made on two grounds: firstly, that there was no provision in the U. P. Sales Tax Act for exclusion of the time taken in obtaining copies of the relevant orders and, secondly, that the application should have been filed within thirty days of the order of the Revising Authority refusing to refer a case to this Court and not within thirty days from the date of the service of the notice of such order. The applicant had claimed that the notice of the order was served on the applicant on 14-9-1951.

Though the applicant contended that his application was not barred by limitation, to be on the safe side, he filed an application under S. 5 of the Limitation Act also. Notice of this application was issued and we had the case listed before us so that both the questions of law which appear from the office report may be heard and decided in the presence of counsel for the parties. No one has appeared on behalf of the State and, after hearing Mr. Mittal, learned counsel for the applicant, we have come to the conclusion that an application under S. 11(2) (b) has to be made within thirty days of the order of the Revising Authority refusing to refer a case to this Court and not within thirty days from the date of the service of notice of such order. Section 11(2)(b) of the Act is as follows:

"11(2) If, for reasons to be recorded in writing, the Revising Authority refuses to make such reference, the applicant may, within thirty days of such refusal, either —

(a) ....

(b) apply to the High Court against such refusal."

Learned counsel has urged that "within thirty days of such refusal" must mean within thirty days of the knowledge of such refusal. We are afraid we cannot accept this contention. Within thirty days of such refusal must mean within thirty days of the date when the Revising Authority had refused to make the reference. A perusal of S. 66(1) of the Indian Income-tax Act would make the point abundantly clear. In S. 66(1), Income-tax Act the applicant has to apply for a reference within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 to the Appellate Tribunal and if the Tribunal refuses to make a reference then under section 66(2) he can

apply for a reference within six months "from the date on which he is served with notice of the refusal."

If the Legislature had intended that thirty days under S. 11(2) of the U. P. Sales Tax Act should count from the date of the service of notice of such refusal then they would have said so. In view of the clear language of S. 11(2)(b) we cannot hold that the application should be made within thirty days of the date of receipt of notice of the refusal and not within thirty days of the date of refusal.

(2) On the other point, as to whether the time taken in filing the requisite copies should or or should not be excluded, there is a Division Bench ruling of this Court in — 'Amritsar Sugar Mill Co. Ltd.. v. Commr. Sales Tax, U. P., Lucknow', AIR 1952 All 816 (A). We are bound by that decision and it is, therefore, not necessary to go into this question further. If the time taken in filing the requisite copies are included in the computation of the period then the application would be within time. We, therefore, hold that the application was within time and direct that notice of the application be issued to the other side.

B/V.R.B. Order accordingly.

A.I.R. 1953 ALL. 559 (Vol. 40, C. N. 277)

RAGHUBAR DAYAL AND MUKERJI JJ.

Mt. Asa Devi, Plaintiff-Appellant v. Mt. Champa Devi and others, Defendants-Respondents.

First Appeal No. 341 of 1939, D/- 11-3-1953.

(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11 — Jurisdiction of Civil Court.

A Civil Court has jurisdiction to determine a question of title to property which had been shown in a list published under S. 11 and about which the plaintiff either failed to prefer a claim before the Special Judge before filing a suit in the civil Court, or preferred the claim after the institution of a suit in the civil Court for recovery of possession of such property on the basis of title. (Para 11)

(b) Contract Act (1872), S. 74 — "Stipulation by way of penalty."

A clause in a contract which terminates the contract and places the parties in the same position in which they were before the contract was entered into cannot be said to be a penal clause. Case law discussed. (Para 14)

Anno: Contract Act, S. 74 N. 1, 19.

(c) Contract Act (1872), S. 74 — Penal clause in family settlement.

If a clause was in the nature of a penalty, it can be relieved against even if it was contained in a family settlement. AIR 1933 All 252 (FB), Foll. (Para 17)

Anno: Contract Act, S. 74 N. 16.

(d) Specific Relief Act (1877), S. 24 (c) — "Already chosen his remedy."

Held that remedy to receive the overdue instalments was not an alternative remedy to getting back the property on failure of three consecutive instalments. (Para 20)

(e) Civil P. C. (1908), O. 7, R. 7 — Relief.

Whether the plaintiff can get actual possession or not by virtue of some statutory provision is not a ground for not giving her a decree for possession. That question can be determined when that question comes before the Court in execution proceedings. (Para 23)

Anno: Civil P. C., O. 7, R. 7 N. 1.

Shambhu Prasad, for Appellant; G. S. Pathak, K. C. Mital, C. S. Saran, S. N. Katju, B. R. Avasthi and J. N. Takru, for Respondents.

CASES CITED:

(A) ('33) AIR 1933 Oudh 291: 8 Luck 707
(B) (1682) 1 Vern 80: 23 ER 325
(C) ('15) AIR 1915 PC 94: 33 Ind Cas 323 (PC)
(D) (1913) 82 LJPC 77: (1913) AC 319
(E) ('31) AIR 1931 Nag 60: 132 Ind Cas 450
(F) ('33) AIR 1933 All 252: 1933 All LJ 132 (FB)
(G) ('29) AIR 1929 All 558: 1929 All LJ 894
(H) ('25) AIR 1925 Mad 84: 82 Ind Cas 751

MUKERJI J.: This is an appeal by a plaintiff in a suit for possession of certain zemindari and house properties which were detailed in extenso at the foot of the plaint. The suit which has given rise to this appeal arose under the following circumstances:

(2) Rikhi Lal and Raghubans Sahai were two brothers who owned considerable house and zemindari property in the district of Saharanpur; they also owned certain mortgagee rights under two usufructuary mortgage deeds of the value of Rs. 42,000/-. Raghubans Sahai was the first to die; he died some time prior to 1905 leaving behind his son Shambhu Nath as his heir. Rikhi Lal, the other brother, died in 1905 leaving a widow Shrimati Asha Devi who is the plaintiff in this appeal. Rikhi Lal before his death had executed a will in favour of the plaintiff and it was on the basis of this will that she succeeded in getting mutation effected in her name on a moiety share of the family property.

(3) Disputes, however, arose between Sm. Asha Devi on the one hand and Shambhu Nath, Raghubans Sahai's son, on the other. These disputes, however, were amicably settled by means of a family arrangement. The settlement which was arrived at was recorded in a document which was registered and which, in effect, forms the basis of the present suit. This document, which we shall refer to hereafter as the family arrangement, was executed by Shambhu Nath and Asha Devi on 17-8-1908. By means of this family arrangement it was settled that Shambhu Nath was to be the owner in possession of the entire properties including the mortgagee rights in respect of the two usufructuary mortgage deeds, except a certain house No. 7 and certain other houses mentioned in list (b) of the list appended to the family arrangement. Asha Devi was also to receive from Shambhu Nath a sum of Rs. 16,000/- in cash at the time of the registration of the family arrangement, and she was to receive annually a sum of Rs. 1,300/- as maintenance; this sum of Rs. 1,300/- was payable by Shambhu Nath in two half-yearly instalments falling due on 15th February and the 15th August every year.

The family arrangement also made provision that in the event of three consecutive defaults in respect of the maintenance payable half-yearly, the family arrangement was to terminate, or, in the words of the arrangement Asha Devi was given:

"The right to cancel this deed of compromise and obtain possession over that property which she has left in possession of the 1st party at present and which is mentioned at the foot of this deed of compromise."

(These are the words in which the family arrangement has been translated and these words appear at page 85, line 35 of the paper-book).

According to the family arrangement if Asha Devi did not obtain possession over certain property on account of its being redeemed, she was to receive a sum of Rs. 5,000/- in cash with interest at the rate of eight annas per cent. per mensem from the date of cancellation after allowing a set-off to the extent of Rs. 16,000/- which was to be paid to her under the family arrangement at the time of registration. The document also created a charge in respect of this sum of Rs. 5,000/- on certain items of property enumerated in list A of the family arrangement. Asha Devi was also given the right to recover the arrears of maintenance in the event of this falling into arrears. These were the material conditions provided for by the family arrangement.

(4) Shambhu Nath made payments of the maintenance payable to Asha Devi according to the family arrangement up to 15-2-1933, and thereafter there was default. There were successive defaults on 15-8-1933, 15-2-1934 and 15-8-1934. Asha Devi consequently taking advantage of the provision in the family arrangement, terminated the arrangement and laid claim to the properties which she had, under the family arrangement, given to Shambhu Nath. In paragraph 7 of her plaint she stated as follows:

"Out of Rs. 1,300/- payable annually, the plaintiff has received the entire amount due up to the 15th of February, 1933. After this she did not receive the amount which was payable on the 15th of August, 1933, 15th of February, 1934 and the 15th of August 1934. The last instalment fell due on the 15th of August, 1934, and as the amount was not received the right to cancel the document, dated the 17th of August, 1908, and to demand possession over the property accrued to the plaintiff. She accordingly enforced that right, cancelled the said document and demanded possession, but no compliance was made."

Compliance not having been made she filed a suit to get back the property on the 11-11-1935, out of which the present appeal has arisen.

(5) Certain events happened during the period since 17-8-1908, the date on which the family arrangement had been recorded, and the date on which the right to cancel that arrangement, namely, 15-8-1934, accrued to the plaintiffs and it is necessary to indicate very briefly some of those events. During this period Shambhu Nath and his successors made certain transfers in respect of properties which had been received by Shambhu Nath under the family arrangement. The other event of importance to notice is the fact that Shambhu Nath died sometime in 1934. One other matter need be noticed at this stage and that matter is that sometime in 1926 Shambhu Nath mortgaged certain properties to Ram Sarup and others & left the responsibility of making payments of the annuity receivable by Asha Devi on the mortgagees; Asha Devi, however, was not party to this contract.

(6) The suit was filed against the heir of Shambhu Nath and the transferees from Shambhu Nath; this had to be so because, as we have indicated earlier, the suit was a suit for possession and after the transfers some of the properties had passed into the hands of the transferees and possession had to be obtained in respect of those properties from the transferees.

(7) There were two sets of defendants, therefore; the first set consisting of the heir of Shambhu Nath, and the second set, the transferees. The defence taken by the heir of Shambhu Nath, namely, Sm. Champa Devi his widow, was that Rikhi Lal and Shambhu Nath were members of a joint Hindu family and that on the death of Rikhi Lal the property passed to Shambhu Nath by survivorship and, as such, the family arrangement relied upon by the plaintiff was an illegal transaction. The existence of the family arrangement was also denied; it was also said that if there was a family arrangement in existence, then it had been obtained by fraud and was therefore not binding. It was further contended that the term under which the plaintiff claimed to have cancelled the arrangement was penal in its character and was consequently unenforceable at law. There was a further defence which need be noticed and that was that the suit was barred by the provisions of the Encumbered Estates Act and S. 11, Civil P. C. This defence was raised because of the fact that Sm. Champa Devi, widow of Shambhu Nath, had filed an application under S. 4, Encumbered Estates Act, on 23-9-1935. In this application Champa Devi had shown the properties to which claim was being laid by Asha Devi as her own properties. It may be noticed also that Asha Devi laid a claim to the arrears of maintenance before the Special Judge at a certain stage of the proceedings there.

(8) The defence of the transferees followed more or less the same line which was taken by Champa Devi, the widow of Shambhu Nath. The transferees, however, raised two more pleas in defence, that they, that is, defendants 2 to 4, were not liable to pay the sum of Rs. 5,000/- to the plaintiff, inasmuch as the usufructuary mortgage in respect of which this claim of Rs. 5,000/- was made had been redeemed. All the transferees claimed protection under S. 41, T. P. Act, and they also raised the bar of limitation.

(9) The trial Court recorded the following findings on the evidence which was adduced before it:

1. That for the purposes of the case it was immaterial whether Shambhu Nath was or was not a member of a joint Hindu family at the time of Rikhi Lal's death.

2. That there was default in the payment of three successive instalments.

3. That none of the transferees made any reasonable or independent inquiry so as to protect them under S. 41, T. P. Act: The learned trial Judge further found that in this case the plaintiff did nothing which could have misled the transferees into believing that their transferor had the right to make the transfer. The learned Judge was also of the opinion that S. 41, T. P. Act, was inapplicable, in terms, to the facts and circumstances of the present case, inasmuch as the transferor in this case was not the "ostensible owner" of the property but was, at the time when he made the transfer, the real owner under the family arrangement.

4. That there was no fraud or misrepresentation of any kind in regard to the family settlement and consequently the settlement was binding on the parties.

(10) The trial Judge, even though he came to the aforementioned findings in the suit, dismissed the suit on two grounds. First, on the ground that the clause in the family settlement by the enforcement of which the suit for possession was filed was in the nature of a "penalty" and consequently could not be enforced. Secondly, the trial Judge was of the view that the plaintiff came in for possession in regard to that property which Champa Devi had showed as her own in the list of properties appended by her

to her application before the Special Judge under S. 4, Encumbered Estates Act, and so in respect of those properties the plaintiff's suit was barred.

(11) Before this case came up for final disposal before us, two other matters were decided by this Court and we should like to refer to those two matters at this stage. One such question was whether a civil Court had jurisdiction to determine a question of title to property which had been shown in a list published under the provisions of S. 11, Encumbered Estates Act, and about which the plaintiff either failed to prefer a claim before the Special Judge before filing a suit in the civil Court, or preferred the claim after the institution of a suit in the civil Court for recovery of possession of such property on the basis of title. The aforementioned question was referred by the Bench before which this appeal came up for hearing on 21-9-1949 to a Full Bench for opinion. On 16-9-1952, the Full Bench decided the question thus:

> "The Civil Court has jurisdiction to determine the question of the plaintiff's title in the present case and we answer the last part of the question referred to this Bench accordingly."

As a result of the Full Bench decision, therefore, the plaintiff's suit for recovery of possession could not be held to be barred under the provisions of S. 11, Encumbered Estates Act.

(12) The other matter which has been decided at an earlier stage is whether the entire appeal abated as a result of the death of Kushumbari Dass respondent No. 5 whose heirs were not brought on the record within the time allowed by law. In regard to this matter the point that had been decided was that the death of respondent 5, Kushumbari Dass leads to the abatement in respect of the claim as against that respondent alone but does not mean the abatement of the entire appeal. This decision apparently was based on the principle that the claim as against the deceased respondent was separable from the claim in regard to the other respondents and that there would be no real inconsistency in the decrees that may be made by this Court as against the living respondents with the decree that determined the rights as against the deceased respondent.

(13) On behalf of the appellants the main question that claimed the attention of the learned counsel in arguments, was the question whether or not the suit could be decided on the ground that the plaintiff's right to claim possession hinged on a clause in the family arrangement which was in the nature of a "penalty". As we have noticed earlier, the trial Judge was of the opinion that relief could only be granted to the plaintiff by enforcing the clause of the family arrangement which was in the nature of a "penalty". Reliance was placed by the trial Judge on the provisions of S. 74, Contract Act. Section 74, Contract Act, is in these words:

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The first explanation to the section may also be quoted:

> "Explanation: A stipulation for increased interest from the date of default may be stipulation by way of penalty."

It is not necessary to quote the exception or the other explanation which is incorporated in the section. It will be observed that in S. 74 two types of stipulations are contemplated: First, a stipulation to pay a sum of money, and, the second, a stipulation of any other kind that may be in the nature of a "penalty". Where parties to a contract mutually agree that in the event of a breach, the one shall pay to the other a specified sum of money, it not infrequently becomes a question of some difficulty whether such sum is to be considered in the nature of a "penalty" — that is, as a sum to be paid in the event of any damage, however great or small, which may be incurred by a breach of the contract; or as liquidated damages — that is, as the sum to be paid in that event, without reference to the extent of the injury actually sustained; and the question as to whether a sum stipulated for in a contract is a penalty or a liquidated damage, is for the Court to decide.

The fact that the sum is expressly stated in the contract to be a penalty or liquidated damages, as the case may be, is 'prima facie' evidence that it partakes of that character but is not conclusive. A distinction has been drawn between liquidated damages and a penalty and the kernel of that distinction is to be found in the fact that the essence of a penalty is a payment of money stipulated 'in terrorem' of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of the damage. Whether a stated sum or a sum that may be definitely ascertainable on the terms of the contract is or is not a "penalty" can be determined by a Court with comparative ease, inasmuch as there are a good many authorities of high value from which principles for such determination can be easily gleaned; but the position in regard to the "other stipulations by way of penalty" cannot so easily be determined because there are not many decided cases interpreting the scope and the nature of these words.

(14) The clause which is said to be in the nature of a penalty in the family arrangement is in these words:

> "If the amount of three harvests becomes due by the 1st party and the 2nd party does not receive it on any account, she shall have the right to cancel this deed of compromise and obtain possession over that property which she has left in possession of the 1st party at present and which is mentioned at the foot of this deed of compromise. The name of the 1st party shall be struck off and that of the 2nd party entered in public papers. The 1st party shall have no objection to it. The 2nd party shall have the right to realize the remaining amount of the fixed instalment with interest aforesaid from the property of the 1st party who shall not be liable for the amount in future."

The trial Judge took the view that the right conferred on the plaintiff to recover the arrears of instalments along with interest at six per cent. per annum and also the right given to her to obtain possession over that share of the property which she had handed over to Shambhu Nath at the time of the family arrangement in the event of the default of three consecutive instalments of the maintenance money was in the nature of a "penalty", because this was

> "a sort of punishment imposed on Shambhu Nath and his successors-in-interest for non-payment of three consecutive instalments on due dates."

In our opinion, the learned Judge was not right in the view that he took of this clause. In order to make a clause penal, the clause and the

contract must, in our judgment, subsist, and that the effect of the "penal" clause should continue to be effective along with the subsistence of the contract. A clause in a contract which terminates the contract and places the parties in the same position in which they were before the contract was entered into could not be said to be a penal clause. There was in this case no "penalty" being imposed which subsisted along with the contract, but the contract itself was to be abrogated according to the clause on the happening of a contingency. No party was being subjected to any particular hardship because of the default; the parties were being relegated to the position in which they were when they originally entered into the contract. In order to correctly judge the import of a clause of a family arrangement, one has to look at the family arrangement as a whole, and one has also to look at the intention of the parties which is to be gathered from the circumstances in which the agreement was made.

In this case we find that there was a dispute in relation to the share of Rikhi Lal which was held by his widow Asha Devi, the plaintiff; Shambhu Nath was claiming it on the strength of the right of survivorship, while Asha Devi claimed it on the ground that her husband at the time of his death was a separated member of a Hindu family. This dispute was mutually settled by the family arrangement: Asha Devi giving up her right to possess the properties on condition that she was paid certain specified sum at the time of the execution of the document and a certain specified sum periodically by way of maintenance. Under these circumstances it was natural for Asha Devi to make certain that she did get her maintenance regularly and that in the event of her maintenance falling into arrears, the bargain could be annulled and she could get possession over the property which she had handed over in consideration of receiving regular maintenance. There was, in our judgment, nothing in this anxiety of Asha Devi to safeguard the regular payment of her maintenance which could be termed 'in terrorem'. It was a part of the bargain itself, the very basis of the bargain, and not a term which rendered the bargain any the more difficult of performance on the happening of a certain contingency or something which had the effect of terrorising the other party to the bargain to adhere to the bargain. In our judgment, it was a fair stipulation which placed the parties on an equal footing, for if Shambhu Nath found it more profitable to keep the properties in his possession then he had to pay the annual maintenance within the specified time, but if he found it difficult to make the payments within the specified time then he could give up the property and save himself the annual payments.

(15) Reliance was placed by the learned Judge on the decision of — 'Munshi Lal v. Ahmad Mirza', AIR 1933 Oudh 291 (A), for the view that Cl. 4 of the family arrangement was in the nature of a "penalty" within the meaning of S. 74, Contract Act. 'Munshi Lal's case (A)', in 1933 Oudh lays down that where a contract carries with it an element of punishment, it is in the nature of a penalty. The material condition which fell for interpretation in — 'Munshi Lal's case (A)', was in these terms:

> "That if for any reason the whole or part of the property sold goes out of the possession of the vendees and their heirs and representatives, then the vendees, their heirs and representatives, shall have 'also' power that by cancellation of the sale deed executed this day by the vendees in favour of the executant No. 4, they get possession of the said property returned and become in possession of the property entered in the said sale deed as a proprietor like the vendee....."

In the view of the learned Judges of the Oudh Chief Court, the use of the word "also" in the aforementioned paragraph indicated that the condition was by way of an additional remedy and, therefore, was in the nature of a penal clause.

This condition was interpreted as a condition of defeasance and, after referring to the provisions of S. 31, T. P. Act, it was noticed that a condition subsequent by way of defeasance on the happening of an uncertain event can be valid; they went on to say that, even if the law allows such a condition being imposed, a Court was not bound in law to enforce such a condition in any particular case. Reliance was placed on the case of — 'Alexander Popham v. Bampfeild', (1862) 23 ER 325 (B), and particularly on the observations of the Lord Chancellor in that case at page 326. The learned Judges of the Oudh Chief Court were of the opinion, relying on the words of the Lord Chancellor, that in the circumstances of that case it was just and equitable to relieve the defendants of the specific enforcement of the condition. They were of the view that the additional remedy of forfeiture given to the plaintiffs in that case was in the nature of a liability imposed on the defendants as a punishment for their committing a breach of the agreement.

In the present case we are of the opinion that the right given to the plaintiff to cancel the contract as a whole was not in the nature of a punishment but was in the nature of a safeguard of the plaintiff's own interests in the property which she had chosen to pass to Shambhu Nath on his discharging certain obligations which he was required to discharge as a consideration for the transfer. We are aware that a penalty may be a vindictive penalty or a reasonable penalty, and that it may be severe or mild, fair or unfair, but in all circumstances a penalty remains a penalty; put to constitute the existence of a penalty what is necessary is that it should appear that there was an element of punishment, however well-deserved and temperate such punishment may be, about it. In this case we have taken the view that there was no element of punishment.

(16) Reliance was next placed by the learned trial Judge on the decision of the Privy Council in — 'Steedman v. Drinkle', AIR 1915 PC 94 (C). In that case there was an agreement for sale of certain land and on execution of the agreement a portion of the purchase money was paid and for the balance it was provided that it should be paid with interest by annual instalments on a particular date in each year and that on any default, the whole property and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined at the option of the vendor, and it was also provided that time was to be considered as the essence of the agreement. The first instalment was not paid; the vendor thereupon gave notice cancelling the agreement. The vendee after receipt of the notice tendered the amount, but the vendor declined to receive it. The vendee sued for specific performance and, in the alternative, claimed a relief against the forfeiture clause in the agreement. On these facts it was held by their Lordships of the Judicial Committee that there was no justification for decreeing specific performance and that the stipulation for forfeiture was one for a penalty which the vendee should be relieved against.

Their Lordships further pointed out that under the agreement of that particular case, the Court below was right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement. It is important to notice that the vendee's claim for specific performance was rejected, with the result that the parties were, by the decision of the Court, restored back practically to the position in which they were before the covenant for sale was executed. It had been held by the Judicial Committee earlier, in the case of — 'Kilmer v. British Columbia Orchard Lands Ltd.', (1913) AC 319 (D), that stipulation that payments already made of instalments might, on forfeiture, be retained was really a stipulation for penalty and should be relieved against. There can be no doubt, therefore, that where a party under a contract obtains an unfair advantage on the happening of a breach, then Courts lean against the party trying to secure such an unfair advantage. In the case before us the plaintiff does not, in our judgment, obtain any unfair advantage by the enforcement of the clause which gives her the right to determine the family arrangement in its entirety.

(17) Reliance was next placed on a decision of the Nagpur Judicial Commissioner's Court in — 'Mt. Bana Bai v. Mt. Chandrabhaga', AIR 1931 Nag 60 (E). In that case the first defendant to the suit executed a deed of maintenance in favour of the plaintiff agreeing to pay her a certain sum of money every year for her maintenance, and if default was made to deliver to the plaintiff possession of a certain field for cultivation and appropriation of profits in lieu of maintenance. Defendant 4 to the suit was a purchaser of the property without notice of the plaintiff's right and he, after his purchase, made certain improvements on the property. Default was made and the plaintiff sued for possession on the strength of the agreement. It was held, first, that the document did not transfer any right to the plaintiff in the property, and that the agreement was only an executory agreement which could be enforced if the plaintiff wished to exercise the option given to her. The fourth defendant was willing to pay the maintenance and hence the agreement was not specifically enforced. It was further held that the provision for the surrender on the possession of the field under the circumstances was in the nature of a penalty within the meaning of S. 74, Contract Act, and the Court, as such, was not bound to enforce it.

The learned Judges of the Nagpur Judicial Commissioner's Court pointed out that the object with which that particular stipulation was put into the agreement was to induce the executants to pay up the amount as soon as the demand for possession was made, and naturally, therefore, they were driven to the conclusion that the condition was in the nature of a penalty. It was argued before the learned trial Judge that even if the clause in question was in the nature of a penalty, even then it could not be relieved against inasmuch as it was contained in a family settlement. The learned Judge rightly overruled this contention, because he had the authority of this Court in — 'Mohiuddin v. Mt. Kashmiro Bibi', AIR 1933 All 252 (FB) (F), to the effect that a compromise, even if embodied in a decree, would not necessarily be enforced by a Court if it contained a penal clause.

(18) On behalf of the appellant reliance was placed on the decision of — 'Sheo Prasad v. Sanaullah', AIR 1929 All 558 (G), where it was held that the term "penalty" cannot be properly applied where all that is agreed between the parties is that they shall revert to the situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement. In that case one of the parties in effect, said this:

> "If you will agree to pay me so much I will accept it; if you do not so pay, I must stand upon my legal rights."

and in regard to this it was held that such a stipulation could not be regarded as a penalty because there was no exacting of anything more than was due.

(19) Reliance was next placed on the decision of — 'Rajagopala Padayachi v. Varadaraja Padayachi', AIR 1925 Mad 84 (H). In that case on a partition among three Hindu brothers, it was agreed that one of them should, instead of being given any land, be entitled to receive from each of the others an annuity and on default of payment of such annuity, should be entitled to resume that portion of his share which had gone to the defaulter. It was held that this clause could not be described as a penalty, nor could it be regarded as a forfeiture clause. It was pointed out that in order to find a penalty clause, it is necessary to first discover whether there were in effect two contracts in one, namely, one a primary contract, and the other in the nature of a subsidiary contract; and when on the failure of the primary contract, the subsidiary contract becomes enforceable, then in such cases Courts are called upon to determine whether or not the subsidiary contract is a contract in the nature of enforcing a penalty. In the case before us, there was really no subsidiary contract enforcing a penalty.

(20) On behalf of Champa Devi respondent it was also urged that specific performance should not be granted in this case in view of the provisions of S. 24 (c), Specific Relief Act. Section 24 enjoins:

> "Specific performance of a contract cannot be enforced in favour of a person....."
>
> "(c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract;"

Reliance was based on this provision on the ground that Asha Devi had already approached the Special Judge for the purpose of getting the overdue instalments. We do not consider that the fact that Asha Devi had approached the Special Judge with respect to the arrears of her maintenance was the choice of an alternative remedy made by her, or that the choice of that remedy could have obtained for her satisfaction for the alleged breach of contract. The remedy to receive the overdue instalments was not an alternative remedy to getting back the property on failure of three consecutive instalments.

(21) On behalf of the respondents it was further argued that the present suit was barred by the provisions of O. 2, R. 2, Civil P. C., because according to the respondent the relief for possession should have been sought before the Special Judge by the plaintiff when she approached that Court with regard to the arrears of maintenance, because the cause of action in respect of both the reliefs was the same. No such bar was raised in the written statement and, indeed, there could be no such bar to this suit, inasmuch as the present suit had been filed before the plaintiff approached the Special Judge under the provisions of the Encumbered Estates Act.

(22) On behalf of the transferees the main argument was that the suit was barred by the provisions of S. 41, T. P. Act. The trial Judge

had considered this argument and had come to the conclusion that there was no such bar. It was found that none of the transferees made any inquiries in regard to the title of his transferor. The learned Judge further found that the section should not in terms apply, because Shambhu Nath was not an ostensible owner but was in effect the true owner when he made the transfers, although his ownership was liable to be defeated on the happening of a certain contingency. The learned Judge further found that the plaintiff did no act, either of commission or omission, which could have misled the transferees in any manner. We have examined the evidence and we are satisfied that the learned Judge was right in the conclusions at which he arrived in regard to this matter. Therefore, in our judgment, the transferees could not, under the circumstances of this case, invoke the aid of S. 41, T. P. Act, for their protection.

(23) On behalf of the transferees, it was lastly contended that this suit was really a suit for specific performance of a contract and that specific performance should not be decreed, inasmuch as the decree cannot now be enforced by giving possession to the plaintiff in respect of the zemindari properties, those properties having vested in the State by virtue of the Zemindari Abolition Act. We, however, are of the opinion that the present suit was not a suit really for the specific performance of a contract; but it was a suit for possession, pure and simple. In Relief A of her plaint the plaintiff's prayer was set out as follows:

"(A) The plaintiff may be put in possession over the property specified below on the dispossession of the defendants."

The suit embraced not only zemindari properties, but also house properties. On the view that we have taken, the plaintiff was entitled to possession of the properties in suit. Whether she can get actual possession or not by virtue of some statutory provision, is not, in our judgment, a ground for not giving her a decree for possession. The question whether she can or cannot be put in actual possession in respect of certain properties will undoubtedly be determined when that question comes before the Court in execution proceedings.

(24) In the result, we allow this appeal, set aside the decree of the trial Court and decree the plaintiff's suit; the decree, however, will not be as against respondent 5, namely, Kushumbari Dass in respect of whom there has been an abatement of the appeal by virtue of a previous order of this Court. The appellant will be entitled to get the costs of this litigation from the respondents.

B/D.H. Appeal allowed.

A. I. R. 1953 ALL. 564 (Vol. 40, C. N. 278)

RAGHUBAR DAYAL J.

Shafi Ahmad and another, Applicants v. State and another, Opposite Party.

Misc. Case No. 2600 of 1951, D/- 10-9-1952.

U. P. Panchayat Raj Act (26 of 1947), Ss. 52 (c) and 85 — 'Case'.

It is not open to sub-Divisional Magistrate to maintain the conviction for one offence and set aside the jurisdiction of the Panchayati Adalat with respect to the proceedings resulting in the conviction of the applicants for the other offence. (Para 2)

Kedar Nath Sinha, for Applicants; Batuk Lal, for Opposite Party.

ORDER: The applicants were tried by a Panchayati Adalat and convicted of the offences under Ss. 447 and 352, I. P. C. and sentenced to a fine of Rs. 15/- each for each offence. On revision, the Sub-divisional Magistrate set aside the order of conviction under S. 352, I. P. C., holding that it was wrong; but he did not quash the conviction of the applicants under S. 447, I. P. C. They, therefore, apply to this Court under Article 227 of the Constitution for the quashing of the conviction under S. 447, I. P. C.

(2) The jurisdiction of the Sub-Divisional Magistrate under S. 85 of the Panchayat Raj Act is limited to his cancelling the jurisdiction of the Panchayati Adalat with regard to any case, suit or proceeding if he finds that there had been a miscarriage of justice. If he finds that there was a miscarriage of justice, he is not given the power to pass the order which he considers to be correct on the basis of the material on record. It appears that the Act contemplates that once it is established to the satisfaction of the Sub-Divisional Magistrate that there had been miscarriage of justice the proceedings of the Panchayati Adalat be treated as null and void, its jurisdiction being cancelled so that the complainant, if so advised, might take the benefit of sub-s. (2) of S. 85 of the Act and file a fresh complaint in respect of that case. The fact that the Sub-Divisional Magistrate found the conviction of the applicants under S. 352, I. P. C. to be bad in law amounts to a finding that there had been miscarriage of justice. It would follow therefore that the only order which the Sub-Divisional Magistrate could have passed by virtue of the power given to him under S. 85, Panchayat Raj Act, was an order cancelling the jurisdiction of the Panchayati Adalat with regard to this case, leaving it free to the complainant to file a fresh complaint with regard to these offences in a competent court.

It was not open to him to maintain in a way the conviction for one offence and set aside the jurisdiction of the Panchayati Adalat with respect to the proceedings resulting in the conviction of the applicants for the other offence, under S. 352, I. P. C. The proceedings before the Panchayati Adalat were one just as the complaint was one and the case was one. It is true that the word "case" defined in cl. (c) of sec. 2 of the Act is to the effect that

" 'Case' means a criminal proceeding in respect of an offence triable by a Panchayati Adalat"; and this definition may be open to the interpretation that a case with respect to several offences against an accused amounts to there being several proceedings each of which is with respect to one particular offence. I am, however, of opinion that this would not be the correct interpretation of the word "case" as defined in this Act. There are no separate proceedings with respect to each of the offences made out on the allegations concerning the events of any particular transaction. It is only the result of the legal provisions that the act consisting of certain activities amounts to one offence and the act consisting of some other activities makes out a different offence.

It would be also very embarrassing in the trial for the different offences if the proceedings with respect to each offence be held to be a separate case and they happen to be tried separately by different courts, as there is a probability of the same evidence being open to scrutiny in the different courts; thus leading to a possibility of different judgments. I am, therefore, of opinion that the word "case" means a criminal proceeding in respect of the incidents complained of irrespective of the fact whether the incidents make out

one particular offence or several offences, and that, therefore, when miscarriage of justice takes place with respect to the conviction of an accused about a certain offence that should affect the entire trial and lead to the quashing of the jurisdiction of the Panchayati Adalat with respect to the entire case.

(3) I, therefore, allow this application, set aside the order of the Sub-Divisional Magistrate and order the Sub-Divisional Magistrate to pass the correct order in the light of what I have observed above, keeping in view that it has been held by the Sub-Divisional Magistrate in revision that there had been miscarriage of justice in so far as the applicants had been wrongly convicted of the offence under S. 352, I. P. C.

C/D.H. Application allowed.

A. I. R. 1953 ALL. 565 (Vol. 40, C. N. 279)
(LUCKNOW BENCH)
(FULL BENCH)
SAPRU, MUKERJI AND CHATURVEDI JJ.

Baij Nath & another, Appellants-Defendants v. Ram Bharose and others, Plaintiffs-Respondents.

Second Rent Appeal No. 40 of 1946, D/-10-4-1953.

Civil P. C. (1908), O. 22, Rr. 3 and 11 and O. 41, R. 4 — Appeals by defendants on common ground — Appeal by one of them abating — Effect on other appeals.

If, in a suit a plaintiff makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants, an appeal filed by all the defendants can be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on the record so that his appeal has abated, only if the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant, and in the event of the success of the appeal, it does not lead to two inconsistent and contradictory decrees.

While the appeal of the remaining defendants can be heard, the decision in it will not enure to the benefit of the legal representatives of the deceased defendant-appellant. (Para 25)

Scope and applicability of O. 22, Rr. 3 and 11 and O. 41, R. 4, discussed. 25 All 27, AIR 1930 All 211 (2), AIR 1944 All 240, AIR 1950 All 1, Considered; AIR 1923 All 211, 43 Cal WN 1088, Distinguished. AIR 1941 Oudh 219 (FB), AIR 1949 Nag 91, Relied on. (Paras 10, 11, 13)

Anno: Civil P. C., O. 22, R. 3 N. 3, 23; R. 11 N. 3; O. 41, R. 4 N. 8.

Mohd. Ayub and Hyder Husain, for Appellants Nos. 2 and 3; H. N. Misra, for Respondent No. 1.

CASES CITED:
(A) ('02) 1902 All WN 171: 25 All 27
(B) ('30) AIR 1930 All 211(2): 125 Ind Cas 591
(C) ('44) AIR 1944 All 240:
ILR (1944) All 344
(D) ('50) AIR 1950 All 1
(E) ('23) AIR 1923 All 211: 45 All 286
(F) ('19) AIR 1919 Cal 410: 53 Ind Cas 548
(G) ('40) AIR 1940 Pat 346: 19 Pat 870 (FB)
(H) ('34) AIR 1934 All 1029: 153 Ind Cas 356
(I) ('28) AIR 1928 Lah 572: 10 Lah 7 (FB)
(J) ('25) AIR 1925 Bom 290: 27 Bom LR 91
(K) ('34) AIR 1934 Lah 206: 15 Lah 667
(L) ('41) AIR 1941 Oudh 219: 16 Luck 515 (FB)
(M) ('36) AIR 1936 Oudh 209: 1935 Oudh WN 297
(N) ('27) AIR 1927 All 311: 100 Ind Cas 346
(O) ('39) 43 Cal WN 1088
(P) ('50) AIR 1950 Cal 59
(Q) ('05) 9 Cal WN 1061
(R) ('28) AIR 1928 Cal 184: 32 Cal WN 299
(S) ('49) AIR 1949 Nag 91:
ILR (1948) Nag 509

SAPRU J.: The question which has been referred by a learned single Judge of this Court to the Full Bench is as follows:

"If, in a suit, a plaintiff makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants, can an appeal filed by all the defendants be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on the record so that his appeal has abated; and further, if the appeal of the remaining defendants can be heard, would the decision in it enure to the benefit of the legal representatives of the deceased defendant-appellant?"

(2) In order to understand precisely how the point has arisen, it is desirable to give a few facts relating to these cases. The principal defendants in the suit out of which the two appeals arise were Braj Bhukhan (now dead), Baij Nath and Bhairon. The plaintiffs' suit was for possession of property alleged to have been taken wrongly into their possession by the defendants Braj Bhukhan, Baij Nath and Bhairon. The case put forward by the plaintiff-respondents was that in a partition the plots over which they were claiming possession were allotted to pattis Bhagwan Dutt and Dudhnath and that they were the proprietors of those pattis. Their case further was that in pursuance of that partition decree they obtained delivery of possession over the plots in the year 1937. Despite the decree in their favour at that time, however, some of these plots continued in possession of the defendants, so that the delivery of possession in respect of them was merely of a formal character. In these circumstances, the plaintiff-respondents had to bring a suit and in execution of the decree passed in that case, they were able to obtain actual possession over the plots over which delivery had actually not been given, some of the plots having been actually delivered at the time of delivery of possession in 1937. Thus their case was that after the decree in that suit had been executed in respect of some of the plots, they came into possession of all the plots in dispute. It is alleged by the plaintiffs that in June 1942 they were dispossessed from all these plots by the three defendants Braj Bhukhan, Baij Nath and Bhairon. Consequently the suit out of which these two appeals arise was brought by them for possession.

(3) The suit was resisted by the defendants on grounds common to them all. A joint written statement was filed. The first plea taken by them was that the plots appertained to patti Braj Bhukhan of which the three defendants

were the proprietors and did not appertain either to patti Bhagwan Dutt or to patti Dudhnath. It may be pointed out that from para. 16 of their written statement it appears that their case was that they were holding possession of the plots separately and that their rights too were separate. In other words their case was that they were not joint tenants, but tenants in common, i.e. tenants with separate and separable interests in the property. The second line of defence was that the three defendants had, in any case, been in possession of them for more than 12 years before the institution of the suit and had for that reason perfected their title by adverse possession. A third line of defence was that the suit was barred by limitation as the plaintiffs had been dispossessed more than three years before the institution of the suit, the period of limitation for a suit for possession under S. 180, U. P. Tenancy Act, being only three years. On the question as to whether the defendants were holding possession on the plots separately and their rights were separate, no issue seems to have been framed by the learned Munsif. On all the points raised the findings of the lower appellate Court were in favour of the plaintiff-respondents and against the defendants. Thereafter the present three defendants, viz. Braj Bhukhan, Baij Nath and Bhairon preferred the present appeals to this Court. During their pendency one of the defendant-appellants Braj Bhukhan died. An attempt was made by his heirs and legal representatives to have themselves brought on the record, but it proved abortive as this Court held that their application for substitution had been filed beyond time, it having been further held that the legal representatives left by Braj Bhukhan were not on the record. On these findings this Court passed an order declaring the appeal in so far as it affected Braj Bhukhan to have abated.

(4) When the appeal of the other two defendants came up before this Court, a preliminary objection was taken to the effect that the order of abatement in the appeal filed by Braj Bhukhan affected the rights of the other appellants to prosecute their appeal. Thereupon the learned single Judge decided to refer the question mentioned above to a Full Bench. The learned single Judge in his referring order went into the question whether in this particular case the right claimed by all the three defendants was a joint right or not. His conclusion was that all the three defendants were co-sharers and that the right claimed by them had been acquired in their capacity as co-sharers in patti Braj Bhukhan. He did not address himself to the question whether the right claimed by them as co-sharers and owners was a right of joint tenancy or tenancy in common. In his judgment he has emphasised that the possession which was claimed to be adverse possession leading to perfection of title in these plots was claimed by all the three defendants in their capacity as co-sharers in patti Braj Bhukhan. He has further emphasised that the third ground, viz., that of dispossession more than three years before the institution of the suit was also a common ground of all the three defendants, the suggestion being that they had dispossessed the plaintiffs jointly. The difficulty in which the learned single Judge found himself was that if the findings against Braj Bhukhan as a result of the abatement of his appeal have to be treated as having become final between Braj Bhukhan and the plaintiff-respondents, an entertainment of the appeal of Baij Nath and Bhairon could possibly result in inconsistent findings with the findings which have acquired finality between Braj Bhukhan and the plaintiff-respondents. He noticed that the question of the applicability of O. 41 R. 4 was not free from difficulty as it had given rise to a divergence of view between Courts in this country. In particular he found that the views taken by a Bench of this Court in — 'Ram Sewak v. Lambar Pande', 25 All 27 (A), though accepted as correct in — 'Shahzad Singh v. Ram Ugrah Singh', AIR 1930 All 211 (2) (B) and approved of in — 'Thakur Prasad v. Ram Khelawan', AIR 1944 All 240 (C), and by a learned single Judge of this Court in — 'Mst. Krishna Dei v. Governor-General in Council', AIR 1950 All 1 (D), were inconsistent with the views expressed by a Bench of this Court in — 'Ambika Prasad v. Jhinak Singh', AIR 1923 All 211 (E), and a Bench of the Calcutta High Court in — 'Balaram Pal v. Kanysha Mashi', AIR 1919 Cal 410 (F). In particular the learned Judge found that the opinion expressed by the Full Bench of the Patna High Court in — 'Ramphal Sahu v. Satdeo Jha', AIR 1940 Pat 346 (FB) (G), was irreconcilable with that taken in — '25 All 27 (A)', and needed to be fully considered by a Full Bench. On his reference this Full Bench was constituted to express its opinion on the points referred to it by him.

(5) Learned counsel for the parties have argued this case with commendable thoroughness and we now propose to state our views on the various points which have been raised in this case. Before coming to the exact scope of O. 41, R. 4 we would like to refer to O. 22, R. 4 (1) which lays down as follows:

"Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

Sub-rule (2) of this rule enables the legal representative of the deceased defendant to make any defence appropriate to his character. Sub-rule (3) lays down:

"Where within the time limited by law no application is made under sub-r. (1), the suit shall abate as against the deceased defendant."

Now it is well known that the right to sue includes the "right to appeal" when a party dies pending appeal vide — 'Ram Sarup v. Jagdish Narain', AIR 1934 All 1029 (H). On a proper reading of the rule, the position seems to be that on the death of one of the defendants, the question of bringing his legal representatives on record will arise only if the right to sue survives. That is to say if the rights of the deceased were personal to him, the right to sue will not survive to or against his legal representatives on the maxim 'actio personalis moritur cum persona' — a personal right of action dies with the person. If, however, right to sue survives, then we have to find out whether the surviving defendants are such persons as could represent the deceased or in other words, whether the rights of the dying defendant vest in the surviving defendants. If the right to sue vests in them, no question of any abatement arises. Only the name of the deceased defendant is deleted and the case or appeal proceeds. Where the surviving defendants do not represent the deceased, the necessity of bringing his legal representatives arises, and as laid down in sub-r. 3, if the legal representatives are not brought on record within the time limited by law, the suit or appeal shall abate only as against the deceased defendant. In this case as Brij Bhukhan's legal representatives were not brought on record within time, the appeal

has abated, and the decree of the lower Court has become final as against Brij Bhukhan. This partial abatement gives rise to the question whether a partial abatement can render the whole appeal ineffective and if so in what circumstances. The question in other words is whether partial abatement can ever operate as an abatement of the whole appeal. It is to this question that I propose to confine myself at present.

(6) It may be pointed out at the very outset that the words "as against the deceased defendant" were introduced in sub-r. (3) of R. 4 of O. 22 by the new Code of Civil Procedure in 1908, as there had been some controversy due to the absence of these words in the corresponding S. 368 of the Code of 1882 as regards the question whether the suit or appeal would abate not only against the deceased defendant or respondent but as a whole. The relevant portion of S. 368 of the old Code ran as follows:

"When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period."

(7) Reference may be made on this part of the case to the Full Bench case of — 'Sant Singh v. Gulab Singh', AIR 1928 Lah 572 (I).

(8) The facts of the Lahore case were that a suit was instituted by the vendor's sons on the basis of a registered deed of sale for a declaration to the effect that the sale had not affected their reversionary rights after the death of the vendor, namely one Kharak Singh. During the pendency of the appeal one of the vendees died and no application having been made to bring his representatives on the record within the time allowed by law, on the expiry of 90 days the appeal automatically abated. An application to set aside the abatement by the plaintiffs on the ground of want of knowledge of the plaintiff's death having been rejected, the order of abatement against one of the vendees became final.

On these facts it was contended on behalf of the respondents who were the plaintiffs in the suit that the appeal must be dismissed in its entirety. The contention put forward was that the sale impugned was joint in favour of the four vendees and that in case the appeal was accepted against the remaining defendants, there would be two contradictory decrees on the record of the Court with regard to the same sale. On these facts the view taken by the Full Bench of the Lahore High Court was that the appeal had not abated in toto, but could proceed against the remaining defendants. The principle laid down in the case was that where the interest of the deceased respondent in the subject-matter of the appeal was separate from those of the surviving respondents (the shares having been defined in the sale-deed), it could not be said that the decree of the lower appellate Court, if in favour of the appellant, would prove ineffective or inconsistent with that part of the lower Court's decree which had become final upon the abatement of the appeal qua the deceased. It was held that the appeal did not abate in its entirety but could proceed against the surviving respondents. In the words of Shadi Lal, C. J.:

"Whether the appeal can, or cannot, proceed in the absence of the legal representative of the deceased respondent must depend upon the nature of each case; and it is not possible to formulate a rule of general application. It is obvious that if the action, which has given rise to the appeal, could have been brought without impleading the person who has died his death affects only the interest, if any, which he had in the litigation, but it cannot prevent the determination of the rest of the claim."

Shadi Lal C. J. went on to observe:

"The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. It is a matter of commonsense that the Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it."

A large number of authorities appears to have been cited in that case but the learned Chief Justice did not consider it necessary to go into them, though they are reviewed by the other learned Judges who constituted the Bench.

(9) So far there is no difficulty and it is conceded even by Harries C. J. in — 'AIR 1940 Pat 346 (FB) (G), that O. 22, Civil P. C., provides a complete code to deal with the questions which arise by reason of the death of one of the parties to an appeal and that the appeal will abate only as a whole

"if the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant."

(10) The complication is introduced by O. 41, R. 4 which in sequence comes after O. 22, R. 4. Order 41, R. 4 lays down:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

Obviously, this rule does not apply to different appeals on a common ground unless they have been consolidated. See — 'Amarsangji v. Desai Umed', AIR 1925 Bom 290 (J). But it does apply to a case where the decree proceeds on any ground common to all the plaintiffs or to all the defendants. It does lay down a discretionary rule for the guidance of the Court that where, for example, the Court of first instance finds in favour of the possession of a party and that party was dispossessed by three persons who were defendants in the suit and who put up a joint defence and only one of them appeals from the decree, the decree may be reversed not only in favour of the party who has appealed but also in favour of those defendants who have preferred no appeal.

Wide as the terms of O. 41, R. 4 are, and important as it is for the Courts not to cut down the vast discretion with which it vests them, it strikes us that the power of the appellate Court under this section is restricted to reversing or varying decree in favour of only those who are plaintiffs or defendants, as the case may be. In cases where there are more plaintiffs or defendants in the suit and the decree is passed against the defendants, the appealing defendant or defendants are looked upon as representatives of all the defendants. This rule would seem to be similar in principle to O. 1, R. 8. It strikes us, however, that it cannot be said that the defendant who appeals and after the preferment

of the appeal dies and against whom on the failure of his co-appellants or of his heirs or legal representatives to apply within the time allowed for substitution, an order of abatement has been passed, can by any fiction of law be treated on a par with a defendant who has not appealed at all. The fact cannot be got over that he joined in preferring a common appeal, that thereafter he died, that thereafter his legal heirs or representatives and the other defendants-appellants did not choose to have his heirs and legal representatives brought on the record. It is clear that a decree obtained after the death of a deceased respondent cannot bind the representatives of the deceased unless they have been made parties to the suit in which it was pronounced. We do not think O. 41 R. 4 can have any application to a case where one of the defendants has ceased to exist and his heirs and legal representatives are not on the record and indeed the Court has declared on a belated application by them that the suit has abated as against him.

(11) From the very wordings of O. 41, R. 4 it would seem that this rule was intended to be applicable to only such cases where all the plaintiffs or defendants were alive and only one or more of them had cared to appeal from the decree. To go further than this would be to hold that O. 41 either overrides or creates an exception to O. 22, rules 3 and 11 and authorises the Court in effect to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. It is obvious that O. 41, R. 4 does not in express terms override O. 22, rules 3 and 11. We cannot understand how it can be said that it overrides them by necessary implication. It is fair to assume that had the legislature intended that it should override the rules referred to above, it would have expressed itself in clear terms to that effect. On this part of the case we are unable to agree with the proposition that there is no difference in principle between a case where only some of the defendants have appealed and the case where all had originally appealed and one had died during the pendency of the appeal and no steps had been taken to bring the names of the heirs or personal representatives of the deceased appellant on to the record.

(12) We may on this part of the case quote Harries C. J. — 'AIR 1940 Pat 346 at p. 347 (G)':

> "The wording of O. 41, R. 4, Civil P. C., suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule lays down that in such a case the Court may reverse or vary the decree in favour of all the plaintiffs or defendants in the suit as the case may be provided that the decree appealed from proceeded on any ground common to all the plaintiffs or defendants. The words 'and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be' suggest that all the plaintiffs or defendants are alive at the time when the decree of the appellate Court is passed. The wording of the rule does not appear to me to be appropriate to a case where one of the plaintiffs or defendants-appellants has died during the pendency of the appeal. A plaintiff or defendant-appellant who has died during the pendency of the appeal can no longer be regarded as a plaintiff or defendant in the suit, and the rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their personal representatives or representatives in interest. The reversal or variation can only be made in favour of the plaintiffs or defendants and that suggests that it cannot be made in favour of the personal representatives of a deceased plaintiff or defendant."

In these circumstances whether the appeal has or has not abated as a whole will depend upon considerations other than the provisions of O. 41, R. 4, Civil P. C.

(13) It must further be pointed out that the words of O. 22 R. 3 (2), Civil P. C. are of a mandatory character, O. 41, R. 4 cannot be held to enunciate a principle which governs other rules or provisions in the Code. Under O. 41, R. 4, the Court has been given certain powers only. They cannot be extended beyond those contemplated by the legislature. To do so would in effect amount to legislation. There is no reference to abatement in O. 41, R. 4. That is a separate matter which has been dealt with in a separate part of the Code. Order 41, R. 4 cannot, therefore, be applied in such a manner as to negative the very specific provisions which have been laid down in the Code regarding abatement. Reference may be made on this part of the case to the case of — 'Amin Chand v. Baldeo Sahai-Ganga Sahai', AIR 1934 Lah 206 (K), where a later provision of a statute is intended to override an earlier portion, the legislature takes care to state it clearly. This has not been done and we cannot by implication hold that O. 41, R. 4 was intended to be used for purposes of setting aside orders of abatement validly passed. It further strikes us that where a valued right has accrued the provisions of O. 41, which enable a Court in appeal to add new parties, should not be applied. Whether the interests of the three defendants were separate or separable, (though they claim to be tenants in common of a patti), was a question on which no specific issue was framed and on which we do not think it proper in this case to express any opinion.

(14) Having stated the conclusion at which we have arrived, we shall now proceed to review briefly some of the more important cases which were cited at the Bar. We shall first deal with the cases of our own Court. The first case to which attention may be drawn is that of — '25 All 27 (A)'. In considering this case it has to be remembered that sub-rule (3) of R. 4 of O. 22, Civil P. C. is not exactly in the same words as was S. 368 of the old Code. Sub-rule (3) of the present Code runs as follows:

> "Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

In the old Code the words "as against the deceased defendant" did not occur. The sub-rule as it stood in the old Code merely provided that where no such application is made, the suit shall abate. It was the absence of these words in S. 368 that led to the contention in numerous cases that where no application is made to bring the legal representatives of a deceased defendant or respondent on the record within the period of limitation, the suit or appeal abated not only against the deceased defendant or respondent, but as a whole. This contention did not find favour with the Courts which were inclined to hold that a distinction should be made between cases in which a suit or appeal could proceed in the absence of the legal representatives and those in which it could not. The view was held that in the former class of case the suit would abate only as against the deceased defendant or respondent. In the latter case it would abate as a whole. Sub-rule 3 has clarified the position and makes it plain that

where no application is made to bring the legal representatives on the record within the time limited by law, the suit shall abate only against the deceased defendant or respondent and not necessarily as a whole. Sub-rule (3) was enacted to give legislative recognition to the current of authority at the time when the Code came to be revised. The consistent trend of authority is in the direction of the view that where the suit is of such a nature that it can proceed without the legal representatives of the deceased defendant or respondent being brought on the record, the suit or appeal shall abate only against the deceased defendant or respondent.

It is in this context that the decision in — '25 All 27 (A)', must be viewed. It was in these circumstances that the aid of S. 544 which corresponds to O. 41, R. 4 was invoked at the time when — '25 All 27 (A)', came to be decided. It may further be mentioned that the view of this Court in a number of cases used to be that the provisions of S. 368 had application only to the case of the death of a respondent who was a defendant in the Court and it was not incumbent on the legal representatives of the deceased defendant to implead the legal representatives of a deceased plaintiff-respondent. The settled view now is that the rule applies both in cases of death of a respondent whether a plaintiff or defendant in the original suit. The position, therefore, is that the question whether the abatement is partial or total will be dependent on the nature of the right claimed in the suit. In the case of an appeal the decision will have to be with reference to the nature of the decree appealed against.

(15) In — '25 All 27 (A)', the suit out of which the appeal arose was one for a partition of certain immoveable property belonging jointly to the parties. The claim was decreed by the Court of first instance on a ground common to all the defendants. From that decree only six of the defendants appealed. While the appeal was pending one of them died. Thereupon an application was made by his widow on behalf of her minor children that they should be made parties to the appeal as his legal representatives. That application was rejected on the ground that it was made after the period of limitation had expired, the learned Judges holding that the appeal against the deceased appellant had abated. On these facts it was observed that the decision of the case turned upon the question whether the right to appeal survived to the surviving appellants. It was pointed out that inasmuch as each of the surviving appellants could have appealed separately, the surviving appellants were competent to appeal, notwithstanding the death of one of the parties, who joined them in making the appeal. It is further to be noticed that it was on the basis that as each of the several plaintiffs or defendants could have preferred an appeal if he had so chosen. The mere fact that they had joined together in filing one appeal would not result in the abatement of the appeal as a whole if upon the death of any one of them the right of appeal survived to the other appellants. No doubt S. 544 which corresponds with O. 41, R. 4, was invoked in aid. The argument that the obligation to implead the legal representatives was greater in this case inasmuch as the suit was one for partition was not accepted, though the observation was made that the Court has always the power to direct that persons interested in the result of the appeal who have not been made parties to the appeal be added as respondents. The decision is based on the assumption that the death of one of the appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned. This in effect is what O. 22, R. 4 as enacted by the Civil Procedure Code in 1908 enables a Court to do and for this reason we cannot look upon this case now as an authority for the proposition that in allowing the suit or appeal to proceed in the event of the suit or appeal having abated against one of the defendants where the right to sue survives, the Court was exercising the power given to it under S. 544 which corresponds, as has already been stated, with O. 41 R. 4. There is, in our opinion, no real conflict between the view that we are taking and that which found favour with the Bench deciding the case in — '25 All 27 (A)'.

(16) The second case to which attention may be invited is that reported in — 'AIR 1930 All 211 (2) (B)'. In this case the plaintiff had sued for the recovery of possession of certain lands which had been leased to him by certain persons who were the defendants to the suit. In this case, — '25 All 27 (A)', was referred to with approval by a learned Single Judge of this Court. The more important point about it, however, is that in the short judgment which was delivered by the learned Single Judge, reference was made to the enactment by the legislature of O. 22, R. 3(2), viz. that where within the time limited by law no application is made under sub-r. (1) the suit shall abate so far as the deceased plaintiff is concerned. The learned Judge pointed out that — '25 All 27 (A)', had been decided prior to the passing of the present Civil Procedure Code.

(17) The third case to which reference may be made is the one reported in — 'AIR 1944 All 240 (C). In this case there had been a failure on the part of the defendant to implead the legal representatives of a co-defendant who was a pro forma defendant in the appeal. Malik J. (Now Malik C. J.) observed that he knew of no provision in the Civil Procedure Code which makes it obligatory for a defendant to implead his co-defendants as pro forma respondents in an appeal. We may say that we agree with this proposition. There is no reference in this case to the case reported in — '25 All 27 (A)', for the obvious reason that this was a case of a pro forma defendant and it was unnecessary for the learned single Judge to consider whether that case had or had not been rightly decided.

(18) The fourth case to which attention may be drawn is that of — 'AIR 1950 All 1 (D)'. This is a single Judge decision of this Court. From the judgment it appears that the plaintiffs sued for recovery of possession over two small plots of land marked in the map attached to the plaint. The common defence of all the three defendants to the suit was that the land did not belong to the plaintiffs at all, that indeed it was the property of defendant 1, he having acquired it by a sale deed in 1934. It further appears that adverse possession was earlier pleaded in the case. One of the respondents, having died and his legal representatives not having been brought on the record within the time allowed by law, it was pleaded that the appeal had abated as a whole. The learned Judge repelled this contention as in his opinion the two persons had derived their interest in the property, i.e., possession through defendant 1 and all the three defendants had contested the claim of the plaintiffs on one common ground, namely that the plaintiffs had no title. The learned Judge held on these facts that the provisions of O. 41, R. 4, Civil P. C. applied and that defendant 1 alone was competent to appeal from the whole decree.

No reasons are given for this view and it is obvious that the learned Judge's view in that particular case was that the right to sue had survived. The learned Judge does not seem to have considered the applicability of O. 22, R. 2.

(19) The fifth case of — 'AIR 1923 All 211 (E)', where a contrary view appears to have been taken is distinguishable on the ground that the suits out of which the appeals arose were pre-emption suits and it is well-known that a right of pre-emption is a joint right exercisable not by any single person but all the pre-emption jointly. This case lays down that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, Rule 4 of O. 41, Civil P. C. does not authorise the cause to proceed with the appeal without making the other plaintiffs parties thereto. The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity.

This ruling, however, has no application where the legal representatives of a pro forma respondent are not brought on the record. No reference was made in this case to — '25 All 27 (A)'. Reliance was, however, placed upon a case reported in — 'AIR 1919 Cal 410 (F)', which is a decision of the Calcutta High Court, and in which it was held by the Bench delivering it that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, R. 4 of O. 41, Civil P. C., does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. In this case the appeal arose out of a suit brought by six plaintiffs for recovery of possession of a homestead on declaration of their title thereto. The plaintiffs had pleaded a joint title, it being contended that the right to sue was one which did not survive to the surviving plaintiffs. One of the plaintiffs died during the pendency of the appeal and his heirs were not brought on the record within the time allowed by law. The right being a joint right it was held that the right to sue was one which could not survive to the surviving plaintiffs separately. The suit having abated under R. 3 of O. 22, the other plaintiffs could not be authorized under O. 41 R. 4 to proceed with the appeal.

(20) We may also in this connection refer to the Full Bench case — 'Ghulam Abbas v. Safdar Jah Zahid Ali Mirza', AIR 1941 Oudh 219 (FB) (L), which was a case under S. 4, Encumbered Estates Act. What appears to have happened in this case is that an application was presented to the Court under S. 4, Encumbered Estates Act. It was opposed by some of the creditors, the ground being that the applicants were not landholders within the meaning of the Encumbered Estates Act. This objection prevailed with the Court. An appeal was filed thereafter by the applicants. While the appeal was pending one of the opposing creditors died. His legal representatives not having been brought on the record within the time allowed by law, it was held that inasmuch as the interests of the creditors were joint and indivisible and they could not be separated from those of the rest and the heirs of the deceased creditor were necessary parties the appeal must be deemed to have abated as a whole for otherwise it would lead to conflicting and inconsistent decision with regard to the same subject-matter. The case of — 'Ramjas Tewari v. Ram Lal Tewari', AIR 1936 Oudh 209 (M), was quoted with approval and the tests laid down were these:

"Whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter."

These are the tests, which we have indicated should be applied in this case and we agree with the line taken by the learned Judges in that Full Bench. It may be mentioned that the first test laid down by it is in harmony with the view which found favour in — '25 All 27 (A). On the second question — '25 All 27 (A)', is silent for the simple reason that that point did not arise in that case.

(21) Attention may also be drawn to the case of — 'Mahamangal Rai v. Kishun Kandu', AIR 1927 All 311 (N), in which a learned single Judge of this Court held that the power vested in an appellate Court by O. 41, R. 4 to reverse or vary the decree appealed from in favour of all the plaintiffs or all the defendants is not restricted to cases in which the plaintiffs or defendants who have not appealed are made parties to the appeal. It was held that the power could be exercised by the appellate Court even if the plaintiffs or defendants who had not appealed were not made parties to the appeal. We have pointed out that the words of O. 41, R. 4 are of the widest character possible, but can it be inferred from the language employed that the legislature deliberately empowered the appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants, even where one of appealing defendant had died and the suit against him had abated. It is obvious that every party to a suit has a right to appeal against a decree by which he is aggrieved and the mere omission of other parties to the suit, who are equally aggrieved, not to join hands with him in preferring an appeal cannot debar an appellate Court to grant an appropriate relief to the party who has appealed. But can it be said that a defendant who appealed and died during the pendency of the appeal, his heirs not having been brought on the record, continues to be a party at all. Obviously he has ceased to be a defendant and his heirs and legal representatives, assuming he has any, cannot be treated as if they were parties to the appeal or the suit.

(22) In the case of — 'Hafijul Hoque v. Altaf Hossain', 43 Cal WN 1088 (O), the position was that the sole defendant having died during the pendency of the appeal and only some of his heirs haivng been brought on the record, the appeal was deemed to have abated as a whole. The basis of this decision was the interpretation of the term "legal representative" in O. 22, R. 3. Term legal representative was meant to mean all the legal representatives. Order 41, Rules 4 and 33 were not held to apply as obviously it was meant for cases where there were more paintiffs or more defendants than one in a suit and where the decree appealed from proceeded on any ground common to all the plaintiffs or all the defendants. This case, therefore, has no bearing on the present case.

(23) Another case which was relied upon was that of — 'Mritunjoy Das v. Sm. Sabitrimoni Dasi', AIR 1950 Cal 59 (P). Here again it may be noted that it was held that where there is an order of abatement already on record, O. 41, R. 4 cannot be attracted. Reliance was placed on — 'Protap Chandra v. Durga Charan', 9 Cal WN 1061 (Q) and — 'Naimuddin Biswas v. Maniraddin', AIR 1928 Cal 184 (R).

(24) We may further add that in — 'Malobi v. Gous Mohamad', AIR 1949 Nag 91 (S), the observation was made by Sen J.:

"that the wording of R. 4 of O. 41, Civil P. C., 1908, suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their personal representatives or representatives in interest. The rule cannot override, or create an exception to O. 22, Rr. 3 and 11, and in the case of one or more appellants dying, even where a decree proceeds on a ground common to all, the matter must be governed solely by the provisions of those latter rules."

"Order 41, R. 4 does not empower the appellate Court to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant."

We may say that we are in agreement with this statement of the law.

(25) We have invited attention to some important cases cited before us. It is unnecessary in our opinion to refer to other cases. We are clearly of the opinion that the answers to the questions postulated by the learned single Judge are as follows:

1. If, in a suit, a plaintiff makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants, an appeal filed by all the defendants can be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on record so that his appeal has abated, only if the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant, and in the event of the success of the appeal, it does not lead to two inconsistent and contradictory decrees.

2. While the appeal of the remaining defendants can be heard, the decision in it will not enure to the benefit of the legal representatives of the deceased defendant-appellant.

(26) We direct that our opinion should be sent to the learned single Judge, who will now proceed to apply it to the facts of this particular case.

A/R.G.D. Questions answered.

A. I. R. 1953 ALL. 571 (Vol. 40, C .N. 280)

AGARWALA AND MUKERJI JJ.

Fakharuddin, Defendant-Appellant v. Mt. Hamidan, Plaintiff-Respondent.

Second Appeal No. 340 of 1948, D/- 6-2-53.

Dissolution of Muslim Marriages Act (1939), S. 2 — Desertion.

Wife going to her mother's house with the consent of husband on the understanding that she would remain there up to a certain date — Husband not calling her back after that date — Conduct of husband held amounted to desertion of his wife — Husband neither paying her maintenance nor performing his marital obligations — Wife held was entitled to decree for divorce. (Para 4)

Anno: Dissolution of Muslim Marriages Act, S. 2, N. 2.

M. A. Kazmi, for Appellant.

AGARWALA J. : This is a defendant's appeal arising out of a suit for dissolution of marriage under the Dissolution of Muslim Marriages Act (8 of 1939). The respondent, Srimati Hamidan, sued the appellant for dissolution of her marriage alleging that the defendant was given to gambling and prostitution, that he habitually maltreated her, that he failed to maintain her for two years before suit and lastly that he failed to perform his marital obligations towards her within the last three years. The defendant denied that he was given to gambling or prostitution or that he maltreated her. He pleaded that the plaintiff-respondent had herself left his house and gone to live with her mother and thereafter refused to come back to him, and, therefore, he was not bound to maintain her and that for the same reason he was prevented from performing his marital obligations towards her

(2) The defence was accepted by the learned Munsif and the suit was dismissed. On appeal, the lower appellate Court agreed with the Munsif that the plaintiff-respondent had failed to prove that the defendant-appellant had habitually maltreated her or that he was given to gambling or prostitution, but it was of the opinion that the defendant had failed to maintain the plaintiff and to perform his marital obligations towards her for over three years. What it found was that the plaintiff had gone to her mother's house with the defendant's consent on the understanding that she would return after Eid, that this was four years before the suit, that the defendant never called her after Eid, that, indeed, he went away from Mathura, where the parties resided, to Agra and remained there for over four years and during this period he never sent for his wife and never sent her any maintenance till she gave notice intimating to him that she would claim dissolution of her marriage with him, and that after the receipt of this notice some money was sent by the defendant to the plaintiff but even then he did not write to her to come and live with him. On these facts the lower appellate Court came to the conclusion that the conduct of the defendant- appellant showed that he did not want her to come back to him and had indeed deserted her. It also found that the defendant paid no maintenance to the plaintiff and did not perform his marital obligations towards her. In the result the lower appellate Court decreed the plaintiff's suit.

(3) This appeal came up in the first instance before our learned brother, Gurtu, who considered that the case should be decided by a Bench as it involved an important question of law.

(4) Before us learned counsel for the defendant-appellant has strongly urged that once it was found that the wife had gone away from the husband to her mother's house and did not return to her husband, it could not be maintained that the husband had deserted her. The argument is based on a misunderstanding of the findings of fact recorded by the Court below. It is not a case in which the wife without the consent of the husband leaves him and does not return to him thereafter. As held by the lower appellate Court, the wife went to her mother's house, with the consent of the defendant-appellant on the understanding that she

would remain at her mother's house up to Eid. According to the usual custom of this country, both in Hindu as well as Mohammadan families, when the wife goes to her mother's house, it is the husband who sends for her. The wife does not normally come back to the husband's house without being called back as it is considered to be very immodest and insulting to her to do this. The inference to be drawn from the facts found by the Court below is that the defendant-appellant never intended to call her back and, therefore, in the eye of law deserted her. He did not maintain her and also did not perform his marital obligations towards her. We find no force in this appeal and dismiss it.

B/G.M.J. Appeal dismissed.

A. I. R. 1953 ALL. 572 (Vol. 40, C. N. 281)

BIND BASNI PRASAD J.

Horilal, Complainant-Applicant v. State through Parmoon, Accused-Opposite Party.

Criminal Revn. No. 1605 of 1950, D/- 11-9-1951.

Penal Code (1860), S. 411 — Stolen article dug out by A from his field — Presumption against A is sufficient for conviction — (Evidence Act (1872), S. 114). 17 All 576 and AIR 1943 Oudh 298, Rel. on; AIR 1931 Lah 4, Not foll. (Para 3)

Anno: Penal Code, S. 411 N. 6.

B. L. Dikshit, for Applicant; B. C. Saxena and Chaturbhuj Sahai, for Opposite Party.

CASES CITED:

(A) ('43) AIR 1943 Lah 4: 44 Cri LJ 186
(B) ('95) 1895 All WN 226: 17 All 576
(C) ('43) AIR 1943 Oudh 298: 44 Cri LJ 473
(D) ('86) 1886 All WN 322: 9 All 134 (FB)

JUDGMENT: This is a petition in revision against an order acquitting Parmu the opposite party from the charge under S. 411, Penal Code. I have arrived at the conclusion that the petition must be allowed. The learned Additional Sessions Judge has taken an entirely erroneous view of the law.

(2) Briefly the facts are that on the night between 18 and 19-9-1949, a theft by housebreaking took place in the house of one Hori Lal in the village of Purwa Pita Ram. He made a report at the police station at 9 a.m. on the following morning. The total value of the articles alleged to have been stolen was stated to be Rs. 1,400/-. He named certain persons in the report against whom he had suspicion. Parmu, opposite party, was not mentioned in it. At the trial of the case evidence was led to prove that on 22-9-1949, in the course of the investigation, Parmu, opposite party, took the Station Officer, Ibne Ali, to his field and there he dug out a silver Chhail Churi which was one of the articles stolen from the house of Hori Lal, complainant. On the basis of this evidence the learned trying Magistrate convicted Parmu and sentenced him to four months' rigorous imprisonment. In appeal the learned Additional Sessions Judge held that the recovery of the Chhail Churi did not fasten the guilt upon Parmu and so he acquitted Parmu of the charge under S. 411, Penal Code but directed that the Chhail Churi shall be delivered to Hori Lal.

(3) It may be noted that the learned Additional Sessions Judge had no doubt in his mind about the fact that the accused handed over the Chhail Churi after digging it out from his 'mukka' field. He observes:

> "It has been satisfactorily proved from the testimony of S. O. Ibne Ali, P. W. 4 and the recovery witnesses, Khyali Ram P. W. 5 and Mangali P. W. 7 that the accused had handed over a Chhail Churi after digging it out from the 'mukka' field on the fourth day of the occurrence of theft by house-breaking; and from the testimony of Hori Lal P. W. 1 and his father Lalta Prasad P. W. 2 and uncle Mani Ram P. W. 3 that the Chhail Churi in question belonged to him and had been lost in the theft."

Relying, however, upon — Hata v. Emperor', AIR 1943 Lah 4 (A) he held that no presumption of the offence under S. 411, Penal Code arises against Parmu under illust. (a) of S. 114, Evidence Act. The view taken by the learned Additional Sessions Judge is erroneous. The leading authority upon this point is the Division Bench case of this Court, — 'Queen Empress v. Gobinda', 17 All 576 (B). It was a case which was referred by a Single Judge to the Division Bench as he felt some doubt in regard to certain earlier Single Judge decisions of this Court. In that case some articles were stolen and some of these were found in the house of one Dhankua and some in his field. He gave no reasonable explanation how he came to be in possession of the articles found in his house. His conviction under S. 411, Penal Code, was maintained. There was another accused Gobinda in that case. Against him the evidence was that he pointed out a place in the field of another man in which some of the stolen articles were found. There was no other evidence against him. Their Lordships, Edge C. J., and Banerji J., observed:

> "The mere fact that a person points out a place where stolen property is concealed, if that place is not in his own house or in his own field but is in the field of another man, is not sufficient, in our opinion, to entitle the Court to find that the person who pointed out the stolen article had received it, or retained it, knowing it to be stolen. There must, to support a conviction in such a case, be some evidence which suggests that the accused himself concealed the article in the place where it was found. It is not sufficient for a conviction that the accused pointed out the stolen article, if it is left doubtful whether the accused or some other person concealed the stolen article, or that the accused obtained in some other way information that the stolen property was in the place where it was found."

Hence Gobinda's appeal was allowed and he was acquitted of the charge under S. 411, Penal Code. This view was followed in Oudh in — 'Mata Prasad v. Emperor', AIR 1943 Oudh 298 (C). In that case Mata Prasad was convicted under S. 412, Penal Code on the solitary evidence that a silver 'kara' was recovered from underneath a bin kept in the kothri of Mata Prasad's house. There was another accused Ram Autar in that case who took the Sub-Inspector & the party to a 'Ghura' from where he dug out one small bundle. From inside this bundle a pair of stolen silver 'karas' were recovered and handed over to the Sub-Inspector. This evidence was held as insufficient for the conviction of Ram Autar. Relying upon —

'17 All 576' (B) Ghulam Hasan, J., held that where the stolen article is recovered from a place which is not the house or the field of the accused a presumption of the offence under S. 411, Penal Code does not arise. Ram Autar was, therefore, acquitted. Several other cases in support of this view are also referred to in this ruling.

(4) The view taken by the Single Judge of the Lahore High Court in — 'Hata v. Emperor', AIR 1943 Lah 4 (A) is in direct conflict with the view expressed by this Court in — '17 All 576' (B) and —'AIR 1943 Oudh 298' (C). The learned Additional Sessions Judge should have followed the view taken by this Court. I am bound by the decision in the Division Bench case of — '17 All 576' (B). The learned Additional Sessions Judge has made a wrong approach to the case.

(5) The question now remains as to what order should be passed in this revision. In the Full Bench case of — 'Queen Empress v. Balwant', 9 All 134 (D) it was held:

"The High Court has power under S. 439, Criminal P. C. to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction. In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under S. 439, reverse such order and direct a retrial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal, or such other Court of equal jurisdiction as the High Court may entrust, under S. 526 of the Code, with the trial of the appeal."

(6) Learned counsel for Parmu accused has contended that the finding of the learned Additional Sessions Judge about the recovery of the Chhail Churi is wrong. That is a question which it will be open to Parmu to contend before the learned Additional Sessions Judge when the appeal is reheard by him. It would not be proper that the appeal be reheard by the same learned Additional Sessions Judge who decided the case which is in revision before us. I understand that Shri Khadim Ali has been transferred from Etawah. It would be proper if this appeal is heard by the 1st Additional Sessions Judge of Etawah in the light of the observations made above.

(7) The revision is allowed. The order of acquittal passed by the learned 2nd Additional Sessions Judge of Etawah is set aside and the appeal is sent back for re-hearing, in the light of the observations made above, by the 1st Temporary Civil and Sessions Judge of Etawah. The record shall be sent to the Court concerned without any delay.

B/V.S.B. Revision allowed.

A. I. R. 1953 ALL. 573 (Vol. 40, C. N. 282)

BRIJ MOHAN LALL J.

Shital Prasad and another, Decree-holders-Appellants v. Mst. Tapesara Kurmin and others, Judgment-debtors-Respondents.

Ex. Second Appeal No. 1292 of 1948 and Civil Revn. No. 649 of 1948, D/- 16-10-1951.

Civil P. C. (1908), Ss. 144 and 151 — Decree for possession of land and for demolition of certain construction — In execution, decree-holder given possession over larger area and larger portion of constructions demolished — Claim by judgment-debtor for restoration of possession of land delivered to decree-holder in excess and for damages for demolition — S. 144 held was not applicable — Judgment-debtor held could seek relief under S. 151 for restoration of possession — Court held was not competent to award damages which could be obtained by separate suit: AIR 1939 All 66, Foll. (Para 5)

Anno: C. P. C., S. 144 N. 3, Pt. 1 and N. 34 S. 151 N. 4.

K. N. Gupta, for Appellants; J. K. Srivastava, for Respondents.

CASE CITED:

(A) ('39) AIR 1939 All 66:
ILR (1939) All 103

JUDGMENT: This second appeal is connected with Civil Revision No. 649 of 1948. It appears that the appellants held a decree against the respondents for possession of certain area of land and for demolition of certain constructions. They put the decree in execution and, according to the concurrent findings of both the Courts below got a larger portion of the constructions demolished than they were entitled to and also succeeded in obtaining possession over a larger area than was awarded to them by the decree.

(2) The respondents filed an objection in the execution Court, drawing its attention to the fact that the Amin, while purporting to execute the decree, had gone beyond the terms of the decree. The Court of first instance ordered that possession shall be delivered back to the respondents over the area on which the decree-holders had obtained possession in excess of the terms of the decree. Further, it held that a sum of Rs. 50/- would be paid as damages to the respondents for the loss caused by the demolition of the building in excess of the terms of the decree.

(3) The decree-holders preferred an appeal in the Court of the District Judge and, at the same time, filed a revision in this Court. The respondents filed a cross-objection in the Court of the District Judge. The appeal was heard by the Civil Judge who dismissed it but allowed the cross-objection raising the amount of damages from Rs. 50/- to Rs. 100/-. Against this decision this second appeal has been preferred.

(4) The learned counsel for the decree-holders has contended that the respondents' remedy lay by way of a regular suit and not by means of an application to the execution Court. His contention is that the decree having been executed in full, the Court became functus officio and any further remedy in respect of this dispute should have been asked for in a regular suit.

(5) It is true that S. 144, Civil P. C. has no application to the present case. That section applies only when the decree of a Court is varied or revised. There has been no variation or reversal of the decree in this case. Therefore, it goes without saying that the respondents judgment-debtors could not invoke the provisions of S. 144, Civil P. C. But they could certainly seek relief from the Court in exercise of its inherent power under S. 151, Civil P. C. Whenever a party is prejudiced by any wrong act or order of the court, the court possesses inherent jurisdiction to restore the status quo and to undo that wrong. Consequently, in so far as the Court ordered the judgment-debtors to be put in possession over that area of land from which they had been dispossessed against the terms of the decree, the Court was perfectly within its right to do so. But different considerations arise in respect of a claim for damages. In awarding damages the Court is not, strictly speaking, putting the parties in the same position in which

they were before the wrong execution of the decree. Had the building still existed and had it been in the possession of the decree-holders, the Court could certainly say that possession should be given back to the judgment-debtors over that portion from which they had been ejected otherwise than in accordance with the terms of the decree. But that is not the position here. The Court is not restoring the building to their possession. It has awarded damages for the loss caused to the respondents. This does not amount to restoration of status quo. I am, therefore, of the opinion that it was not within the competence of the Court to pass an order of damages in the execution proceedings. The judgment-debtors should have been left to enforce their claim for damages for wrongful execution of the decree by means of a separate suit. It was held in the case of — 'Badruddin Khan v. Mahvar Khan', AIR 1939 All 66 (A) that:

> "It is true that the jurisdiction to make restitution is inherent in every Court, but where the relief claimed is not really restitution and can appropriately be claimed by a suit, recourse cannot be had to the inherent powers of the Court under S. 151 of the Civil P. C."

With this remark I respectfully agree. I am thus of the opinion that the claim for damages should have been enforced by means of a regular suit.

(6) The appeal is allowed in part. The order of the Courts below awarding compensation to the respondents for wrongful demolition of a portion of their building is set aside. The order regarding re-delivery of possession to the respondents over land from which they were dispossessed otherwise than in accordance with the terms of the decree is maintained. In view of the special circumstances of this case, I make no order as to costs.

D/V.R.B. Appeal allowed in part.

A. I. R. 1953 ALL. 574 (Vol. 40, C. N. 283)

AGARWALA J.

Ram Swarup, Decree-holder-Appellant v. Mst. Kalawati, Judgment-debtor -Respondent.

Ex. Second Appeal No. 2008 of 1947 and Ex. Second Appeal No. 387 of 1948, D/- 4-1-1951.

Civil P. C. (1908), S. 47, O. 21, Rr. 58, 66 — Charge in favour of legal representative of deceased judgment-debtor — Enquiry as to validity is not necessary for sale proclamation. (Paras 3, 4, 5)

Anno: Civil P. C., S. 47, N. 46; O. 21, R. 58, N. 14; O. 21, Rule 66 N. 11.

Krishna Shankar, for Appellant; Jagnandan Lal, for Respondent.

CASES CITED:

(A) ('90) 1890 All WN 137: 12 All 313 (FB)
(B) ('35) AIR 1935 All 183: 1935 All LJ 74
(C) ('37) AIR 1937 All 97: 1937 All LJ 13
(D) ('33) AIR 1933 All 287: 1933 All LJ 89

JUDGMENT: These are two connected decree-holder's appeals. The decree-holders are different though the judgment-debtor is the same. A simple money decree was obtained by two decree-holders in the two appeals against one Dayanand. Dayanand died leaving Shrimati Kalawati, his widow, as his legal representative. She was impleaded in execution proceedings. The decree-holders prayed that certain houses be put up for sale in execution proceedings. In proceedings under Order 21, Rule 66, C. P. C. for the settlement of the terms of the sale proclamation, the decree-holders filed an affidavit stating that there appeared to be a charge on the houses in favour of Shrimati Kalawati and Shrimati Manbhari, mother of the deceased judgment debtor, created by means of a deed dated 25th June 1931.

(2) At a later stage Shrimati Kalawati herself came forward with an objection praying that the charge in her favour already stated may be proclaimed at the time of the sale. The decree-holders' reply to this prayer was that the document creating the charge was a fictitious document and created no rights in Shrimati Kalawati. The trial Court went into the question and held that the document was a fictitious document and dismissed Kalawati's objection. In appeal by Kalawati to the lower appellate court, it was held that it was not necessary for the court to go into the question as to whether the document creating the charge was fictitious or not. All that was necessary was that it may be shown in the sale proclamation that Kalawati claimed a charge on the property. The view it took was that the matter would have to be gone into in a proper proceeding.

(3) The decree-holders have come up in second appeals to this Court and it has been strenuously urged on their behalf that as the charge was in favour of the legal representative of the judgment-debtor, this was a matter which fell within the purview of S. 47, C.P.C., and should have been investigated and decided by the executing Court. In support of this plea several cases have been cited before me — 'Seth Chand Mal v. Durga Dei', 12 All 313 (FB) (A); — 'Lachhoo v. Firm Munni Lal Babu Lal', AIR 1935 All 183 (B) and — 'Badri Prasad v. Mt. Janki', AIR 1937 All 97 (C). In all these cases, however, it was held that the dispute as to the ownership of the property sought to be sold by the decree-holder, between the legal representative of the judgment-debtor and the decree-holder, is a matter which fell to be decided under S. 47, and was not a matter which fell under O. 21, R. 58, C. P. C. There can be no dispute about the proposition of law stated in all these cases. This, however, does not solve the difficulty. Even if the matter did not fall under O. 21, R. 58 but fell under S. 47, C. P. C. the court has still a discretion in fit cases whether it will decide the precise question raised between the parties or leave it to future proceedings. When it is admitted by the legal representative that the property does indeed belong to the deceased judgment debtor, and the only claim made by the legal representative in her personal capacity is that he or she holds a charge on the property created by the deceased judgment debtor, it is discretionary with the Court to decide or not to decide the question whether the charge is fictitious or genuine.

(4) In — 'Mahmud Hasan v. Mohammad Abdul Hamid Khan', AIR 1933 All 287 (D), it was held that the proper course in such cases is that the matter be left to be determined in a regular proceeding for the enforcement of the charge. This is a Bench decision and is binding on me.

(5) In the case of a charge it will be the look out of the auction purchaser to contest the charge if he so desires. So far as the sale of the property is concerned, it can always take place because it is admittedly the case of the parties that the property belongs to the

deceased judgment-debtor. Charges or encumbrances on the property sought to be sold are always shown in the sale proclamation under O. 21, R. 66, C. P. C. and there is nothing to prevent the charge in favour of the legal representative of the deceased judgment-debtor from being shown in the sale proclamation. If this can be done, there is no necessity of entering into an enquiry as to the validity of the charge.

(6) I think that the decision of the court below was perfectly correct. I dismiss these appeals with costs.

C/D.H. Appeals dismissed.

A. I. R. 1953 ALL. 575 (Vol. 40, C. N. 284)

MUSHTAQ AHMAD J.

Radha Kishun and others, Appellants v. Hari Prasad and another, Respondents.

First Appeal No. 479 of 1942 and First Appeal No. 189 of 1943, D/- 3-3-1952.

(a) Civil P. C. (1908), O. 41, R. 1.

A question of ownership is one of pure fact and where the lower Court has taken all relevant aspects of the case into account and come to a definite conclusion, the appellate Court cannot reject that finding as wrong. (Para 8)

Anno: C.P.C., O. 41, R. 1 N. 13.

(b) U. P. Encumbered Estates Land Act (25 of 1934), S. 11 (3) — Plea of tenancy raised before Special Judge—Special Judge not bound to refer it for decision to revenue Court — Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 288 (1).

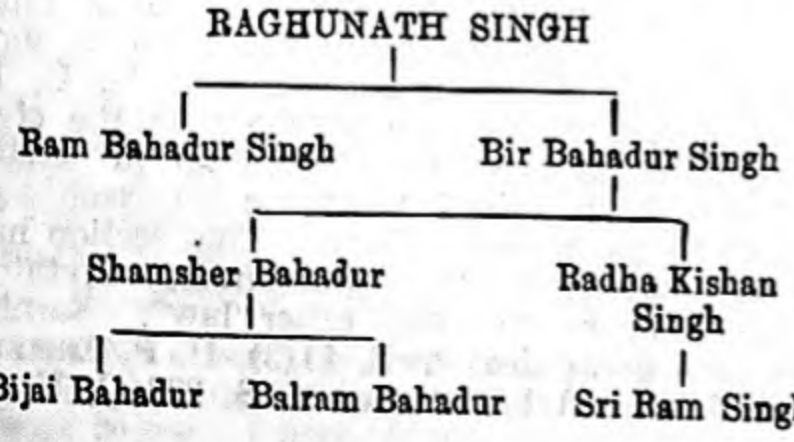
A suit contemplated by S. 288 (1), Tenancy Act, is obviously a suit instituted in a civil Court. A claim filed under S. 11, Encumbered Estates Act, cannot be said to be a suit instituted in a civil Court". The proceedings initiated on such a claim may take the nature of a civil suit and the final order passed may be deemed to be a decree, as provided by sub-s. (4) of that section, but this is quite different from saying that there was ever a suit instituted in a civil Court. (Para 15)

Ambika Prasad, for Appellants; A. P. Pandey, for Respondents.

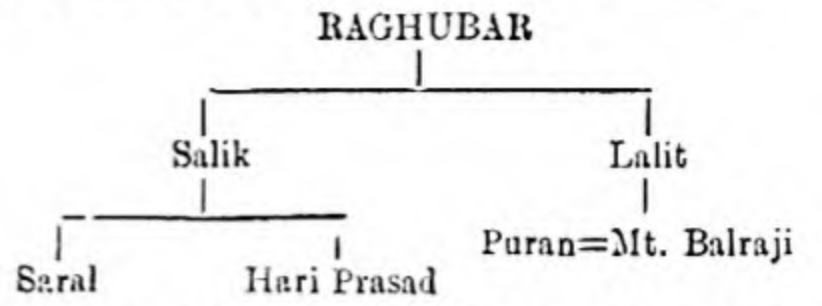
JUDGMENT: The appeal first mentioned was filed by the landlords-applicants against certain claimants in a case under the Encumbered Estates Act and the appeal next mentioned was filed by another set of claimants in respect of another property against the same landlords under the said Act in the same proceedings. I propose to deal with and dispose of these appeals seriatim.

F. A. No. 479 of 1942:—

(2) It would be convenient to preface this judgment with two short pedigrees. The landlords' pedigree stands as follows:



The claimants' pedigree stands as follows:



(3) The landlords-appellants are either the sons or grandsons of Bir Bahadur in the first pedigree, and the claimants-objectors are the sons of Salik in the second pedigree.

(4) The items of property claimed by the respondents-objectors under S. 11, Encumbered Estates Act, in denial of the title of the landlords-applicants were these

In village Pokhranda: (1) (Grove No. 194) purchased in the name of Salik under a sale-deed (page 53) dated 23-9-1895, for Rs. 49/-, and (2) certain fixed-rate holdings purchased at an auction (page 57) sale-certificate and (page 59 dakhalnama) in the name of Salik aforesaid on 21-3-1896, for Rs. 24/-.

In village Kharauni: (1) 4 tenancy plots purchased in the name of Puran on 10-12-1919 (page 61) for Rs. 550/-, (2) some tenancy plots purchased in the name of the same Puran under a sale-deed dated 2-4-1920, (not printed), and (3) a portion of a house occupied by the claimants the other portion being occupied by Balraji, widow of Puran.

(5) The case of the appellants who are the owners of the two villages referred to above was that they had with their own money acquired the first four items of property aforesaid in the names of their servants Salik and Puran, and on that basis they included those items in the schedule of their own properties. The case of the claimants of course was that their father Salik had purchased the first two items and their cousin Puran the third and fourth items of property with their own money and for themselves and not for the landlords-applicants or their predecessors. About the house, the landlords' case was that they had constructed it and allowed their servants to live in it, whereas the claimants alleged that they were the owners of the same.

(6) The Court below having allowed the claim of the respondents under S. 11, Encumbered Estates Act, excluded the aforesaid items of property from the schedule of properties owned by the landlords applicants. The appeal with which I am dealing is one against that decree.

(7) The only point to be determined is whether the sale-deed and the auction-sale, referred to above, had been effected in the names of Salik and Puran only 'benami' for the zamindars or actually in favour and for the benefit of those persons. The case of the landlords was that those men were their family servants and as such the amounts of consideration paid under the various transactions had been provided by themselves without any idea of making a gift of them to the ostensible transferees and that the latter therefore never acquired any interest in the properties in question. (After discussing the evidence the judgment proceeded:) The learned Special Judge was not inclined to think that the above evidence was sufficient to discharge the onus that lay on the appellants to prove that they and not the osten-

sible vendees, were the owners of the particular items of property in question. He pointed out that, apart from the fact of the title-deeds having been produced by the zamindars, it was the names of Salik and Puran which had been recorded in the papers all along and that the claimants presumably were in possession of the plots. On this point also I am inclined to agree with the learned Judge.

(8) Learned counsel then called my attention to the registration endorsement on the sale-deed of 23-9-1895 which mentioned that the executant of the deed had said before the Sub-Registrar that the same might be given to Babu Ram Bahadur Singh after the registration. He also pointed out that Salik Kamkar had himself requested that the sale-certificate relating to the auction- sale of 21-3-1896 be handed over to a person named Syed Ahmad in whose favour a 'mukhtarnama' stood. It is not clear who had executed this 'mukhtarnama', and the learned counsel argues that Salik being a man of low status the deed must have been executed by the zamindars, so that the sale-certificate was desired by Salik to be handed over to a man of the zamindars. From this he contends that it is the zamindars who must have purchased the property covered by the sale-deed and the sale-certificate. I do not think any conclusive argument can be based on this circumstance. If Salik and Puran had long been connected with the zamindars' family as servants, then, they being probably illiterate also, it was not unnatural that the documents had been agreed to be delivered to the zamindars instead of to those servants for safe keeping. A question of ownership being one of pure fact and the learned Special Judge having taken all relevant aspects of the case into account and come to a definite conclusion, I do not find myself in a position to reject his finding as wrong.

(9) There is thus no force in this appeal and I dismiss it. The respondents not being represented before me, there is no question of their costs in this Court.

First Appeal No. 189 of 1943:—

(10) As already said, this appeal was filed by certain claimants of a different property than those claimed in the other appeal by the respondents thereof. In this appeal the property in question comprised certain fixed-rate tenancy plots which the appellants claimed under S. 11, Encumbered Estates Act, to have acquired under a deed of gift of the year 1930 from a woman Nanka Kumari, widow of one Narain Shukal who had a brother called Tilku. The appellants' case of course was that these two brothers Narain Shukal and Tilku were the original tenants-in-chief.

(11) The landlords-applicants (respondents) had, on the other hand, claimed these plots as their tenancy lands under a sale-deed dated 22-5-1893. executed by one Onkar Pandey.

(12) The learned Special Judge rejected the appellants claim and the present appeal was filed against the decree passed to that effect under S. 11 of the Act.

(13) The finding of the learned Special Judge that the landlords-applicants and not the claimants were the tenant-in-chief of these plots was based on a number of entries in the village papers and also on the oral evidence before him. He pointed out that, while in the khasra of 1240 Fasli and the khataoni of 1270 Fasli, the name of Chhakauri Pande, grand-father of Onkar Pande, the executant of the sale-deed relied upon by the landlords, was entered as a tenant-in-chief of four plots which are the present equivalents of the former eight plots and further, while in the settlement khasra of 1290 Fasli and in the khasras of 1279 and 1298 Fasli the name of Onkar Pande had been recorded as a tenant-in-chief and the names of Tilku and Narain Shukal as sub-tenants and lastly, while in 1326 to 1341 Faslis the landlords had been shown as tenant-in-chief and Mst. Nanka Kumari as Shikmi, the name of Tilku had been recorded in the jamabandi of 1289 Fasli as a tenant-in-chief of the plots in dispute. The position, therefore, briefly was that, except in a particular year, 1289 Fasli, the names either of the predecessor of Onkar Pande or of Onkar himself or even of the landlords-applicants were entered as tenants-in-chief right from 1240 up to 1341 Fasli, although in 1290, 1297 and 1298 F. the claimants or their predecessor were entered as Shikmi tenants. From these entries which, on the face of them, heavily weighed in favour of the landlords and also on the oral evidence before him, the learned Special Judge held that the landlords and not the claimants were the tenants-in-chief of these plots. He also found that one-half of the area of these plots had come within the ambit of the abadi, only the remaining area still being agricultural. Lastly, there was a finding by him that none of the plots in dispute were covered by the gift of 1930 relied upon by the claimants and that in fact the claim put forward by them had a much later origin. On these findings, as already mentioned, the claim put forward by the appellants was rejected.

(14) Only two points have been raised by Mr. J. N. Chatterji, learned counsel for the appellants: (1) that, under S. 288, U. P. Tenancy Act, 1939, the learned Special Judge ought to have framed an issue on the plea of tenancy raised by the appellants and referred it to the revenue Court for decision at least with regard to the one-half area found to be agricultural, and (2) that, even if the landlords were the tenants-in-chief and the claimants only sub-tenants of these plots, the same could not be sold in liquidation of the landlords' debt, as otherwise the sub-tenancy rights would be automatically destroyed.

(15) As regards the first point it was, to begin with, not urged in the Court below nor even taken in the grounds of appeal before me. Learned counsel argued that the matter being one of jurisdiction could be allowed to be raised at any stage and that I should therefore, entertain it even in appeal. Assuming I entertained it, the point was open to two answers. Firstly, under the clear terms of S. 11(3), Encumbered Estates Act, it is the bounden duty of the Special Judge to determine all claims made under the section. This must mean that he should himself determine such claims. On the contrary S. 288(1), U. P. Tenancy Act, makes it obligatory on the civil Court in a suit where a question of tenant right has been raised to frame an issue and refer it to the revenue Court. This section has no such words as "notwithstanding anything to the contrary in any other law". Surely, there is a great deal in S. 11(3), U. P. Encumbered Estates Act, contrary to S. 288(1), U. P.

Tenancy Act, for, while the one requires determination by the Special Judge himself, the other makes it incumbent that it should be made through the channel of the revenue Court. Secondly, a suit contemplated by S. 288(1), Tenancy Act, is obviously a suit instituted in a civil Court, as would also appear from the words of a later section, 290 of the Act. I cannot imagine how a claim filed under S. 11, Encumbered Estates Act, can be said to be a suit instituted in a civil Court". The proceedings initiated on such a claim may take the nature of a civil suit and the final order passed may be deemed to be a decree, as provided by subs. (4) of that section, but this is quite different from saying that there was ever a suit instituted in a civil Court. No authority has been shown in support of this contention either.

(16) As regards the second point, it is obviously based on a disregard of the actual pleadings before the Special Judge. The case of the landlords-applicants was that they were the chief tenants of the plots in dispute, while that of the claimants was that they and not the landlords were the chief tenants. The issue naturally arising on these rival assertions was whether the landlords or the claimants were the chief tenants. It was no part of anybody's pleadings that any one on the side of the claimants had ever been a sub-tenant of any one of the plots. The reference to sub-tenancy in the judgment of the Court below came in only because, in three of the several village records there was an entry of such tenancy, the landlords themselves being entered as the chief tenants. The learned Special Judge also treated the issue strictly as it had framed it and with perfect justification. He held that the landlords, and not the claimants, were the chief tenants of these plots. In this perspective, obviously no question of any sub-tenancy arose and, therefore, no question of the plots not being saleable in liquidation of the landlords' debts on that score also arose, particularly when it was further held that the landlords and no one else had been in possession of the plots. If the point now raised before me had been taken before the Court below and accepted, I need not decide what would have been the position. As it is, I am not inclined to allow it to be raised in complete replacement of the pleadings actually advanced by the claimants at the stage of enquiry.

(17) So far as the finding that the landlords and not the claimants were the fixed-rate tenants of these plots is concerned, it was based on a careful scrutiny of the various entries in the village papers extending, as I have shown, over a vast period and also on oral evidence. The landlords filed a number of rent decrees showing their possession over the plots in question. The claimants sought to nullify the effect of these decrees by filing receipts of rent granted by the zamindars in respect of the period covered by those decrees. It is obvious that the receipts granted in such circumstances had their origin in suspicion and carried no weight to prove any tenancy rights in favour of the claimants. In fact it was found that the zamindars were actually siding with the claimants in granting those spurious receipts.

(18) No other point was raised, and I do not find it possible to disturb the judgment of the Court below. I accordingly dismiss this appeal also, the appellants in this case paying the costs of the respondents and bearing their own.

C/V.B.B. Appeals dismissed.

A. I. R. 1953 ALL. 577 (Vol. 40, C. N. 285)
(LUCKNOW BENCH)

MALIK C. J. AND HARI SHANKAR J.

V. G. Deshpandey, Applicant v. City Magistrate, Lucknow and others, Opposite party.

Appln. No. 10 of 1953/C. M. An. (O. J.), D/- 17/3/1953.

Constitution of India, Art. 19 (1) (a), (2) — Order under S. 144, Criminal P. C. — (Criminal P. C. (1898), S. 144).

The question whether there was apprehension of the breach of the peace must be left to the Magistrate. Unless the order passed by a Magistrate under S. 144, Cr. P. C., is on the face of it absurd or is mala fide there is no reason for the High Court to interfere. (Para 3)

Anno: Cr. P. C., S. 144 N. 1, 15.

N. Banerji, for Applicant.

ORDER: This is an application under Arts. 226 and 228 of the Constitution for an order that the case against the applicant before the Judicial Officer, Lucknow, be withdrawn and disposed of by this Court and that the proceedings in the lower Court be stayed.

(2) Learned counsel has urged that in view of the provisions of Art. 19 (1) (a) of the Constitution the learned Magistrate was not justified in passing an order under S. 144, Criminal P. C. It is further urged that S. 144 itself is ultra vires as it places unreasonable restriction on the right of a citizen conferred by Art. 19 (1) (a) of the Constitution. The facts, as they appear from the application, are that the applicant came to Lucknow and on 15/3/1953, at about 4-30 P. M. a notice was served on him signed by the City Magistrate, Lucknow, that it had come to his notice that the applicant was going to deliver a speech in support of the Praja Parishad Agitation in Jammu and on the Jammu and Kashmir question generally and that in the prevailing communal excitement in the city such a speech was likely to cause further excitement and breach of public peace and tranquillity. It is said in para 9 of the petition that the situation in Lucknow was normal, there was no communal excitement and the speech that the applicant wanted to deliver was not likely in any way to result or tend to result in any communal disturbance or any breach of the public peace and tranquillity.

(3) Article 19 (1) (a) guarantees to the citizens of India freedom of speech and expression, but it is subject to the restriction imposed under Article 19 (2) which now provides after the recent amendment that the State has the right to impose reasonable restriction in the interest of public order. In the Criminal Procedure Code there are various sections which are known as preventive sections which gave a Magistrate the power to pass an order in the interest of maintenance of law and order or to prevent the commission of a crime. It is not necessary for us in this case to consider the whole of S. 144, Criminal P. C. or whether or not it is too widely worded. Learned counsel has urged that S. 144 places in the hands of a Magistrate unlimited power and a Magistrate can, at his sweet-will and pleasure, interfere

with the fundamental rights given in the Constitution. We must confine ourselves to the facts before us which raise only one point, namely, whether a Magistrate has a right, when he apprehends a breach of the peace, to pass an order under S. 144, Criminal P. C. and direct a person not to make a speech which might tend to that result and whether it is open to the court to consider whether there were good grounds for the apprehension. The question whether there was apprehension of the breach of the peace must be left to the Magistrate. After all he is primarily responsible for maintenance of law and order and it is for him to judge whether there was a reasonable apprehension justifying an order under S. 144, Cr. P. C. Unless the order passed by a Magistrate is on the face of it absurd or is mala fide there is no reason for the court to interfere. We are not satisfied, therefore, that there is any cause for granting the application.

(4) The application is rejected.

A/D.H. Application rejected.

A. I. R. 1953 ALL. 578 (Vol. 40, C. N. 286)

MUSHTAQ AHMAD J.

Smt. Shushil Kuer, Plaintiff-Appellant v. Makkhan Lal, Defendant-Respondent.

Second Appeal No. 1261 of 1949, D/- 3-12-1951.

†**Tenancy Laws — U.P. Tenancy Act (17 of 1939), S. 54(2) (before its repeal in 1947) and S. 242 — Acquisition proceedings under S. 54 — Compromise between parties — Order of acquisition in terms of compromise passed — Order embracing provisions outside S. 54 — Restoration proceedings purporting to be under S. 54(5) — Restoration order passed — Suit for declaring restoration order ultra vires — Jurisdiction of Civil Courts to grant declaration not barred — (Civil P. C. (1908), S. 9). AIR 1940 PC 105, Rel. on. (Para 8)**

Anno: C.P.C., S. 9 N. 51.

P. L. Banerji and B. L. Gupta, for Appellant; Kedar Nath Sinha, for Respondent.

CASE CITED:

(A) ('40) AIR 1940 PC 105: ILR (1940) Mad 599 (PC)

JUDGMENT: This is a plaintiff's appeal in a suit for declaration that the order of the Collector, Aligarh, dated 20-12-1947, under S. 54(5), U. P. Tenancy Act, 17 of 1939 was ultra vires and not binding on the plaintiff. There was also a relief for injunction restraining the defendant from acquiring possession of the land in dispute by virtue of that order.

(2) Sometime in 1940, the plaintiff-appellant applied under S. 54 of the said Act to the Collector for the acquisition of some land held by the defendant-respondent on the ground that he (plff.) required it for his own purposes to build a house thereon. On 1-12-1942, a compromise was filed by the parties in the case initiated by this application in the following terms:

1. that the landlord would pay Rs. 340/- as compensation to the tenant,
2. that the tenant, having received this amount, would deliver possession to the landlord,
3. that the tenant would thenceforward have nothing to do with the land, and
4. that the landlord might put the land to any use and might even transfer the same as its absolute owner.

(3) The same day an order recording this compromise was passed by the Collector.

(4) In June 1946, an application was made to the Collector by the defendant-respondent purporting to be under cl. (5) of S. 54, U. P. Tenancy Act, for the restoration to him of the land in suit by the landlord, presumably on the assumption that such an application lay under that clause. I may mention that, in a case where the order of the Collector could be said to be one under cl. (2) of S. 54, the Legislature permitted the tenant to ask for the restoration of the land to him by an application under cl. (5) thereof, if for three years the land had not been used by the landlord for the purpose for which he had acquired it under cl. (2) of the section. On 20-2-1947, the application just mentioned was granted in spite of an objection taken by the landlord that it could not be entertained in view of the circumstances in which the order of the Collector dated 1-12-1942 had been passed.

(5) The suit giving rise to the present appeal was filed for a declaration that this order of the Collector dated 20-2-1947 was 'ultra vires'. Both the courts below dismissed the suit on the view that the civil courts had no jurisdiction to make the declaration sought for by the plaintiff. The sole question before me is whether this view of the courts below was correct, namely whether the civil courts had in fact no jurisdiction to declare the order of the Collector of 20-2-1947 as 'ultra vires.'

(6) The argument of Mr. Pearey Lal Banerji in support of the appeal before me was that the order dated 1-12-1942, referred to above, which had been passed on the basis of a compromise between the parties, the same embracing a number of points not strictly within the scope of S. 54 of the said Act, could not be said to be one under cl. (2) of this section at all. This clause provides:

> "The Collector shall, in accordance with rules made by the Board, order the acquisition of, and the ejectment of the tenant from, the land applied for, or form part thereof, and shall award to the tenant the compensation to which he may be entitled under the provisions of sub-section (3)."

This provision, on the face of it, enjoins a number of directions to be observed by the Collector when passing an order thereunder. These are:

1. the acquisition of the land must be ordered in accordance with rules made by the Board, and
2. compensation must be fixed under the provisions of sub-section (3), this sub-section laying down the scale for that purpose.

(7) If neither of these directions was followed —as in fact it was not in this case—by reason of a compromise having been filed by the parties, the order can hardly be conceived as one under sub-section (2). I have already quoted the main terms of the compromise, from which it would be patent that the Collector never passed an order in this case within the framework of this sub-section. Besides, if the order can be said to be one under this sub-section, it must necessarily follow that its operation is liable to be determined by a subsequent order of restoration under cl. (5) of the section. But if such restoration has been put out of question because of an agreement between the parties, no order under cl. (5) can be made either.

I have already pointed out, when quoting the terms of the compromise, that the tenant had completely surrendered the land, allowed the landlord to put the same to any use he liked and even to transfer it to whomsoever he chose. Even the amount of compensation was not determined under sub-section (3) of the section but as agreed to between the parties. All this fell distinctly

beyond the compass and scope of S. 54, U. P. Tenancy Act, there being hardly a feature in the compromise which could be identified with anything in that section. As a necessary result, the order passed by the Collector on 1-12-1942, instead of being one under sub-section (2), was one on a compromise, in letter and spirit quite different from an order contemplated by that sub-section. In this context it becomes pretty easy to answer whether in such a case an application under cl. (5) of the section could be moved or an order under that sub-section be passed at all.

In the present case an aplication purporting to be under this clause and even an order purporting to be under this clause were no doubt made & passed respectively. But the whole question is whether either the one or the other did fall within the clause, leading to the question whether it was not open to the civil courts to say, as contended for by the plaintiff-appellant, that neither fell within that clause.

(8) If the order dated 20-2-1947, for the reasons I have already mentioned, did not come within the purview of cl. (5) of S. 54 of the said Act, then, in so far as the order purported to be one under that clause, it was on the face of it ultra vires. The main obstacle which the courts below conceived to the success of the suit was that they had no jurisdiction to say that this order was ultra vires. This meant that, even though a court may pass an order with absolutely no jurisdiction to pass it and such lack of jurisdiction is clearly established, the civil court is powerless to relieve the party against whom that order was passed against the implications of or obligations imposed by the same. In the U. P. Tenancy Act no doubt certain suits are expressly barred from the jurisdiction of the civil court, and learned counsel for the defendant-respondent has cited to me Ss. 60 and 242 of the Act. This is putting the position rather too simply, and there can be no contest at all if the position actually was so simple. Of course, if a suit lies within the exclusive jurisdiction of the revenue court, the jurisdiction of the civil court must be taken to be barred. I am not aware of any provision in the Tenancy Act, which, even where that court has passed an order which was altogether ultra vires of it, debars the civil court from declaring that order as beyond jurisdiction and, therefore, not binding on the party ostensibly affected by it.

In — 'Secretary of State v. Mask & Co.', AIR 1940 PC 105 at p. 110 (A) the Judicial Committee observed as follows:

"It is now necessary to determine whether the order of the Collector of Customs, dated 20th June 1933, which dismissed the appeal under S. 188, and which was confirmed by the Governor-General in Council on an application under S. 191, excludes the jurisdiction of the Civil Courts to entertain a challenge of the merits of that decision. It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

If, therefore the Collector, even in the context of the compromise filed before him, actually purported to pass his order of 1-12-1942 under sub-s. (2), S. 54, U. P. Tenancy Act, he surely went beyond his jurisdiction. If he did so, equally surely the Civil Court had jurisdiction to declare the order to be ultra vires. I have already shown that the order passed by the Collector on that date could not be one under sub-s. (2) at all for the simple reason that it fell distinctly outside the scope of that sub-section and embraced a number of provisions which had their origin in an agreement between the parties and not on the provisions of S. 54 at all. If I am right in this view, the position is obviously covered by the dictum I have just quoted.

(9) For these reasons I allow this appeal, set aside the decrees of the courts below and grant the relief prayed for by the plaintiff-appellant with costs throughout.

(10) Leave to appeal to a Bench is granted.

C/V.B.B. Appeal allowed.

A. I. R. 1953 ALL. 579 (Vol. 40, C. N. 287)

MALIK C. J. AND AGARWALA J.

Gaya Rai and others, Plaintiffs-Appellants v. Lalji Rai and others, Defendants-Respondents.

First Appeal No. 502 of 1943, D/- 19-2-1953.

Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 23 — Appeal from decree on application under S. 12 for redemption of mortgage — (Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21).

Section 23, U. P. Agriculturists' Relief Act provides that where appeals lie to two Courts, then it is the Court of lowest jurisdiction which will be entitled to entertain the appeal. An appeal from the decree passed by a Civil Judge on an application for redemption of mortgages under S. 12, U. P. Agriculturists' Relief Act, lies, under S. 21 of Act (12 of 1887) to the District Judge or the High Court according to the valuation of the suit and hence it should be filed in the Court of the District Judge, which is the Court of the lowest jurisdiction. (Para 1)

Kanhaya Lal Misra, for Appellants; Janaki Prasad, for Respondents.

MALIK C. J.: A preliminary objection has been raised that this appeal should not have been filed in this Court and should have been filed in the Court of the learned District Judge. The plaintiff filed an application under S. 12, U. P. Agriculturists' Relief Act for redemption of a large number of mortgages. The suit was decreed in part. Under S. 23, U. P. Agriculturists' Relief Act an appeal against such a decree lies to the Court to which original decrees passed by such Courts are ordinarily appealable and where such decrees are appealable to more Courts than one, to the Court of lowest jurisdiction. Section 21, Bengal, Agra and Assam Civil Courts Act (Act 12 of 1887) provides that

"an appeal from a decree or order of a Subordinate Judge (in this state Civil Judge) shall lie—

(a) to the District Judge where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed five thousand rupees, and

(b) to the High Court in any other case."

It is, therefore, clear that an appeal from a decree of a Civil Judge would lie to the District Judge or to the High Court according to the valuation of the suit. Section 23, U. P. Agricul-

turists' Relief Act provides that where appeals lie to two Courts, then it is the Court of lowest jurisdiction which will be entitled to entertain the appeal, and it, therefore, appears to us quite clear that the appeal should have been filed in the Court of the learned District Judge.

(2) The period of limitation for filing the appeal in the lower Court was only 30 days, but the appeal was filed in this Court beyond 30 days. It is however not necessary for us to consider whether the lower Court would or would not condone the delay. As the appeal was not entertainable by this Court we think the best course would be to direct that the memorandum of appeal be returned to learned counsel and we order accordingly. The respondent is entitled to his costs.

(3) Learned Advocate-General has prayed that the memorandum of appeal be returned to him today, but we do not know whether it is possible. The memorandum of appeal shall be returned to him at a very early date.

B/D.R.R. Order accordingly.

A. I. R. 1953 ALL. 580 (Vol. 40, C. N. 288)

SAPRU AND CHATURVEDI JJ.

Dr. D. N. Kesarbani, Applicant v. U.P. Medical Council, through the Registrar, Lucknow, Opposite Party.

Misc. Writ No. 7986 of 1951, D/- 10-3-1953.

(a) U.P. Medical Act (3 of 1917), Ss. 25, 26 — Erasing of name from register of Medical Practitioners — (Constitution of India, Art. 226).

Section 25 does not enable the Council to remove the name of a person simply because he has been struck off the register of graduates of the body which originally granted the degree. In so doing, the Council acts without jurisdiction and it is a proper case in which a writ of prohibition should issue restraining the Council from proceeding further with any steps to erase the name of the person from the register of medical practitioners. There is no question of infamous or disgraceful conduct in a 'professional respect' in such a case and S. 26 does not apply. (1887) 19 QBD 467; (1894) 1 QB 750, Rel. on. (Paras 13, 16)

(b) Constitution of India, Art. 226 — Domestic tribunals — (Domestic tribunals).

Though the High Court was reluctant to interfere with the autonomy of domestic tribunals and educational institutions which have to maintain standards, held the High Court could understand the applicant's misgivings regarding what the body would do when his case came up before it for consideration and this aspect of the matter could not be ignored by the High Court. (Para 11)

A. P. Pandey and S. P. Kumar, for Applicant; G. Mehrotra, for Opposite Party.

CASES CITED :

(A) (1887) 36 WR 442: 19 QBD 467
(B) (1894) 63 LJ QB 534: 1 QB 750

SAPRU, J.: This application has been presented under Art. 226 of the Constitution to this Court by Dr. D. N. Kesarbani, Medical Officer of Government Tuberculosis Clinic at Allahabad, for various reliefs, and more particularly for a writ of prohibition commanding the opposite party from taking any steps towards erasing his name from the register of Medical Practitioners of this province.

(2) The facts which have given rise to this application may be stated shortly. Dr. Kesarbani had his early education at the Gurukul Kangri University at Hardwar. He had a bright career at that institution which is one of the best well-known private institutions in this country. For various reasons, it was the policy of this institution not to have affiliated itself to any university or incorporated as a university by an Act of the legislature. It has played, as has been testified to by educationists of eminence, an important part in the cultural and national life of this country. He graduated himself in medicine from the Gurukul Kangri University in 1928 and was able to obtain a first class. That degree, as is well known, is not regarded as a qualification for registration as a medical practitioner. The medical degree at Gurukul is called 'Ayurved Alankar'. Mr. A. P. Pandey has invited our attention to the course of study prescribed for this degree and has also placed before us certain question papers set for candidates for the medical degree at the University. Statements by doctors of eminence have been placed before us to the effect that the standard of education in modern medicine of the Gurukul Kangri University is of a fairly good character. On this part of the case, we may refer to the testimony of a physician of international reputation, Sir R. N. Chopra. He is an M.D., Sc.D. (Cantab) and an F.R.C.P. (London). He is a physician of the highest eminence and in the affidavit which he has sworn he states that he believes and bona fide believes that the Gurukul Kangri University has a well integrated course in both systems of medicine, Indian and Scientific, without supplanting the latter.

(3) Another physician, Dr. Kul Bhushan, who also holds good qualifications says that the standard of education in modern medicine of the students of the Gurukul Kangri University is of fairly good quality.

(4) An ex-Principal of the institution, Dr. Radha Krishna has also filed an affidavit to the effect that the syllabus and curriculum of the college in modern medicine can be compared with those of other Medical Colleges in India. He also states that ample opportunity is provided for practical training in various laboratories and there is enough scope for learning bed-side medicine; besides the hospital has a large number of out-door patients.

(5) We have referred to the statements in the form of affidavits of these well-known persons in order to indicate that the Gurukul Medical Degree is not a degree in what may be called pure Ayurvedic. Along with instruction in ancient system of pharmacopoeia, instruction in modern systems of medicine is also imparted. Whether the standard reached by the Gurukul Kangri University is equivalent to that of Indian Universities conferring medical degrees is a question which is not relevant for our purposes. The bearing of these remarks will be evident later. We may also quote from the report of the Ayurvedic and Unani system Re-organisation Committee in 1950. That committee writes that a scrutiny of the list of examiners for the last three years showed that greater stress was laid in Gurukul Kangri on Allopathic studies than on Ayurvedic studies.

(6) We have considered it necessary at this stage to refer to these matters as one of the questions we have had to consider is whether any misrepresentation was made by Dr. Kesar-

bani to the University of Rome when he applied for certain exemptions for admission to the Medical Faculty of the Royal University of Rome for the M.D. degree. We shall refer to this aspect a little later in our judgment. We may also mention that the Registrar of the Gurukul Kangri University in his affidavit has stated that the subjects taught in the Gurukul Medical College include anatomy with histology; physiology; Pharmacology and therapeutics; hygiene and public health; medical jurisprudence and toxicology; children's diseases; mental diseases; clinical medicine; pathology and bacteriology; general medicine; general, regional and operative surgery; midwifery and gynaecology. According to the Registrar, the curriculum and the text books compare quite favourably with those prescribed for the M.B.B.S. examinations of the various Medical Colleges in India. The standard is equally high and among the examiners have been emient professors or examiners in other Medical Colleges of India.

The standard of knowledge in basic sciences, i.e., in Chemistry, Physics and Biology of the University students was in no way inferior to that of Intermediate in Science in the officially recognised universities. Moreover, it was compulsory for every student to be well conversant with three languages, i.e., Sanskrit, English and Hindi. From these facts the Registrar draws the inference that a graduate of the Gurukul Medical College gets a proper education in pre-medical basic medical and professional medical subjects in the most modern way. We do not think it necessary to record any conclusion on the question whether the standard reached by the Gurukul Kangri University in its medical examinations is as high as that of the universities created by the Acts of the State legislatures in India.

We are satisfied, however, that it would be incorrect to describe the Gurukul Kangri University as one which imparts education only in an 'obsolete indigenous system'. On the question of the efficiency in education imparted by the Gurukul Kangri University, opinions may well differ. But as to the fact that along with instruction in ancient system of pharmacopoeia, instruction in modern system of medicine is imparted there can be no doubt whatever. We have felt it incumbent on us to make these remarks because we find that in a letter which was written by the Medical Council to the Royal University of Rome an assertion was made that Dr. Kesarbani had misrepresented to them the real nature of the education that he had received at Gurukul. That education was described as being an education in the old Ayurvedic system (obsolete indigenous system) and not in modern scientific system as is being imparted in recognised Medical Colleges in India.

(7) We have said that Dr. Kesarbani graduated in 1928 from the Gurukul Kangri University. Between 1928 and 1930, he worked in several hospitals in Bombay and acquired practical experience for a period of about three years. In 1931, he moved to Dehra Dun and built up a good reputation in that city. In 1938 he decided to leave for Europe, having secured a scholarship for that purpose. He decided that he would have his education in Italy and went to that country armed with letters from Professor Benoy Kumar Sarkar of Bengal Institute of Sociology, Calcutta. Dr. Sarkar gave him a letter addressed to one Professor Formichi, Vice-President of the Royal Academy of Italy. In this letter Dr. Sarkar introduced Dr. Kesarbani as a doctor who had studied modern and old systems of medicine in the private educational institution, the Gurukul University Kangri at Hardwar in the United Provinces. He mentioned also that it was known to him that this was one of the leading national universities in India and enjoys high esteem among the nationalists. That letter mentioned that Dr. Kesarbani had graduated from there in 1928 and since then had been doing some research work. That letter also stated that at that time he was practising medicine at Dehra Dun. A reference is made in that letter to the fact that one Dr. Balram had been given certain exemptions by the University of Munich in Germany for his doctorate in medicine.

In his opinion, Dr. Kesarbani's qualifications were not inferior to those of Dr. Balram. In view of that fact, he hoped that there would be no difficulty in his admission and that he would be allowed to take his doctorate examination from the University of Rome. There was no scope for a brilliant student like him in this country as he was a graduate of a national university. Dr. Sarkar added that he (Prof. Formichi) knew very well the prevailing conditions in this country. On receiving this letter of introduction, Prof. Formichi gave a letter of introduction to Dr. Spano, Administrative Director of the University, asking him to obtain for Dr. Kesarbani the facility he was asking for and added that he would be much displeased if he, 'having to face too many difficulties there, proceeds to Munich where they had made golden bridges for his admission.' On the strength of his qualifications as also perhaps of the recommendations which he had brought with him, the University of Rome gave to Dr. Kesarbani an exemption of 4½ years. The M.D. of Rome is a six years' course but he was allowed to take it in one and a half year. He had, however, to appear in four rigid examinations and he got through them creditably. In his final examination, he was able to secure distinction and, in fact his marks were in the average 88 per cent marks. Finally, the University of Rome conferred upon him the degree of Doctor of Medicine and Surgery. The degree qualified him for practice outside Italy.

At the time that he went to Italy, this country was not at war with it. An Italian degree used to be recognised for purposes of registration of medical practitioners. In 1939 the war broke out & he continued to stay in Italy & Germany. From 1939 to 1942 he studied medicine and surgery in the University of Munich, passed all the examinations comprising twelve subjects and got an M.D. with distinction. From 1942 to 1947 he worked as Lecturer and was Incharge M.O. of Chest diseases ward of the University Hospital. Later in that country he was taken as a panel practitioner in the town of Holzkirchen. He was also appointed Doctor-in-charge for civil personnel in the American Air-Field. Finally, when political conditions were favourable for his return, Dr. Kesarbani came back to this country in 1947. Even before reaching India, he took the precaution of writing a letter to the Chief Minister of Uttar Pradesh intimating to him his intention of return and giving him a synopsis of his qualifications.

A short time after his return in 1947 he saw an advertisement by the Public Service Commission of U. P. for the post of the Medical Superintendent, Bhowali Sanatorium, Naini Tal. He applied, was interviewed by the Public Service Commission and finally selected by that Commission. On the 3rd March 1948, Dr. Kesarbani took charge of the Bhowali Sanatorium. It may be mentioned that he was registered as a medical practitioner by the Medical Council under S. 18, U. P. Medical Act, 1917. On 19-12-1947 he was entitled to be so registered as he had a degree of the University of Rome which was within the meaning of the Indian Medical Act a Royal University of Italy.

No objection of any character was made at that time to his registration. It may be mentioned that there was a perfect disclosure on Dr. Kesarbani's part of all the requirements for registration. He gave the Medical Council to understand that he had his preparatory medical education at Gurukul, that after Gurukul he practised for a number of years at Bombay and Dehra Dun and that he was able to obtain an M.D. degree of the Royal University of Rome. The Medical Council with every relevant fact in its possession came to the conclusion that he was entitled to registration and he was so registered.

(8) Suddenly something happened which made the Medical Council change its mind. On 29-4-1948 the Registrar of the Medical Council wrote to the applicant a letter asking him to answer three questions. Those questions were:

"1. When did you leave India for foreign countries?
2. The qualifications with date which you secured in India before going abroad. Please mention the names of the institutions where studied?
3. The qualifications with dates which you secured outside India and the period of studies and the name of the institutions which you attended to obtain these qualifications?"

He replied to this letter in August and sent along with it his certificates in original.

(9) The Medical Council, however, chose to take steps which, we think, were of an ill-advised nature. The Registrar of the Medical Council wrote to the Rector of the Royal University of Rome that Dr. Kesarbani had made incorrect and false representations. He further added that the training he had received was in a university not recognised by the Government of India but was in the old Ayurvedic system (obsolete indigenous system) and not in modern scientific system as was being imparted in recognised Medical Colleges in India. The letter went on to suggest that they did not seem to be fully aware of the fact that Dr. Kesarbani was trained in the Ayurvedic system in a private college and an unrecognised university. The Registrar further added that he required the information as objections had been raised to his registration with the Council on the ground of insufficient training. Reminders were sent on 29-12-1948, 1-1-1949 and 22-1-1949 on behalf of the Medical Council to the University of Rome requesting them to expedite a reply to their communication dated 26-11-1948.

On 28-1-1949 the Rector of the Rome University wrote to the Registrar, Medical Council, that Dr. Kesarbani had applied to be admitted in the 6th year course of medicine and surgery on presentation of the following documents:

1. High School Certificate from the residential University of Gurukul at Hardwar dated the 24th April 1924.
2. Diploma Certificate with examinations and marks obtained at the Faculty of Medicine at the same University, signed by Vigishwar, Secretary and Vishwanath, Vice-Chancellor.

The Council was at first disposed only to give him credit for four complete years as some of the subjects required at the Italian University had not been included in his course of study; but at the meeting of the Council held on 24-1-1939 after having received new information and clarifications, permitted the aforesaid student to enter the sixth year course with the obligation of passing four examinations before being allowed to take his Diploma Examination. It was added that his inscription, meaning thereby admission, was, however, subordinated to the presentation of a document proving that the student had attended a two years course of preparation for the study of Medicine before his entering the Faculty of Medicine of Gurukul University. On 27-2-1939 the Chancellor and Vice-Rector of the Gurukul University informed the University of Rome that the applicant before them had, before entering the Gurukul University course for medicine, completed a two years course in pre-medical subjects.

They had before them another letter from one Dr. S. K. Mehta informing them that the applicant had served in the Emergency Hospital, Bombay, of which he was in charge from May 1929 to 1931, showing great professional capacity and a thorough knowledge of the Ayurvedic cures. It was on the basis of this information that the applicant has been admitted to the sixth year course. According to him, he had passed the examination, obtaining in medicine and surgery 88 per cent of the marks. He had, however, not been able to succeed at the examination of the university of Milan. For that reason he would not be permitted to practise the medical profession in Italy. The Director went on to add that the applicant had been admitted to the 6th year course on account of inexact information and documents forwarded by the authorities in India. They added that it was because this inexact information and the documents forwarded by the authorities in India that the authorities of that university were able to realise that the Ayurvedic system had fallen into disuse and that the Gurukul Kangri University was not legally recognised by the Government of India. There is towards the end of the letter a request that it is desirable that all possible information should be sent regarding the organisation of university studies as conducted in India.

Now Dr. Mehta's letter had made it clear that Dr. Kesarbani was an authority in Ayurvedic cures. There was no inexactness in the letters which were sent by the Chancellor and the Vice-Rector of the University of Gurukul. It is true that Gurukul is not a recognised university in the sense that it owes its inception to no Act of legislature. It is, however, a well recognised institution whose good work has been highly praised by scholars and educationists of eminence. It is well-known that it constituted an experiment along new lines in education. Its reluctance to accept official help was due to the nature of the Government that was operating in this country before 1947. Gurukul was not an obscure institution. It could be classed with well-known institutions such as the Shanti Niketan of Rabindra Nath Tagore. The standard reached by the medical students at that university may or may not have been comparable with that reached by the students of medical institutions of Indian Universities, but it would be a travesty of truth to describe the courses of study at Gurukul Medical Faculty as purely or even mainly confined to indigenous methods.

We have referred on this point to the eminent authority of Dr. Chopra. We may say that Mr. Ramsay Macdonald who was at one time the Prime Minister of England wrote in 1916 about Gurukul in the following terms:

"The Gurukul is the most momentous thing in Indian education that has been done since Macaulay sat down to put his opinion into minute in 1835."

We may also remark that the President of our Republic, Dr. Rajendra Prasad, spoke about Gurukul in the following terms:

"The present Government is Gurukul's own and the Government also considers the Gurukul as its own; hence the Gurukul should form a part of the Government educational system. But at the same time I realise that in the making of every country independent educational institu-

tions have a place of their own. It is such institutions that can bring about a revolution in education; therefore, if the Gurukul Kangri would desire to preserve its independent identity, the Government shall have no objection. The Government shall give it all kinds of help and prompted by this feeling I announce a grant of Rs. one lac to the Gurukul Kangri on behalf of the Government of India."

We may also invite attention to the observation of the Universities Commission which was presided over by Dr. Radha Krishnan, now Vice-President of the Indian Republic:

"Gurukul Kangri: The institution with its branches has about 1500 students, of whom 100 are of the College grade. Vedic reseach, Ayurvedic research and advanced work in ancient Indian Literature and History have been its specialities. Non-recognition of its degrees and diplomas had stood in the way of its popularity, but now after half a century of conscientious work it is being recognised as a real centre of learning."

(10) We have mentioned all this in order to indicate unmistakably that Dr. Kesarbani did not receive his medical education in India in an unknown and obscure institution but at a well-recognised institution which did not, however, for reasons into which it is unnecessary to enter, receive or desire to receive Governmental aid. Subsequent to this letter, the Medical Council sent for Dr. Kesarbani on 18-3-1949. He was asked to answer certain questions. He wanted to place certain documents before the President but the latter did not consider it necessary to give him time for that purpose. On the basis of that interview the Council wrote to the Rector of the Royal University of Rome pointing out that the University of Rome had given Dr. Kesarbani exemption of nearly 4½ years on an inexact information. The Council further found that Dr. Kesarbani had not pursued a regular course of studies in any recognised medical college before proceeding to Italy and obtained exemption by supplying incorrect information. They pointed out that even though Dr. Kesarbani had not passed a college education which would be regarded as good for purposes of registration in Italy, he could practise in this country as the degee which he possessed was a registrable degree. They felt that they were not in a position to erase his name from their register and they invoked the assistance of the University of Rome for that purpose. If the University of Rome could cancel the M. D. Degree awarded to him on the ground that he had by supplying incorrect information obtained exemptions, it would be easy for them to erase his name from the medical register.

(11) We are surprised that a responsible body created by the legislature for the maintenance of professional standards should have acted in this irresponsible manner without giving any adequate opportunity to Dr. Kesarbani to explain his case. Without caring to ascertain in an unbiassed manner the case which Dr. Kesarbani had to put up, this statutory body chose to write to the University of Rome and went out of its way to suggest that action should be taken against him for the cancellation of the degree for which he had worked and toiled hard in Rome. Reluctant as we are to interfere with the autonomy of domestic tribunals and educational institutions which have to maintain standards, we can well understand Dr. Kesarbani's misgivings regarding what this body will do when his case comes up before it for consideration. This aspect of the matter cannot be ignored by us. For nearly 9 months the Medical Council received no reply from the University of Rome. On 20-3-1951 the Rector of the University of Rome wrote to the President of the Medical Council informing them that the degree which had been conferred on Dr. Kesarbani had, in pursuance of their letter, been cancelled. This ended the chapter so far as the degree of M. D. is concerned. We understand that Dr. Kesarbani has made an appeal to the Rector of the University of Rome against the order of the University authorities cancelling the degree and that that appeal is still pending before the Rector.

(12) To continue with the story, the Medical Council on receiving the information that the M. D. degree had been taken from Dr. Kesarbani invited the attention of Government to the effect that Dr. Kesarbani was not a qualified medical practitioner and wrote to them suggesting that he should be removed from government services. In their letter of 18-1-1950 to the Secretary to Government, U. P., Medical (B) Department, Lucknow, the line taken was that the admission of Dr. Kesarbani to the final year of M. D. class of the University of Rome was obtained by conveying inexact information and that Dr. Kesarbani had not obtained a regular and proper training in basic medical subjects and had not been suitably trained. In their opinion, therefore, he was not a fit person to remain in Government service in a premier institution of the status of Bhowali Sanatorium. The Medical Council was directed by Government to get into touch with Dr. Kesarbani and give him an opportunity to explain the case which had been formulated by the Council. A letter was accordingly addressed by the Medical Council and he was required to send his reply within ten days. Thereafter there followed a long correspondence with Dr. Kesarbani and the Medical Council into which it is unnecessary to enter. But we may, however, make a pointed reference to the letter dated 29-4-1951 in which Dr. Kesarbani asked the Registrar of the Medical Council 'o be good enough to send to him the correspondence that had taken place between the University of Rome and the Medical Council.

The Registrar, Medical Council, on 4-5-1951 had the correspondence, including the letter of 31-3-1949, sent to Dr. Kesarbani. The present position is that Dr. Kesarbani has been asked to show cause as to why his name should not be erased from the Medical Register since his M.D. (Rome) degree has been annulled by the Rome University and he no longer holds the medical qualification necessary for registration under the U. P. Medical Act. A letter to this effect was sent on 17-4-1951 and it was followed by letters dated November 5, 17, 22 and December 5, 1951. It is against this threatened action that Dr. Kesarbani has come up to this Court under its writ jurisdiction.

(13) We have already pointed out that there are good reasons why Dr. Kesarbani apprehends that he will not get a fair, just and impartial hearing before the Medical Council. It is at the instance and on the initiative of the Medical Council that his M. D. degree was cancelled by the University of Rome. We can well understand, therefore, his hesitation in appearing before a body which he has reason to apprehend is not likely to adopt a fair and impartial attitude towards the case put forward by him. Apart from this, the question of law raised in this case requires some consideration. The question is whether the Medical Council has any power to cancel a Registration on any ground other than that mentioned in S. 25, U. P. Medical Act. It is conceded by the learned Standing Counsel that the only section under which action can be taken against him is S. 25, U. P. Medical Act. Section 26 of the Act can have no application to the facts of Dr. Kesarbani's case as it is limited to

cases of infamous conduct in any professional respect. There is no question of infamous conduct in any professional respect so far as Dr. Kesarbani is concerned.

Section 25 of the Act runs as follows:

"Any entry in the register of medical practitioners, which is proved to the satisfaction of the Council to have been fraudulently or incorrectly made, may be erased under an order in writing of the Council after notice has been given to the person concerned and his objections, if any, have been considered."

It is only in cases where an entry in the register has been made fraudulently or incorrectly that the Medical Council can take action against any registered medical practitioner under S. 25. No doubt the satisfaction that is required is of the Council. But it is obvious that the fraud or mistake has reference to the time when the initial entry was made.

(14) On this part of the case, we may refer to the case of — 'Ex Parte, Partridge', (1887) 19 QBD 467 (A). That was a case of a person who obtained a diploma as licentiate in dental surgery from the Royal College of Surgeons, Dublin in 1878, and whose name was subsequently entered in respect of that qualification in the Dentists Register kept in accordance with the provisions of the Dentists Act, 1878, (41 and 42 Vict. c. 33). The Council of the Royal College withdrew that diploma in July 1885 for the reason that the dentist had been advertising his profession. One of the conditions on which the diploma was granted by the Royal College of Surgeons, Dublin, was that the dentist would not endeavour to attract business by advertisement or by any practice considered by the College to be unbecoming. It was further laid down that if this condition was not observed, the diploma would be cancelled by the President of the Council. A declaration to the effect that he would observe that condition having been made by the dentist, the diploma was conferred on him. Later, it was discovered that he had been advertising himself and on that basis the General Council of Medical Education and Registration erased his name from the Dentists Register under the Dentists Act, 1878.

(15) Now, we may point out that we have compared the provisions of the U. P. Medical Act, 1917, with those of the Dentists Act, 1878. We find that section 7 of that Act corresponds with S. 17, Medical Act, S. 11 with S. 33, S. 12 with S. 17 and S. 13 with Ss. 25 and 26. It is unnecessary to notice other sections of the two Acts. On an application for a mandamus to the General Council of the Medical Education and Registration to restore the name of the dentist to the register of Dentists, Mathew J. observed that in a case such as the present the Medical Council possessed no further powers of dealing with the register than those conferred in the various sections of the Act. He held that the mere fact that the diploma had been cancelled by the Medical authority was not a ground upon which the General Council was justified in disqualifying the applicant or exposing him to the penalties imposed by the Act upon unqualified practitioners. The matter went up to the Court of appeal and we may quote in this connection the remarks of Lord Esher, M. R.:

"It seems to me that these provisions go to show that the power of erasure by the Council is in the nature of a judicial power, and must be confined to the matters into which they are authorised to inquire for the purpose of exercising such power. It may be that the local or more limited Medical authority may strike a man off their register for a breach of an undertaking on which he obtained his qualification.....The Dentists' register is a novel institution, the creature of the Act of 1878, and it seems to me that there can be no power of dealing with the register so created except those which are given by the Act."

Lindley L. J. was more specific. He observed:

"The effect of our decision is that it will not be competent for the General Council, without exercising their jurisdiction under S. 13, (S. 13 corresponds with Ss. 25 and 26 of the Medical Act), and simply because a licentiate of a local medical authority has been struck off the register of that authority, to erase his name from the Dentists register.....Section 13 authorises the Council to erase the names of convicted persons and those guilty of infamous or disgraceful conduct in a professional respect. There is no provision which enables the Council to remove the name of a person once on the register simply because he has been struck off the register of licentiates of the body which originally licensed him."

(16) Now, admittedly, there is no question here of infamous or disgraceful conduct in a professional respect so far as Dr. Kesarbani is concerned. We may point out that in the case of — 'Allinson v. General Medical Council', (1894) 1 QB 750 (B), Lopes L. J. made the following observation when dealing with infamous conduct in a professional respect:

"The Master of the Rolls has adopted a definition which, with his assistance and that of my brother Davey, I prepared. I will read it again: 'If it is shown that a medical man in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency', then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'. That is at any rate evidence of 'infamous conduct' within the meaning of S. 29. I do not propound it as an exhaustive definition, but I think it is strictly and properly applicable to the present case."

In the case before him the applicant had been guilty of infamous conduct in a professional respect. There is no suggestion that Dr. Kesarbani has been guilty in the pursuit of his profession of conduct which can be regarded as disgraceful or infamous by the profession he belongs to. Indeed, according to the medical council he does not belong to the medical profession at all. That being the position, the only section which can apply is S. 25 of the Act and it strikes us that we can read in S. 25 no provision which would enable the Council to remove the name of a person simply because he has been struck off the register of graduates of the body which originally granted the degree. That being so, the clear view to which we are driven is that the Council is acting without jurisdiction. On this basis, we think that this is a proper case in which a writ of prohibition should issue restraining the Council from proceeding further with any steps to erase the name of Dr. Kesarbani from the register of medical practitioners and we order accordingly. The proceedings instituted on that basis are hereby quashed. It is unnecessary to pass any orders with regard to the other reliefs claimed by the applicant as our order in regard to prohibition will enable the applicant to get the substance of the reliefs that he claims. The applicant will be entitled to his costs which we assess at Rs. 500/-.

A/D.H. Application allowed.

A. I. R. 1953 ALL. 585 (Vol. 40, C. N. 289)

SANKAR SARAN AND
GURTU JJ.

Gulab Singh and others, Applicants v. Collector of Farrukhabad and others, Opposite Party.

Writ Applns. Nos. 7959 and 7951 of 1951 D/- 16-3-1953.

U. P. Land Utilization Act (5 of 1948), S. 3 — Validity of order of allotment made without proper service of notice — (Constitution of India, Art. 226).

An order of allotment of land passed under S. 3, U. P. Land Utilization Act without effecting a proper service of notice on the landlord concerned as required by S. 3(2), in consequence of which the landlord was prevented from showing that the land had already been let to tenants and was being utilized for cultivation, is without jurisdiction and can be quashed by a writ of certiorari at the instance of tenants of the landlord who are adversely affected by it. The fact that there was a subsequent representation made by the landlord and that a report was put up by the planning officer and an order passed thereon could not wipe off the effects of the failure to give notice under S. 3(2), according to law.

(Paras 16, 17, 18 and 19)

Suraj Nath Singh, for Applicants; K. C. Saksena, for Opposite Party.

CASE CITED:
(A) ('52) AIR 1952 All 822: 1952 All LJ 380

GURTU J.: These are two writ applications arising out of proceedings taken under S. 3, U. P. Land Utilization Act, 1948 (Act 5 of 1948). Writ No. 7959 of 1951 is by certain alleged tenants of the land in question. Writ No. 7951 of 1951 is by the erstwhile landlord of the village in which the land in question was situate.

(2) It is to be conceded that in view of the U. P. Zamindari Abolition and Land Reforms Act and the vesting order thereunder the applicant, the ex-landlord has no locus standi to prosecute this application. Writ Application No. 7951 of 1951 will, therefore, have to be dismissed.

(3) Since these two writ applications were connected they are being dealt with together in order that the facts in the affidavits in support either of one application or the other may be used in disposing of the Writ Application No. 7959 of 1951, if necessary.

(4) The case of the applicants in Writ Application No. 7959 of 1951 is that the plots mentioned in para. 2 of the affidavit filed in support of the application were settled with the applicants and with certain other persons who are opposite parties, 3rd set, for cultivation purposes by the then landlord by means of various pattas executed in April 1950 and in April 1951, and that the applicants are the tenants of the lands included in their respective pattas. The applicants allege that the plots were mostly under cultivation in 1950 though the crops in the year were not good because the lands could not be properly ploughed and also because of excessive rains. The opposite party 2, the Krishna Co-operative Society Limited, under the provisions of the Land Utilization Act, applied to the Collector Farrukhabad, to let out the plots to them for farming purposes upon a representation that the lands were still uncultivated and had not been let out to any one. The applicants allege that without any notice having been given to the applicants or delivered to the landlord or having been affixed to the chaupal or some other public place in the village an allotment of the plots in favour of the Co-operative Society was made sometime in or about July, 1951. The applicants allege that the action of the Collector in so letting out the lands is against the principles of natural justice and has deprived the applicants of their rights and that no allotment could have been made by the Collector in favour of the Co-operative Society without notice having been served as required by S. 3, U. P. Land Utilization Act, 1948. The applicants allege that they have no other speedy remedy and therefore, seek a writ of certiorari or mandamus or other direction quashing the proceedings taken by the opposite parties, the Collector and the Co-operative Society.

(5) The Co-operative Society by its secretary has filed a counter-affidavit. It is alleged therein that the applicants are all mukhtar-i-ams of the landlord and have been set up by the landlord to harass the co-operative society. It is denied that the applicants or the opposite parties, third set, are tenants of the land in dispute and it is alleged that they were not given the land on pattas either in 1950 or 1951. It is alleged that the revenue records do not mention the names of the applicants or the opposite parties, third set, as tenants of the land and that the alleged pattas were not verified by the Kanungo according to the rules. It is further alleged that the landlord admitted in his letter, dated 9-8-1951 to the Collector that the land had not been brought under plough and it is alleged that the plots in suit were never brought under cultivation either by the applicants or the opposite parties, third set and that no crops were ever raised by them. It is alleged that since the plots in dispute had not been let out to anybody and not cultivated they were shown in the list maintained by the Collector as culturable waste land. It is alleged that when upon a previous notice under the U. P. Land Utilization Act the landlord represented that the lands were already let the Collector had allowed time up to 30-5-1950, to the landlord to let out the land and had directed that all plots should be leased out and a list of persons in whose favour leases had been executed should be sent, but that no such names had been sent. It was further alleged that before the present allotment order was made a notice was issued to the landlord under S. 3, Land Utilization Act which was served on the landlord through his duly authorised agent and that the service of the notice was admitted by the landlord in his Manager's letter, dated 9-8-1951. It is alleged that the land was not at all settled with any tenants and was lying waste as shown by the chart maintained by the Collector.

(6) A rejoinder affidavit was filed by the applicants. It was denied that applicant 3 was a Mukhtar-i-am. It was alleged that the revenue records did not make a mention of the names of the applicants or opposite parties third set as tenants of the land in dispute because the revenue officials, viz., the Kanungo and the Patwaris, had been ordered by their superior officers not to make entries in the revenue papers about the pattas given to the applicants and they refused to attest the pattas or to make entries in spite of their request for the same to them. It was reiterated that crops had been raised on most of the plots in dispute in 1950 and in all of them in 1951 on behalf of the applicants and the opposite parties third set. It was alleged that the service of the notice on the landlord was never made personally nor on his Manager, but it had been served on his Mukhtar-i-am who did not bring it to the notice of the landlord and for this negligence he was removed from service. Attached to this

rejoinder affidavit are copies of the pattas executed and also copies of the representation made to the Collector wherein it was prayed that the order of allotment in favour of the Co-operative Society should be withdrawn.

(7) A supplementary affidavit was filed by the Co-operative Society. It alleges that the pattas alleged to have been executed in April 1950, did not exist or they would have been produced before the Collector in compliance with his order, dated 3-5-1950, made when the earlier notice had been issued. It was alleged that the applicants could have made an application before the revenue Court for entry of their names under the provisions of the Land Revenue Act and their failure to get their names entered is indicative of the fact that there were really no pattas in existence.

(8) To the supplementary affidavit is attached the letter of the Manager of the Estate to the Planning Officer, dated 9-8-1951.

(9) It runs as follows:

"With reference to your notice No. 739, dated 4-6-1951 for settlement of the plots Nos. 54/1, 609/1 of village Uncha within fifteen days I beg to inform you that the notice was received here in the office on 8-6-1951 by the sectional clerk and mukhtar-i-am of the office who unfortunately detained the paper with him for a long time without putting the same before the proper authority. It was extremely careless on the part of the clerk concerned who due to his lack of vigilance and foolishness could not understand the significance and importance of such a notice. For this act of his carelessness the clerk has been punished and the ziladar too has been suspended. In support of my above assertion I enclose the copy of the orders for your perusal.

"Last year another notice of the similar nature was received and the reply thereto was submitted on 2-5-1950 saying therein that major portion of the area has been settled. In view of the last year's reply of the notice there could hardly arise the question of settlement of the area already settled by us.

"You fully appreciate that due to sparse rains this season the settled land could not be brought under plough by this time as well. In the circumstances mentioned above I earnestly appeal to you to reconsider the cases you have settled for quashing them and giving estate settlement holders chance to cultivate their land and oblige.

"In this connection I beg to request you to please pass stay orders against Hotilal and others till you finally decide the cases. Enclosures:

1. Copy of Manager's order, dated 8-8-1951 passed against the Ahalmad, Th. Shahzadey Singh.

2. Copy of Manager's order dated 8-8-1951 passed against the Zilladar, P. Tirbeni Prasad, Zilladar Uncha."

(10) Attached to this supplementary affidavit is also an uncertified copy of the report which was made to the Collector by the District Planning Officer on 6-9-1951. It runs as follows:

"Collector.

Subject: Letting of land in village Uncha and Tera Rabboo to Shri Krishna Co-operative Farming Society under your orders, dated 28-7-1951 (Flag 'A') and of 16-7-1951 Flag 'B'.

"The Manager, Tirwa Raj has represented against this allotment order on the ground that the land has already been let out by them to the cultivators. I submit my comments parawise as follows:

"Notice under S. 3, Land Utilization Act was duly served on the Muktar-i-am of the estate in person on 8-6-1951 but no objection was filed by the State till 17-7-1951 when final orders were passed by you though the prescribed period for the purpose had since been elapsed. If it was the fault or the carelessness of the subordinate staff of the State for not putting up the notice before the Manager it was their look out. This office has nothing to do with it.

"The possession of the land in question was delivered to Sri Hotilal Upadhyaya and others on 20-7-1951 through the Kanungo concerned by beat of drum in village Uncha where a permanent ziladar of the estate is posted. No facts for letting out the land in dispute to other tenants was ever brought to the notice of the supervisor Kanungo who went on the spot for delivering the possession by the ziladar or any other representative of the estate till 9-8-1951. Had there been any tenant, he should have come forward at least at the date of the order on the spot. Besides it is not even proved from the patwari records that the lands in question have ever been held by any tenant or any registered patta was ever made in anyone's favour by the estate before the final orders passed by you in the matter.

"Some persons have filed certain objection by alleging that the land situated in village Uncha, which is in dispute had already been leased to them in April 1950 and as such it should have come under plough during last rainy season and an entry to this effect should have long been done in the patwari records.

"This plot was inspected by Shri M. K. Mukerji, Assistant Registrar, Co-operative Societies, Farrukhabad and Sri S. L. Asthana, District Agricultural Officer on 3-8-1951. The report at Flag 'D' clearly shows that they found the land in question uncultivated.

"The state has also mentioned in their objection that a similar notice was received by them and they put in objection in its reply that the major portion of the land has already been settled and will be brought under cultivation during the rains of 1950, but it has not yet been done.

"In the circumstances, there is no force in the objections filed by the Manager, Tirwa Raj, and others and may therefore be filed.

Sd/ B. K. Tandon,
District Planning Officer,
Faraukhabad, 6-9-1951."

(11) A copy of the District Magistrate's order, dated 7-9-1951, passed on the representation of Tirwa Estate's Manager is also attached and it runs as follows:

"The land does not seem to have been cultivated which has been admitted by the Estate authorities vide Flag (C). Under the circumstances their representation has no force and is rejected."

(12) Learned counsel for the applicants has argued that it has been established that the applicants and the opposite parties third set were lessees of the lands which have been allotted to the Co-operative Society. He relies upon the fact that pattas are in existence and submits that the absence of verification of these pattas by the Kanungo and the failure to get an entry into the revenue records made has been explained by him. He urges that when the first notice was issued the Collector was duly informed by the letter, dated 2-5-1950 written by the Mukhtar-i-am of the Raj that the major portion of the area covered by plots Nos. 97/1/47.74 and 609A/60.84 had been settled and would come under the plough in the coming rainy reason and that it had been intimated that the rest of the area which was

inferior to it would also be settled in the very near future. Learned counsel says that in view of the undertaking given the rest of the area was also settled and that the failure to send the list of persons in whose favour the leases had been executed did not matter. The co-operative Society, on the other hand, has relied upon the facts set out in the District Planning Officer's report.

(13) For the purpose of these proceedings it is only necessary to examine this matter from one angle and it is this: Whether the applicants have prima facie established that they could have made a reasonable representation to the Collector if they had received notice of the fact that the lands in question which were being sought to be allotted by the Collector were the lands which could not be allotted because they were already leased and had been put under cultivation. In our view such a representation had considerable chance of being accepted by the Collector if it had been made considering the facts which have been averred in the affidavit of the applicants. It is argued that S. 3 did not entitle the applicants to any notice. This appears to be correct. However, though the tenants could not have directly represented their case if the landlord had received a notice under S. 3, he was bound to have brought the fact, which the tenants themselves might not have been entitled to bring, to the notice of the Collector directly that the lands sought to be allotted were already leased out and were being subjected to cultivation. The counsel for the applicants says that no notice as required by law was served on the landlord and, therefore, the Collector had no power to make an allotment in favour of the Co-operative Society.

(14) It is an admitted fact that the notice was not served personally on the landlord but was served on the Mukhtar-i-am. It is however urged by the learned counsel for the Co-operative Society and for the State that a notice served on the Mukhtar-i-am is sufficient. It is urged that when the first notice was issued correspondence with reference to it was carried on by a Mukhtar-i-am of the estate and that the letter, dated 9-8-1951, of the Manager himself does not show that the Mukhtar-i-am was not entitled to receive the notice. The question, therefore, is whether there is anything in the language of S. 3 which prohibits the service of a notice on a Mukhtar-i-am when it is clear that the Mukhtar-i-am is the person who normally acts for the landlord. Section 3 (2), U. P. Land Utilization Act (Act 5 of 1948) runs as follows:

"The notice shall be served on the landlord by delivering or tendering to him a copy of such notice. But if the landlord is not readily traceable or refuses to accept the notice, the service shall be effected by affixing a copy of such notice to the chaupal or some other public place in the village and thereupon the landlord shall be deemed to have been sufficiently served."

(15) It is urged that the section indicates that service has to be effected on the landlord himself. Learned counsel for the applicants has drawn our attention to — 'Ram Niranjan Lal v. Addl. Dist. Magistrate, Kanpur', AIR 1952 All 822 (A). In that case the Collector made an ex parte order under S. 3, U. P. Land Utilization Act on the finding that the notice on the landlord was properly served. The finding was based on the report of the process server which was not verified by him as required by R. 78 of the Revenue Court Manual. It was held

"that the finding that the landlord had been served with notice and had deliberately absented himself from Court was based upon evidence which was not admissible in law and therefore the Court had no material on which it could assume jurisdiction to proceed ex parte against the landlord and therefore the Court acted without jurisdiction and its order was liable to be quashed under Art. 226 of the Constitution."

Learned counsel for the applicants says that this case is an authority for the proposition that where some essential preliminary has not been complied with the proceedings subsequent are invalidated. He submits that in the cited case the essential preliminary to holding that the notice had been duly served was the presence of the requisite affidavits. In the failure of those affidavits it could not have been held that there was proper services and in the failure of service there could have been no order of allotment. Learned counsel says that in the present case also the essential preliminary to an order of allotment under S. 3 was that a notice should have been served on the landlord by delivering or tendering to him a copy of such notice or if the landlord was not readily traceable or refused to accept the notice the service could have been effected by affixing a copy of such notice to the chaupal or some other public place in the village.

Learned counsel submits that whether or not the landlord had a Mukhtar-i-am on whom in the absence of any express provision a notice might have been served so as to be an effective notice on the landlord would not matter as in view of the statutory requirement of S. 3 (2) of the Act the notice in this case had to be served on the landlord personally. Learned counsel argues that since this was not done there was in effect no service at all and the essential preliminary to the passing of an order under S. 3 was lacking. It is not suggested that the Mukhar-i-am brought the notice to the attention of the landlord prior to the date of hearing the representation either. In view of this learned counsel argues that the landlord was prevented from showing that the land had already been let and was being utilised for the purpose of cultivation. Learned counsel argues that in thus depriving the landlord of an opportunity the Collector had incidentally deprived the tenants of an opportunity of having their case put up through the landlord and thus they have been adversely affected and though the landlord's application may now have to be dismissed because of the vesting order under the Zamindari Abolition and Land Reforms Act the order of allotment would not be protected by this latter fact since the allotment order was, in any case, tainted by invalidity on account of the failure to effect a proper service of notice under S. 3 (2).

(16) In our view this submission has considerable force and as we have already indicated that there was sufficient material which could have been put before the Collector if notice had been served on the landlord which would probably have led the Collector not to re-allot the land. The failure to give a proper notice under S. 3 (2) becomes all the more important.

(17) The fact that there was a subsequent representation made by the landlord and that a report was put up by the planning officer and an order passed thereon could not wipe off the effects of the failure to give notice under S. 3 (2) according to law. The approach in regard to a representation which is made against an order which has already been passed may not always be the same as the approach to a representation made before an order is passed.

(18) At the time when the impugned order was passed under the U. P. Land Utilization Act the right of letting the lands within the zamindari was still with the landlord. The statute clearly made an inroad upon such rights. It was, there-

fore, essential that before the rights under the Act were exercised the pre-requisites to the exercise of those rights were satisfied.

(19) In the present case there was a clear failure to serve a notice on the landlord as required by law in consequence of which the landlord was prevented from showing that the lands had already been let and were being utilised for cultivation and the denial of this opportunity to the landlord had adversely affected the applicants, the tenants. We hold, therefore, that the allotment order of the Collector in favour of the Krishna Co-operative Society, Limited, was without jurisdiction.

(20) We accordingly issue a writ of certiorari quashing the proceedings taken by opposite party 1 under the provisions of the U. P. Land Utilization Act and we also direct opposite party 2 not to cultivate the land after 20-5-1953.

(21) Writ Application No. 7951 of 1951 is dismissed.

A/K.S. Order accordingly.

A. I. R. 1953 ALL. 588 (Vol. 40, C. N. 290)

(LUCKNOW BENCH)

V. BHARGAVA AND HARI SHANKAR JJ.

Kaushalendra Pratap Sahi, Appellant v. Messrs. Sen and Sanyal, Respondent.

First Ex. Decree Appeal No. 6 of 1952, D/- 13-1-1953.

(a) Civil P. C., (1908), O. 34, R. 15(2), (as amended in Avadh) — Scope.

Sub-rule (2) of R. 15, (Avadh) clearly lays down that, if a charge is created by the decree itself, the mere creation of that charge would give the right to the decree-holder to execute the decree by sale of the property charged and would obviate the necessity of filing a separate suit. Even though the decree does not directly and specifically empower the decree-holder to ask for sale of the charged property in execution of the decree, that right accrues to him under the sub-rule. AIR 1932 All 439 and AIR 1951 All 141 (F.B.), Considered and Distinguished. (Paras 4, 8)

Anno: C. P. C., O. 34, R. 15, N. 2.

(b) Civil P. C., (1908), O. 34, R. 15(2), (as amended in Avadh) — Question of fact.

The question whether a charge is created by the decree itself or by the compromise stated by the counsel before the Court is naturally a question of fact which has to be decided on the interpretation of the statement which is made by the counsel.

Held on construction of the decree that the charge in question was created by the decree and not by the compromise preceding it. (Para 5)

Anno: C. P. C., O. 34, R. 15, N. 10a.

D. P. Agarwal and M. M. Gaur, for Appellant; Mohd. Naziruddin and B. N. Roy, for Respondent.

CASES CITED:

(A) ('32) AIR 1932 All 439: 54 All 763
(B) ('51) AIR 1951 All 141: 1951 All LJ 39 (FB)

V. BHARGAVA J.: This is a judgment-debtor's appeal arising out of proceedings for execution of a decree. The decree sought to be executed was passed in a suit filed by the respondent against the appellant and one other person J. P. Sahi for recovery of a sum of Rs. 22,765/- in the Court of the Civil Judge of Sultanpur. The suit was dismissed by the Civil Judge and an appeal was filed by the present respondent in the erstwhile Chief Court of Avadh. During the pendency of the appeal, on 12-12-1944, counsel for the parties made a statement in Court that parties had come to terms and gave the details of the terms on which the parties had agreed requesting that the appeal may be decided in accordance with those terms. Thereupon the Court ordered that "in view of the compromise we order that a decree be passed in terms of the compromise". The terms of the compromise laid down that the suit was to be decreed for a sum of Rs. 12000/- against the present appellant alone and the amount was also to be payable in three instalments. The first instalment of Rs. 2000/- was to be paid on or before 12-1-1945. The second instalment of Rs. 4000/- was to be paid on or before 12-5-1945, and the balance on or before 12-11-1945. In case of any default, the whole amount was to become payable and the plaintiff (the present respondent) was to be entitled to execute his decree for the balance remaining due and was also to be entitled to half the costs incurred in both the Courts. There was a stipulation for payment of interest also in case of default. The last paragraph of the terms was as follows:

"Defendant 1 is the owner of a house known as 'Unity Lodge' on Rai Behari Lal Road, Trans Gomti Area, Lucknow, and it is argeed that the amount of the decree namely Rs. 12000/- shall be a charge on the house."

(2) The first two instalments of Rs. 2000/- and Rs. 4000/- were paid but the balance of Rs. 6000/- which was due on 12-11-1945, remained unpaid. The execution out of which this appeal arises was sought on 5-12-1950, by sale of the house mentioned in the last clause of the terms of the agreement mentioned above.

(3) Various objections were taken by the appellant against the execution but we need mention only one objection, as that is the only one which has been argued by the learned Counsel for the appellant before us in this appeal. This objection was that the decree, as it had been passed by the Chief Court of Avadh, was not executable by sale of the house mentioned in the decree. This objection was not accepted by the lower Court, which directed the sale of the house and consequently the appellant has come up to this Court.

(4) Learned counsel for the appellant has argued that the language of the terms of the compromise between the parties, which were also the terms of the decree, merely had the effect of declaring that there was a charge on the house in respect of the decretal amount of Rs. 12,000/- and did not specifically grant any right to the decree-holder to proceed to realise the decretal amount by sale of the house in an execution of the decree. He, therefore, contended that if the decree-holder wanted to proceed against the house, he had to institute a suit for enforcement of the charge. In support of this contention learned counsel referred us to two rulings of the Allahabad High Court. The first of these cases is that of 'Posti Mal v. Radhakrishan Lalchand', AIR 1932 All 439 (A), which was decided by a Division Bench. The second case is a decision of the Full Bench of five Judges in — 'Mahesh Prasad v. Mt. Mundar', AIR 1951 All 141 (FB) (B).

Both these cases lay down that unless the decree specifically in so many words grants the right to the decree-holder to proceed to realise the decretal amount by sale of the property charged with the decretal amount in the decree, the decree-holder can only proceed against that property by institution of a separate suit for enforcement of the charge. So far as this principle, as laid down in these cases, is concerned, it does not in our opinion assist the appellant in the present appeal, because that principle was laid down on the interpretation of R. 15 of O. 34, Civil P. C. as it had been framed by the Allahabad High Court. The case before us is governed by R. 15 of O. 34, Civil P. C., as it stood after amendment by the Chief Court of Avadh. The Chief Court of Avadh amended R. 15, by incorporating in sub-rule (1) of R. 15 the provision of which is applicable to the suits within the jurisdiction of the Allahabad High Court before the amalgamation of that Court with the Chief Court of Avadh and by adding sub-r. (2) which applied only to proceedings pending in the areas forming the jurisdiction of the Chief Court of Avadh. This new sub-rule was as follows:

> "(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realised by sale of that property in execution of that very decree."

The very language of this sub-rule shows that the Chief Court of Avadh introduced a drastic change in the method of proceeding in execution of decrees creating charges which resulted in a departure from the procedure followed in the Allahabad High Court. This sub-rule clearly lays down that, if a charge is created by the decree itself, the mere creation of that charge would give the right to the decree-holder to execute the decree by sale of the property charged and would obviate the necessity of filing a separate suit. Since this sub-rule is clearly applicable to the case before us, the view taken in those cases is of no assistance.

(5) In view of this position learned counsel for the appellant had to argue the alternative point raised by him, viz., that in this particular case the charge had not been created by the decree but by the compromise which had been entered into between parties and which was brought before the Court through their counsel. The question whether the charge was created by the decree itself or by the compromise stated by the counsel before the Court is naturally a question of fact which has to be decided on the interpretation of the statement which was made by the counsel. The learned Civil Judge in dismissing the objection has carefully considered the language and has held that a reading of the terms of the compromise as a whole makes it clear that what was agreed upon between the parties was "that the decree should charge the amount for which it was to be passed on the house". On an examination of the terms of the compromise, we are of the opinion that the interpretation placed by the learned Civil Judge is perfectly correct. The compromise first laid down that the suit was to be decreed for a sum of Rs. 12,000/- only and not for the full amount of Rs. 22,765/- which was the amount claimed in the suit. The charge on the house was created in respect of this reduced amount of Rs. 12,000/- and not in respect of the amount claimed by the plaintiff in the suit. The creation of the charge was itself clearly dependent on the reduction of the amount which was to be decreed in favour of the plaintiff. If the parties had chosen to embody the above terms in a written petition of compromise and had got it registered before presenting it to the Court for passing a decree on its basis, it might have been possible to urge that the charge was created by the compromise. In this case, it seems to us that the parties purposely avoided adopting this course and left it to the Court to pass a decree for the reduced amount of Rs. 12,000/- and then to declare and create a charge on the house. It was not the compromise but the decree which was registered on the footing that it created the charge on the immovable property. In these circumstances, the contention of the learned counsel that the charge was created by the compromise itself and not by the decree cannot have any force.

(6) Learned counsel, in support of his argument, relied on the decision in the case of — 'Posti Mal v. Radhakishan Lalchand (A)', mentioned above, where also there was first a compromise followed by a decree in terms of the compromise and a charge was created on certain property and it was held that the charge was created by the compromise and not by the decree. The report of the case does not, however, clearly bring out all the terms of the compromise. The facts given in the judgment show that the parties entered into a compromise

> "which provided that an instalment decree for Rs. 3100/- be passed in favour of the respondent. Rs. 500/- was made payable every half year; on non-payment of the first instalment, interest at the rate of 9 per cent. per annum was made payable. In default of payment of two consecutive instalments, the decree-holder was declared entitled to obtain execution of his decree in respect of the entire decretal amount remaining unpaid. The defendant (the appellant in this Court) further hypothecated certain properties which were detailed in the compromise. A decree was passed on foot of the compromise and embodied all its terms."

This recitation of facts merely indicates that the defendant had hypothecated certain properties, which were detailed in the compromise. In what language this hypothecation was expressed has not been brought out in the judgment. The language in which the facts have been put by the Court is indicative of the fact that the defendant had himself hypothecated the properties and that the compromise was not so worded as to leave it to the Court to create the charge. There was no such circumstance of reduction of the amount claimed and its conversion into decretal amount before the charge could become effective, as exists in the case before us. We do not think, therefore, that the case relied upon by learned counsel is of assistance to him.

(7) Learned counsel also referred us to a paragraph in the judgment of Agarwala J. in the Full Bench decision in the case of — 'Mahesh Prasad v. Mt. Mundar (B)', where he mentioned the case of — 'Posti Mal v. Radhakishan Lalchand (A)'. Agarwala J. remarked that

> "in — 'Posti Mal v. Radhakishan Lalchand (A)', the charge was not created by the decree itself but was created by the compromise on the basis of which the decree was passed."

Learned counsel cited this paragraph from the judgment of Agarwala J. in support of his argument that the Full Bench had also held that in the case of — 'Posti Mal v. Radhakishan Lalchand (A)', the charge had been created by the compromise and not by the decree. We do not think that this remark can be interpreted in this manner. The context in which this remark was made shows that the learned Judge did not enter into the question whether in that case the charge had been created by the compromise or by the

decree. He only recited it as a fact that, in that case, it had been found that the charge had been created by the compromise and not by the decree. The judgment, which was delivered by Agarwala J., was not assented to in its entirety by all the other Judges constituting the Full Bench. The learned Chief Justice wrote a separate judgment, though on the question before the Full Bench he arrived at the same conclusion as Agarwala J. Two other learned Judges, Waliullah and Wanchoo JJ., agreed entirely with the learned Chief Justice, whereas the fifth learned Judge, Seth J., merely agreed to the dismissal of the appeals without expressing any opinion as to whether he agreed with the reasoning given by the learned Chief Justice or by Agarwala J. In his judgment, the learned Chief Justice nowhere made any comments which would show that he even considered the decision in the case of — 'Posti Mal v. Radhakishan Lalchand (A)'. It cannot, therefore, be said that the decision in — 'Posti Mal v. Radhakishan Lalchand (A)', was approved by the Full Bench in its entirety.

(8) In any case, even if it be held that the decision in — 'Posti Mal v. Radhakishan Lalchand (A)', is correct and has to be followed by us, we are unable to hold that that decision is applicable to the case before us. We have already pointed out the distinction on facts which exists between that case and the case before us. In this case, we can see no reason to differ from the view taken by the learned Civil Judge that the charge on the house was created by the decree and not by the compromise which was earlier than the decree. There is the additional circumstance supporting this conclusion that, after the decree had been passed, it was registered on the ground that it created a charge on the movable property. If the charge had been created by the compromise embodied in the statement of the counsel itself, that compromise should have been registered. The registration of the decree is a clear indication of the fact that the charge was created by the decree and not earlier by the compromise. Since the charge was created by the decree, sub-r. (2), R. 15, O. 34, C. P. C. is clearly applicable and even though the decree does not directly and specifically empower the decree-holder to ask for sale of the charged property in execution of the decree, that right accrues to him under the sub-rule.

(9) The appeal consequently fails and is dismissed with costs.

(10) HARI SHANKAR J.: I agree and have nothing to add.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 ALL. 590 (Vol. 40, C. N. 291)

(LUCKNOW BENCH)

GHULAM HASAN J.

Shamshad Ali, Appellant v. Saadat Ali Khan, Respondent.

Second Exn. of Decree Appeal No. 8 of 1950, D/-16-4-1951.

Limitation Act (1908), Art. 182(2) — Order under O. 41, R. 11, C. P. C., gives a new starting point for limitation. (Civil P. C. (1908), O. 41, R. 11). 1947 All WR 89, Rel. on; AIR 1933 PC 68; AIR 1914 PC 65 and AIR 1914 PC 66, Ref. (Para 4)

Anno: Lim. Act, Art. 182, N. 40.

Akhtar Hussain and R. K. Agnihotri, for Appellant.

CASES CITED:
(A) ('33) AIR 1933 PC 68: 60 Ind App 83 (PC)
(B) ('14) AIR 1914 PC 65: 41 Ind App 104 (PC)
(C) ('14) AIR 1914 PC 66: 36 All 350 (PC)
(D) ('47) 1947 All WR 89

JUDGMENT: This appeal raises what I may call an unrighteous defence of limitation to an application for execution of the decree.

(2) The respondent obtained a decree against the appellant for possession over a portion of a certain plot of land and the rest of the claim was dismissed. Both the parties filed appeals to the lower appellate Court and these were dismissed.

(3) The plaintiff, thereupon, filed an appeal to the Chief Court but that appeal was dismissed under O. 41, R. 11, Civil P. C. Thereafter the decree-holder applied for execution of the decree. It is common ground that the application was time-barred if time was to be reckoned from the date of the judgment of the lower appellate Court but it was within time if time was to be reckoned from the date of the judgment of the Chief Court. The Courts below before whom the question of limitation was raised answered it against the judgment-debtor holding that the application for execution was within time under Art. 182 (2), Limitation Act. This view is contested in second appeal to this Court.

(4) I am of opinion that there is no substance in this contention. It is urged that the words "where there has been an appeal" in Art. 182 (2) mean where there has been a competent appeal upon which a judicial order has been passed determining the rights of the parties 'inter se'. An order dismissing an appeal under O. 41, R. 11, Civil P. C. is, it is argued, not a judicial order which determines the rights of the parties but merely holds that the appeal is not competent for some reason or another. There is no support for this contention in any of the judicial decisions. A reference to the provisions of R. 11 of O. 41 will show that the appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. I have not the slightest doubt that an order passed by the High Court under this Order is a judicial order which finally determines the rights of the parties 'inter se' and is a final order so far as that Court is concerned. This is quite sufficient in my opinion to dispose of the second appeal but a reference has been made to the latest decision of the Privy Council in — 'Husain Asghar Ali v. Ramdittamal', AIR 1933 PC 68 (A), which distinguished the two earlier decisions of the Privy Council in — 'Batuk Nath v. Munni Devi', AIR 1914 PC 65 (B) and — 'Abdul Majid v. Jawahir Lal', AIR 1914 PC 66 (C). In this case the order passed was one of abatement by the appellate Court as the appellant had died during the pendency of the appeal. Their Lordships held that the order was a judicial order finally disposing of the appeal and was final order within the meaning of Art. 182 (2) giving a new starting point for the period of three years prescribed for an application to execute the decree. Their Lordships distinguished the two earlier cases referred to above on the ground that there was no judicial order passed in those cases from which limitation could be reckoned, for the appeals stood dismissed by no order of the Court but under the rules for non-prosecution. There is not the slightest doubt that an order made by a High Court under O. 41,

R. 11 is a judicial order made by an appellate Court which has the effect of finally disposing of the appeal and gives a new starting point for limitation. A similar view was taken in — 'Ajodhia Prasad v. U. P. Government', 1947 All WR 89 (D), which was also a case in which an order of abatement had been passed by the appellate Court. In that case it was held that limitation should be reckoned not from the date of the death of the particular person involving an automatic abatement of the proceedings but from the date when an order declaring the appeal to have abated was passed.

(5) I am satisfied that the decision of the Courts below is correct. I dismiss the appeal under O. 41, R. 11, Civil P. C.

C/D.R.R. Appeal dismissed.

A. I. R. 1953 ALL. 591 (Vol. 40, C. N. 292)

(LUCKNOW BENCH)

MALIK C. J.

Mahesh Pratap Singh and another, Defendants-Appellants v. Rampal Singh, Plaintiff-Respondent.

Second Appeal No. 337 of 1945, D/- 4-8-1952.

Civil P. C., (1908), O. 6, R. 2 — Alternative and inconsistent pleas — (Easements Act (1882), S. 4).

In a suit against obstruction to a flow of water through drain, the plaintiff alleged in the plaint that he was a co-sharer of the plot and in the alternative that he had acquired a right of easement by user for more than 25 years.

Held that the finding of the lower Court that the plaintiff had acquired a right of easement to flow the water of his drain through the channel could not be challenged merely on the ground that the plaintiff had alleged in the plaint that plot was situate in the mahal of which he was a co-sharer along with defendants and others. 34 Cal 51 (F. B.); AIR 1930 All 877, Followed; AIR 1943 All 362, Not followed. (Para 9)

Anno: Civil P. C., O. 6, R. 2, N. 5, Pt. 8; O. 7, R. 7, N. 3; Easements Act, S. 4, N. 2.

Sri Ram, for Appellants; K. N. Tandon, for Respondent.

CASES CITED:

(A) ('43) AIR 1943 All 362: ILR (1943) All 792
(B) ('07) 4 Cal LJ 437: 34 Cal 51 (FB)
(C) ('30) AIR 1930 All 877: 53 All 16

JUDGMENT: The plaintiff is a co-sharer in Mahal Rampur Bhagan and his house is in plot No. 559. To the south of that plot there is a plot No. 546. The drain of plaintiff's house is marked in the site plan prepared by the commissioner which is a part of the decree prepared by the lower appellate Court. In this site plan the disputed portion of the drain is shown by the letters KG and C. The plaintiff's case was that the drain water of his house used to flow through this drain towards a 'talab' or tank to the south and the defendant, without any right caused obstruction to this drain a few months before the suit was filed. In the plaint it was said that the plot No. 546 was situate in Mahal Rampur Bhagan of which the plaintiff, defendants and others were co-sharers. After having made that statement in para. 1 the plaintiff went on to allege that he had been using the right to flow his drain water through this drain for more than 25 years. This was characterised as a 'haq ashais' which can be translated as 'a right of easement'. The other right claimed by the plaintiff was that the women of his family used to go out of a window marked L towards the west of his house and after passing over the plot No. 546 used to go towards the tank to ease themselves. By building the walls ABC and CD to the south and the west of this plot it was said that the right of the women of the plaintiff's family for going to the tank over the plot No. 546 was interfered and the walls should, therefore, be demolished.

(2) The defence was that plot No. 546 was not situate in Rampur Bhagan but in Rampur Jogshah and that neither the plaintiff nor the defendants had any right of ownership in the said plot. It was further denied that the plaintiff had constructed the drain more than 20 years before the suit or that there was in existence the window L through which the ladies of his house had been going towards the pond to ease themselves and the plaintiff had acquired a right of easement.

(3) The learned Munsif held in defendants' favour that the plot No. 546 was situate in Rampur Jogshah in which the parties were not co-sharers and the plaintiff had not been using the drain or the passage for the requisite period to acquire the right of easement and dismissed the plaintiff's suit.

(4) On appeal the lower appellate Court believed the evidence of the plaintiff and his two witnesses that the plaintiff's house had been constructed more than 20 years before the suit, that the drain was an old one through which the water of the plaintiff's house used to flow towards the tank and that the window L was built at the time when the house was constructed, through which the ladies of his house used to go out to ease themselves. The lower appellate Court has not recorded a finding to that effect in so many words but it has believed the evidence of the plaintiff and his two witnesses who had deposed to the facts mentioned above. As a result the lower appellate Court set aside the decree of the trial Court and decreed the plaintiff's suit for demolition of the walls ABCD and for the opening of the drain KG. In the alternative the lower appellate Court directed that the defendants could make their own drain shown by the letters EKA wide enough to allow the flow of water from the 'nabdans' in both the houses.

(5) In this second appeal Sri Shri Ram on behalf of the appellants has urged that the plaintiff having asserted in his plaint that he was a co-sharer in plot No. 546 he could not have had the animus to acquire a right of easement by user and his suit on that ground must, therefore, fail. In the alternative, he has urged that the finding that the drain was more than 20 years' old was not based on evidence but was based on mere surmises and was not binding on the Court. And further, that the lower appellate Court had not set aside the finding of the trial Court as regards the right of way and, in any case, the plaintiff had not proved his right of way and the walls ABC and CD could not be demolished.

(6) On the first point the learned counsel has relied on a decision of this Court in — 'Lalit Kishore v. Ram Prasad', AIR 1943 All 362 (A). In that case a suit had been filed by the plaintiff claiming a right of ownership by adverse possession. That suit having failed, a second suit was filed claiming a right of easement. The learned Judges observed:

"In order to acquire a right of easement a person must not only do the necessary physical acts over the period prescribed by law but he must

be setting himself up as the person who is doing those acts over the property of another."

Reliance was placed on the definition of the word "easement" in S. 4, Easements Act that an easement was a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of, certain other land not his own. It is urged that if the plaintiff claimed that the land was his own he could not have had the animus to acquire a right of easement over such land, and, even though he might have used the land for more than 20 years, he could not acquire a right of easement by prescription.

(7) The finding in this case is that the servient tenement, plot No. 546, is in Rampur Jagshah in which the parties have no right and the defendants have, as a matter of fact, constructed the walls and taken possession of the land without any right. The allegation in the plaint that the plot No. 546 was in Rampur Bhagan is, therefore, clearly wrong and it cannot be said that the plaintiff and the defendants had any title in this plot or that the plaintiff had the right to use it in the manner in which he claimed to have used it. The question, therefore, arises whether the mere fact, that the plaintiff had wrongly alleged in the plaint that the plot No. 546 was in Rampur Bhagan, in which both the parties were co-sharers, was an allegation which was so decisive of the matter that in spite of the finding that the plot was not in this Mahal but was in another Mohal, in which the plaintiff had no right of ownership, the Court must dismiss the suit.

(8) Cases have arisen where the plaintiff had claimed a right of ownership and in the alternative a right of easement and the Courts have considered the question whether in such a case the alternative plea could or could not be set up. In 'Narendra Nath v. Aboy Charan', 34 Cal 51 (FB) (B) decided by a Bench of five Judges, presided over by Maclean, C. J., the judgment of Geidt J. was approved which was to the effect that suit was not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights of ownership and of easement. The reasoning of the learned Judge was that the plaintiff could say that he believed the land to be his but if he was unable to prove it he could, at any rate, claim that he had been exercising the right of way as an easement uninterruptedly and as of right for over 20 years. The question directly arose in another Division Bench case — 'Dwarka v. Ram Jatan', AIR 1930 All 877 (C) where the plaintiff had claimed possession of a piece of land by removal of the boundary walls on the ground that the plaintiff was the owner thereof. In the alternative he claimed an easement and a decree for right of way through his southern door and the right to discharge water from his drain across the land in dispute and for an injunction restraining the defendants from interfering with the said rights. The question was whether the plaintiff having claimed ownership could allege and establish that he had acquired a right of easement. The learned Judges pointed out that the plaintiff had not been put to his election and the point had not been raised in the lower Courts that the plaintiff did not possess the requisite animus because he was claiming to be the owner of the property. The learned Judges further observed that:

"Where the owner of one property exercises certain rights of enjoyment over the property of another for the beneficial enjoyment of the former, he must be presumed to possess an animus which is manifestly to his advantage."

(9) With these observations of the law I respectfully agree. There are no doubt certain observations in the case of — 'Lalit Kishore v. Ram Prasad (A)', which support the contention raised by learned counsel for the appellant, but both are Division Bench cases and it is open to me to follow whichever case in my view lays down the correct law. I, therefore, hold that the finding of the lower Court that the plaintiff had acquired a right of easement to flow the water of his drain through the chanel KGC cannot be challenged in this Court merely on the ground that the plaintiff had alleged in the plaint that plot No. 546 was situate in Rampur Bhagan of which he was a co-sharer along with defendants and others. The finding is based on the evidence which has been believed by the learned Civil Judge. The learned Judge has given the defendants the option of either opening the drain KG or to make their own drain shown by the letters EKA wide enough to allow the flow of water from the 'nabdans' in both the houses. This is quite a reasonable order and it is, therefore, not necessary to interfere with it.

(10) Coming to the next part of the relief granted in the decree, for the demolition of the walls ABCD, a look at the site plan would show that there are as a matter of fact two walls, one ABC towards the west, and another CD situate towards the south. Neither of these two walls are in front of the window L and it cannot, therefore, be said that these walls interfere with the ingress or egress of the women of plaintiff's family through the window L. It is urged by learned counsel for the respondents that the women, after they came out of the window L, used to pass over the plot No. 546 to go to the pond to the south to ease themselves. It does not appear that any attempt was made in the lower Court to lead any evidence that they ever followed a definite course, through the servient tenement, nor was any attempt made to mark out a passage. From the plan attached to the decree it appears that there is a lane towards the west. Be that as it may, in the absence of any evidence that there was any marked passage which was followed by the women of plaintiff's family for more than 20 years to reach the pond at the south after coming out of the window L it is difficult to hold that they had acquired any right of way. The learned Judge was not justified in directing the demolition of the whole of the walls ABC and CD.

(11) Learned counsel has prayed that an issue may be remitted to the lower Court to clarify the position but there was no evidence on the point that the women of the plaintiff's family ever followed a definite path. The whole of the plot No. 546 was an open piece of land and the women of the plaintiff's family might have gone to any part of the plot to ease themselves. It cannot even be said that there was a passage through this plot leading to a 'terminus ad quem'. In the circumstances the learned Judge was not justified in directing the demolition of the Walls ABC and CD.

(12) The result, therefore, is that this appeal is partly allowed. The decree of the lower Court is amended to this extent that the order of the learned Additional Civil Judge directing the demolition of the walls ABCD is set aside. The rest of the decree shall stand.

(13) The parties shall bear their own costs of this appeal.

C/H.G.P. Order accordingly.

A.I.R. 1953 ALL. 593 (Vol. 40, C. N. 293)

RAGHUBAR DAYAL J.

Raj Bahadur Applicant v. Babu Ram Opposite-Party.

Civil Revn. No. 1117 of 1951, D/-12-9-1951.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3A — Accommodation constructed after 30-6-1946.

In the absence of any fixation of the reasonable annual rent by the District Magistrate Civil Court cannot take any amount as being the reasonable annual rent. (Para 3)

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5. — Suit by tenant — Jurisdiction of Court.

The tenant can sue in two cases: firstly when the annual reasonable rent is said to be excessive and secondly when the agreed rent is said to be higher than annual reasonable rent. Forum for his suit is to be determined according to the annual rent payable. The agreed rent may be said to be the rent payable, till the Court fixes the annual rent, but the annual reasonable rent cannot be said to be rent payable when no rent is agreed upon and in that case, therefore, forum will have to be determined from the amount alleged by tenant to be payable as fair rent. The alleged amount, should therefore, be taken to be contemplated by the words "annual rent payable" in the case of a suit on the ground that agreed rent is higher than annual reasonable rent. AIR 1951 All 562, Rel. on. (Paras 6, 7)

D. Sanyal for Applicant.

CASE CITED:

(A) ('51) AIR 1951 All 562: 1952 All LJ 90

ORDER: The applicant, Raj Bahadur, filed a suit in the Court of the Munsif, Kasganj, under S. 5(4). Control of Rent and Eviction Act, 3 of 1947, alleging that the rent agreed upon between him and the landlord was higher than the annual reasonable rent, the agreed rent being Rs. 960/- per annum at Rs. 80/- a month and the annual reasonable rent being Rs. 156/- at Rs. 13/- a month. The Munsif dismissed the suit holding that the house in suit was constructed after 1-10-1946 and that in view of S. 3A of U.P. Act 3 of 1947 no reasonable annual rent could be said to be fixed with respect to the house, as the District Magistrate had not fixed any rent under that section. He did not, therefore, consider any other fact which would have been necessary to consider if he was going to give relief under S. 5(4).

(2) The applicant has filed this revision. Two points are urged. One is that the view of the learned Munsif about the necessity of the applicant's first going to the District Magistrate for fixing the annual rent under S. 3A is wrong, and the other is that the Munsif had no jurisdiction over this suit as the annual rent was Rs. 960/-, much above Rs. 500/- upto which valuation the Munsif could have jurisdiction under S. 5(4) of the Act. I do not agree with both these contentions.

(3) It was necessary for the success of the applicant's case that he should prove that the agreed rent of Rs. 80/- a month was higher than the annual reasonable rent. "Reasonable annual rent" is defined in S. 2, cl. (f) with respect to accommodation constructed before 1-7-1946. Section 3A of the Act provides for the fixation of the reasonable annual rent by the District Magistrate in case of an accommodation constructed after 30-6-1946. In the absence of any such fixation of the reasonable annual rent by the District Magistrate the civil Court cannot take any amount as being the reasonable annual rent. The mere fact that in deciding the case under S. 5(4) of the Act the civil Court will have to take the same facts into consideration in view of S. 6(1)(b) of the Act as the District Magistrate has to take into consideration in view of S. 3A, sub-s. (2), cl. (a) does not mean that the civil Court can first fix the annual rent, taking into consideration what is mentioned in S. 6, then call it a reasonable annual rent, then decide that the agreed rent is higher than such rent and lastly decide to fix the same rent as the annual rent. I am, therefore, of opinion that the learned Munsif was right in coming to the conclusion that the applicant had failed to establish what the reasonable annual rent for this house was.

(4) On the second point that the Munsif had no jurisdiction, the argument is that jurisdiction is to be determined according to the annual rent which is agreed upon between the parties. The case of — 'Prayag Narain v. Dr. Mangha Ram', AIR 1951 All 562 (A), is against this view and I respectfully agree with the view expressed in that case. If the contention for the applicant be correct, it would mean that the expression "if the annual rent claimed or payable" in S. 5(4) of the Act is identical with the expression if the "reasonable annual rent or the agreed rent." If it was so, I am of opinion that the latter expression would have been more appropriately used in the section, as the amount of the reasonable annual rent or the agreed rent which must be expressly stated by the plaintiff would have been a definite sum.

(5) The section contemplates suit by landlord for fixation of rent on the allegation that the annual reasonable rent is inadequate. He cannot charge rent in excess of reasonable annual rent. He has, therefore, to allege in his plaint what rent he claims as adequate rent. Forum for such a suit will be determined according to the rent claimed. If it was to be determined on the basis of reasonable annual rent, the expression "reasonable annual rent" would have been used for the expression "rent claimed." Reasonable annual rent cannot be the rent claimed. Landlord cannot sue if the rent has been fixed by agreement.

(6) The tenant can sue in two cases: firstly when the annual reasonable rent is said to be excessive and secondly when the agreed rent is said to be higher than annual reasonable rent. Forum for his suit is to be determined according to the annual rent payable. The agreed rent may be said to be the rent payable, till the Court fixes the annual rent, but the annual reasonable rent cannot be said to be rent payable when no rent is agreed upon and in that case, therefore, forum will have to be determined from the amount alleged by tenant to be payable as fair rent. The alleged amount should, therefore, be taken to be contemplated by the words "annual rent payable" in the case of a suit on the ground that agreed rent is higher than annual reasonable rent.

(7) It follows, therefore, that when the applicant alleged that the proper monthly rent was Rs. 13/- a month, the annual rent work-

ed out to Rs. 156/- and that, therefore, the Munsif had jurisdiction over the case.

(8) In view of the above, I reject this application.

C/D.H. Revision dismissed.

A.I.R. 1953 ALL. 594 (Vol. 40, C. N. 294)

AGARWALA AND CHATURVEDI JJ.

Raghunandan Lal, Plaintiff-Appellant v. Sheodhan Das and others, Defendants-Respondents.

First Appeal No. 60 of 1948, D/- 16-3-1953.

(a) Specific Relief Act (1877), S. 15 — Contract to sell by member of Hindu joint family.

Section 15 cannot apply to the case of a member of a joint Hindu family who enters into an agreement of sale of joint family property and who cannot transfer his own share in the joint family property. (Para 6)

Anno: S. R. Act, S. 15, N. 4.

(b) Specific Relief Act (1877), S. 15 — Proviso — (Evidence Act (1872), Ss. 101 to 103).

If the plaintiff relies upon S. 15, he should satisfy the requirements of the proviso to S. 15. (Para 7)

Anno: S. R. Act, S. 15, N. 1; Evidence Act, Ss. 101 to 103, N. 6, 64.

Gopalji Mehrotra, for Appellant; J. N. Chaterjee, for Respondents.

AGARWALA, J.: This is a plaintiff's appeal arising out of a suit for specific performance of a contract.

(2) Sheodhan Das, defendant 1, and Ballabh Das father of Janki Das, defendant 2, were brothers & formed a joint Hindu family governed by the Mitakshara. On 24-8-1945 Sheodhan Das entered into an agreement of sale of certain house property with the plaintiff appellant for a sum of Rs. 11250/-. The agreement of sale was executed by Sheodhan Das alone for himself and as agent for Ballabh Das and as a Karta of the family consisting of himself and of his brother. The sale consideration was apparently to be paid in cash. One of the terms of the agreement of sale was that Sheodhan would have the sale executed by himself, his brother Ballabh Das and Janki Das, defendant 2. The sale deed was not executed within the stipulated time and Ballabh Das died. Later on, after his death, Sheodhan Das and Janki Das executed a sale deed of the disputed property in favour of Kanhaiya Lal, defendant 3-respondent, for a sum of Rs. 13000/-. The plaintiff-appellant then filed the suit, which has given rise to this appeal, for specific performance of the contract, and he impleaded, besides Sheodhan Das and Janki Das, Kanhaiya Lal, the subsequent purchaser as defendant 3.

(3) Defendant 3 defended the suit. The other two defendants remained absent. The defence of defendant 3 was that he paid the price in good faith and had no knowledge of the agreement of the sale between the plaintiff and defendant 1, that the property was joint family property and defendant 1 had no right to make sale in respect of it on behalf of defendant 2, that the plaintiff did not pay the price within three months as agreed upon by him in the agreement of sale, and that, in any event, the plaintiff was not entitled to have the sale deed executed.

(4) The trial Court held that defendant 3 had notice of the contract of sale of the plaintiff. But on the other issues in the case he decided against the plaintiff. It further held that the property was joint family property and defendant 1 was not entitled to make an agreement with the plaintiff on behalf of the other members of the joint family and that the contract was not for legal necessity or for family benefit. In the result it dismissed the suit.

(5) In this appeal by the plaintiff, it has been urged that defendant 1, as Karta of the family and as Mukhtaram of Ballabh Das, father of defendant 2, was entitled to enter into a contract of sale of the joint family property, and in the alternative, even if he could not do so, the agreement of sale could at least be enforced against him 'qua' his own half share in the family property. There is no evidence on the record that defendant 1 was the Mukhtaram of Ballabh Das. Even if he were, he would not enter into a contract of sale of the joint family property, since there was a third person, namely defendant 2, a coparcener in the joint family property, unless the agreement of sale was for legal necessity. The Court below has found that the agreement of sale was not for legal necessity. Indeed, the plaintiff did not base his right to have the specific performance of contract on there being legal necessity for the contract. Learned counsel for the appellant has not seriously pressed this aspect of the case before us. He has, however, vigorously urged that under S. 15, Specific Relief Act, the plaintiff was entitled to have the contract of sale enforced as against defendant 1 'qua' his own half share.

(6) Now it is settled law so far as this State and the States governed by the Banaras School of Hindu Law are concerned, that one member of a joint Hindu family cannot transfer even his own share of the joint Hindu family property before partition. A 'fortiori' such member cannot enter into an agreement of sale with regard to his own share of joint Hindu family property. There being no question of legal necessity involved in the case, the agreement of sale made by defendant 1 was wholly unauthorised in respect of the share of defendant 2 and also in respect of his own share. Section 15, Specific Relief Act does not make it obligatory upon the Court to enforce a contract of sale entered into by one member of the joint Hindu family in respect of his own share. Section 15 says:

> Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he 'can perform', provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

Leaving aside the proviso, the section authorises the Court to direct the defendant, who has entered into a contract of sale of a property, which he could sell, to execute a sale deed in respect of that portion of the property in res-

pect of which the defendant could have executed the sale deed. The words "as he can perform" are important. If the defendant could not sell even his own share of the property by reason of a rule of Hindu Law because the property was joint family property, he could not be said to be in a position to perform the contract in respect of even that part of the property. Section 15, therefore, cannot apply to the case of a member of a joint Hindu family who enters into an agreement of sale of joint family property and who cannot transfer his own share in the joint family property.

(7) Further, the lower Court has held that the plaintiff did not relinquish all claim to further performance of contract, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant, as provided in the proviso to S. 15. This is also correct. If the plaintiff relied upon S. 15, he should have satisfied the requirements of the proviso. No other point is urged.

(8) There is no force in this appeal and it is dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1953 ALL. 595 (Vol. 40, C. N. 295)

SANKAR SARAN AND GURTU JJ.

Mowasi, Applicant v. State of Uttar Pradesh and others, Opposite Party.

Civil Misc. Writ No. 258 of 1952, D/- 17-2-1953.

(a) Land Acquisition Act (1894), S. 48 — Applicability.

There can be no necessity for formal withdrawal as contemplated by S. 48 before the stage of S. 6 at least has been reached. (Para 12)

(Held, however, that where the objection under S. 5A was allowed and the Government decided not to proceed with acquisition proceedings in respect of the land and the proceedings were duly cancelled and another proceedings in respect of another land ordered, there was in effect withdrawal in terms of S. 48 in respect of former proceedings). (Para 12)

Anno: Land Acquisition Act, S. 48 N. 1.

(b) Land Acquisition Act (1894), Ss. 5A and 6 — Finality of decision under S. 5A.

The decision once taken under S. 5A cannot be cancelled or altered. After a decision has been taken by the State Government on the objections in favour of the objector, it is no longer possible to make a declaration to the contrary under S. 6 because that would amount to setting aside the decision taken under S. 5A which the Act makes final.

This is particularly so where the decision in substance amounts to withdrawal under S. 48. (Para 12)

Anno: Land Acquisition Act, S. 5A N. 1; S. 6 N. 1.

Jagdish Sahai, for Applicant; S. B. L. Gour and S. C., for Opposite Party.

CASE CITED:

(A) ('53) AIR 1953 All 182: (Misc. Writ No. 7878 of 1951)

GURTU J.: This is an application under Art. 226 of the Constitution of India. The applicant prays that this Court be pleased to issue a writ in the nature of a writ of 'certiorari' calling for the record of the case and to quash the entire proceedings subsequent to the order dated 27-5-1952 dropping the land acquisition proceedings in respect of the applicant's plots and to direct the opposite parties not to acquire or proceed to acquire the plots belonging to him.

(2) The applicant averred that he was the hereditary tenant of certain plots of land specified in para. 2 of the affidavit filed on his behalf which were situate in village Gulaothi, Pargana Agauta, district Bulandshahr and that the D. N. Higher Secondary School, opposite party 2, moved to acquire those plots along with two others.

(3) A preliminary Notification was issued in respect of these plots under S. 7 of the Land Acquisition Act in the State gazette dated 9-3-1951. The applicant filed an objection under S. 5A, Land Acquisition Act against the acquisition of the plots belonging to him. The applicant and the school authorities both appeared before Mr. S. D. Chaturvedi, Land Acquisition Officer. On 17-10-1952, Mr. Chaturvedi overruled the applicant's objections. On 20-10-1951, the applicant sent a petition to the Government of Uttar Pradesh in this regard. The State Government, thereupon asked for a report under S. 5A, Land Acquisition Act and, after perusing all the relevant documents for proving the report submitted by the Land Acquisition Officer under S. 5A of that Act, allowed the objections filed by the applicant and decided not to acquire the plots. On 3-5-1952, a G. O. No. A (2) 819/XV 601 (27) 1951 dated 3-5-1952 was issued by the State Government. The G. O. reads as follows:

"With reference to your endorsement No. 628/VIII-49-50/51 dated 29-12-1951 regarding the acquisition of land for D. N. Higher Secondary School, Gulaothi (Bulandshahr) I am directed to enclose a copy of letter No. 709 dated 31-3-1952 from the Deputy Director Education 1st Region Meerut and to say that the Government agree with his recommendation and have hence decided to drop the acquisition proceedings. I have, therefore, to request you to take necessary steps for the acquisition of the alternative land out of plots Nos. 748 to 751 belonging to Shri Faizyab Khan for the school and forward the proposal to Government for the issue of Notification under S. 4 (1) of the Act.

2. A cancellation Notification in respect of the land under acquisition is under issue.

3. The Hindustani Records of the case is returned herewith.

No. A (2)-(1)/XV-601 (27) 1951.

Copy forwarded for the information to the Deputy Director of Education 1st Region Meerut in reference to his D. O. No. 709 dated 31-3-1952.

By order.
Sd/- B. N. Jha,
Joint Secretary."

(4) That after the issue of the G. O. mentioned above, Sri S. D. Chaturvedi on 27-5-1952 ordered the proceedings for the acquisition of the said plots to be dropped and ordered that proceedings for acquisition of plots Nos. 748 to 751 (belonging to Faizyab Khan) may be started afresh if the authorities moved for the acquisition of the latter plots.

(5) On 3-6-1952, the Joint Secretary, Education Department issued another G. O. cancelling the earlier one dated 3-5-1952 quoted above and on the basis of that later G. O. the Land Acquisition Officer passed an order on 9-6-1952. That G. O. is No. A (2)/2503/XV-601 (27)-51 dated 3-6-1952 and runs as follows:

"I am directed to say that the Governor has again reconsidered the orders issued in G. O. No. A (2)/1819/XV(27)/51 dated 3-5-1952 regarding the acquisition of land required for D. N. Higher Secondary School Gulaothi, district Bulandshahr and has been pleased to order that the orders issued in the G. O. cited above may be treated as cancelled.

2. The Governor has also been pleased to order that the acquisition of land as recommended by you vide your endorsement 628/VIII dated 28-12-1951 may now be proceeded with. I am, therefore, to ask you kindly to forward a draft of the agreement which the school authorities are required to execute under S. 12, Land Acquisition Act. The agreement should be accompanied by a copy of schedule site plan (in duplicate) and a copy of the Articles of Association of the society.

3. The School authorities may also be asked to remit a sum of Rs. 28/- direct to Government Conveyancer, Uttar Pradesh, Council House, Lucknow being his fee for getting the deed of agreement.

End. No. 880-R/III-2/N.D. Dated 10-6-1952.

Copy forwarded to the Manager, D. N. Higher Secondary School Gulaothi (Bulandshahr) for an immediate compliance.

Sd/- D. N. Chaturvedi,
District Inspector of Schools,
Bulandshahr.
10/6."

(6) The Land Acquisition Officer passed an order on 9-6-1952 to the effect that in view of the G. O. dated 3-6-1952, the land acquisition proceedings would be revived and the site-plan and draft of the agreement as required by S. 42, Land Acquisition Act be filed and a deposit of Rs. 28/- be made and the case be listed on 25-6-1952.

(7) The applicant contends that all proceedings subsequent to the order dated 27-5-1952 are illegal and without jurisdiction. The D. N. Higher Secondary School through its Assistant Manager filed an affidavit in reply. Paragraph 19 of that affidavit states that the orders for cancellation of acquisition proceedings dated 3-5-1952 were obtained surreptitiously by manoeuvring incorrect representation of facts and the mistake having been detected immediately, when the school authorities presented the petition to the Hon'ble Minister of Education, an enquiry was made and the mistake was rectified by the G. O. dated 3-6-1952. It was further said in para. 20 of that affidavit that the order obtained by misrepresentation of facts or surreptitiously was not legally effective.

(8) Learned counsel for the applicant contends that the State Government having upheld the applicant's objections under S. 5-A of the Land Acquisition Act and having issued the G. O. dated 3-5-1952, the decision became final and could not be changed and varied. It is also urged that no declaration under S. 6 of the said Act having then been made, the entire proceedings now being taken are illegal and void. It is further urged that the proceedings having once been terminated and dropped, the same could not be revived. Lastly it is submitted that, in any case, the proceedings could not be now revived without a fresh Notification under S. 4 of the Land Acquisition Act.

(9) The Land Acquisition Act, by S. 4, provides for a preliminary investigation whenever it appears to the State Government that land in any locality is needed or is likely to be needed for any public purpose. A preliminary Notification to that effect has to be published in the Official Gazette and the Collector has to give public notice of the substance of such Notification. When such a preliminary Notification is published, objections may be filed under S. 5A by any person interested in any land which is so notified. After the Collector has given the objector an opportunity of being heard, he has to submit the case for decision of the State Government together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the State Government on the objections, it is enacted, shall be final. Under S. 6 of the Land Acquisition Act, if the State Government is satisfied, after considering the report, if any, made under S. 5A, sub-s. (2), that any particular land is needed for a public purpose, or for a Company, a declaration has to be made to that Govt. or some officer duly authorised to so order. After the declaration of the intended acquisition under S. 6 and after the land has been marked, measured and planned in accordance with S. 8, the Collector causes public notice to be given under S. 9 stating that the Government intends to take possession of the land and that claims of compensation to all such land may be made to him. There is then an enquiry under S. 11 into measurements, values and claims, and an award by the Collector. The further provisions of the Act need not be gone into for the purposes of this application.

There is one provision, however, which is relevant and it is contained in S. 48, Land Acquisition Act. Section 48 provides as follows:

"(1) Except in the case provided for in S. 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provisions of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section."

(10) It has been urged by the applicant that the decision of the State Government taken under S. 5A is final and is equally binding on the State Government as on the person whose property is sought to be acquired and that once the State Government has come to a decision, it is no longer open to it to review its decision. On the other hand, it is urged that until a formal withdrawal had been made under S. 48, the State Government is still entitled to acquire the land in respect of which the preliminary investigation was caused to be made under S. 4.

(11) Learned counsel for the applicant urges that S. 48 does not come into play until a declaration is made under S. 6 and no declaration can possibly be made under S. 6 after a decision in favour of the person whose property is sought to be acquired has been taken under S. 5A. It is argued that at the stage of S. 4(1), the position only is that it appears to the State Government that land is needed or is likely to be needed for any public purpose and that the preliminary Notification does not entitle the State Government to acquire the land notified under the preliminary Notification. It is then urged that the object of that Notification is merely to enable the State Government to determine whether the representation made in regard to the necessity for acquiring land in a particular locality and whether the representation made that it is required for a public purpose is a correct representation. No

right to acquire any land accrues until the preliminary investigation is completed and a declaration is made under S. 6. It is pointed out that the right to do certain acts on the land proposed to be acquired, which is conferred by S. 4, sub-s. (2), is a right limited to the purpose of the preliminary investigation and that S. 5 separately provides for the compensation relative to such entry showing that the entry and the payment of compensation are, in no way, connected with the acquisition which may ultimately take place as a result of the Notification under S. 6 and the notice under S. 9. It is urged, therefore, that S. 48, which refers to the withdrawal from the acquisition, can only refer to a withdrawal after the acquisition proceedings, as such, have commenced under S. 9 and at the earliest under S. 6.

(12) There seems to be force in these contentions. The declaration of intended acquisition is made only under S. 6. Up to that point there is only a preliminary investigation. It is only when it is finally determined that the land is needed for a public purpose, and that the compensation-money is chargeable wholly or partly against public revenues or some fund controlled or managed by a local authority or the funds of some company, that a declaration can be made which becomes final and cannot be questioned. In a sense, therefore, it may be said that once the declaration of an intended acquisition has been made under S. 6, the State Government has taken the first step for acquiring the property and that it is only then that a question of withdrawing from the acquisition can arise. It is possible that S. 6 is thus the first step, though it would appear that the first step is really taken when notice under S. 9 is issued i.e., the notice to treat. In our view, therefore, there would be no necessity for a formal withdrawal as contemplated by S. 48 before the stage of S. 6 at least has been reached.

We have not been informed whether the cancellation Notification referred to in para. 2 of the G. O. dated 3-5-1952 was issued in the Gazette, but it is clear that the G. O. dated 3-5-1952 was acted upon and that, as averred in para. 17 of the applicant's affidavit, the Land Acquisition Officer, Sri S. D. Chaturvedi on 27-5-1952 ordered that the proceedings for the acquisition of the plots in question should be dropped and further ordered that proceedings for the acquisition of plots Nos. 748 to 751 (belonging to Faizab Khan) may be started, if the authorities moved for their acquisition. In our view, therefore, there was also, in effect, a withdrawal even in terms of S. 48 of the Act.

Section 5A does not, in express terms, empower the State Government to cancel its decision. Even assuming that the decision of the State Government, as contained in the G. O. dated 3-5-1952, was obtained under the circumstances alleged in the counter-affidavit of the Assistant Secretary of the D. N. Higher Secondary School, the question still remains whether it could be cancelled at all when the section itself makes the decision final. In our view, the decision once taken under S. 5-A could not be cancelled or altered. After a decision has been taken by the State Government on the objections in favour of the objector, it is no longer possible to make a declaration to the contrary under S. 6 because that would amount to setting aside the decision taken under S. 5-A which the Act makes final. In this case that is particularly so because, in substance, there has also been a withdrawal under S. 48. In our view, it is no longer possible to acquire the applicant's plots without a fresh Notification under S. 4 and proceedings consequential being taken.

(13) Our attention was invited to — 'Brij Nath Sarin v. Uttar Pradesh Govt.', AIR 1953 All 182 (A). That was a case in which pursuant to a Notification there had been a decision under S. 5A upholding the objections made. Subsequently, a fresh Notification under S. 4 of the Act was issued and similar objections to those taken formerly were taken. On this latter occasion, those objections were not upheld. It was argued that the decision having once been taken under S. 5-A, under the previous Notification, it was not open to the State Government to restart acquisition proceedings for the land in question despite a second Notification under S. 4. It was held that this latter contention had no force. This case is different from the present case where no fresh Notification under S. 4 has been issued at all and the proceedings are sought to be continued under the preliminary Notification dated 9-31951 under S. 4 in spite of the decision under S. 5-A in favour of the applicant and in spite of the fact that there has been, in effect, a formal withdrawal from the acquisition proceedings also.

(14) However, 'AIR 1953 All 182 (A)', in a way, supports the point of view which we have expressed, namely, that a fresh Notification under S. 4 would be necessary. It would thus appear that the applicant is entitled to the reliefs claimed by him.

(15) Accordingly, a direction will issue quashing the G. O. No. A(2)/2503/XV-601(27) 51, dated 3-6-1952 and the entire proceedings subsequent to the order dated 27-5-1952, whereby the land acquisition proceedings in respect of the applicant's plots were dropped. We further direct the opposite parties not to acquire or proceed to acquire the plots belonging to the applicant without a fresh Notification being issued under S. 4 of the Land Acquisition Act. In the circumstances of this case, we direct the parties to bear their own costs.

B/R.G.D. Directions issued.

A.I.R. 1953 ALL. 597 (Vol. 40, C. N. 296)

AGARWALA J.

State v. Gendan Lal Dwivedi.

Criminal Misc. Case No. 381 of 1951, D/- 25-6-1951.

Criminal P. C., (1898), Ss. 561A and 439 — Applicant in contempt — High Court would refuse to entertain application. (Para 1)

Anno: Cr. P. C., S. 439, N. 11; S. 561A, N. 1.

ORDER: The applicant was a sub-post master at Bhartana. He was prosecuted and convicted for offences under Ss. 409, I. P. C. and 55, Indian Post Office Act and sentenced to four years' rigorous imprisonment and a fine of Rs. 5000/- under the former and to one year's rigorous imprisonment and a fine of Rs. 100/- under the latter section. He appealed and his appeal was dismissed. He filed an application in revision in this Court. That was also dismissed on 15-5-1950. On 7-2-1951 he made an application to this Court under S. 561A, Criminal P. C. without surrendering himself for all this time. This Court ordered the record of the case to be summoned and the matter is now before me for orders. The applicant is present in person. He has been out of jail for over a year without any authority. He says that he was ill but he has made no such allegation in his application. It is the settled practice of this Court that a petitioner who has been convicted should surrender himself before he makes an application in revision in this Court unless he is ill and is unable to go to jail and prays that he be released on bail. The petitioner without any order for bail, has been evading compliance of the order of sentence passed against him. In these circumstances, I am not prepared to hear him.

(2) I reject this application and direct that he should surrender to the proper authorities forthwith. This order will not debar him from making a fresh application under S. 561A.

C/K.S. Application rejected.

A.I.R. 1953 ALL. 598 (Vol. 40, C. N. 297)

MUSHTAQ AHMAD J.

Mohan Lal, Defendant-Appellant v. Kunwar Sen, Plaintiff-Respondent.

Second Appeals Nos. 855 of 1946 and 231 of 1950, D/- 26-10-1951.

(a) Houses and Rents — U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3 and 15 — Pending suit — Section 15 and not S. 3 applies — Grounds for ejectment not those mentioned in S. 3 — Decree can be passed, if permission of District Magistrate is obtained. AIR 1952 All 584; AIR 1951 All 396, Relied on. 1951 All WR HC 263, Distinguished. (Paras 10, 12)

(b) T.P. Act (1882), S. 106 — Notice expiring with end of month of tenancy — Notice held valid.

As a further precaution the landlord had allowed the tenant to vacate the premises on such day of the Hindi calendar month as the latter himself believed to be the date on which the tenancy expired:

Held that the notices given by the landlord were perfectly valid. (Para 4)

Anno: T. P. Act, S. 106 N. 40 and 41.

S. S. Verma, for Appellant; M. L. Chaturvedi, for Respondent.

CASES CITED:

(A) ('44) 1944 All LW 591

(B) ('52) AIR 1952 All 584: 1951 All WR HC 115

(C) ('51) AIR 1951 All 396: 1951 All LJ 154

(D) ('51) 1951 All WR HC 263: (S. A. No. 664 of 1948, D/- 25-1-1951 All)

JUDGMENT: The appeal first mentioned was filed by the defendant in a suit for ejectment and arrears of rent regarding a shop together with some rooms on the first floor. There was originally a lease granted by the plaintiff-respondent to the defendant on 27-4-1938 for one year. It was provided in the lease that the rent shall be paid from month to month according to the Hindi calendar and that the tenancy was to begin from Baisakh Badi 1, Sambat 1995. Prior to the suit, the plaintiff had served a notice dated 8-12-1944 on the defendant, demanding arrears of rent and also the vacation of the premises. Subsequently another notice was sent on 23-12-1944, in which a certain error in the earlier notice with regard to the real date of the commencement of the lease was sought to be rectified.

(2) It may be mentioned at once that, in para 1 of the plaint, the plaintiff had alleged that the monthly tenancy, meaning of course the tenancy at will that had come into existence after the expiry of the period covered by the written lease of 27-4-1938, commenced on the 1st of each Hindi month. This was admitted in the corresponding paragraph of the written statement. There was, therefore, no doubt on the question, and this indeed is the finding of the lower appellate Court also, that the tenancy began on the 1st of each Hindi month.

(3) The defence taken was that, although the tenancy alleged by the plaintiff was a fact, there had been no default in payment of rent as the defendant had tried to make such payment in various ways, the same not being accepted by the defendant that the notices given by the plaintiff were invalid and that the defendant was not liable to be ejected in view of the protection afforded by the Defence of India Rules.

(4) The trial Court decreed the suit in the terms of the relief on 26-5-1945, holding that the arrears had been proved, that the notices served by the plaintiff were valid and that the orders of the District Magistrate under the Defence of India Rules did not affect the present suit.

(5) On appeal by the defendant, this decree was affirmed by the lower appellate Court, although the learned Civil Judge remarked that the question of the arrears and the question of the defendant's ejectment could be determined only in the execution proceedings. That was on the authority of the case in —'Makhan Lal v. Shankar Lal', 1944 All L W 591 (A), since overruled.

(6) The defendant then filed the present second appeal and applied for stay of execution of the decree for ejectment, as an application for such execution had been made by the respondent in the trial Court. The prayer for stay was refused. Then the defendant filed an objection to the application for execution on the ground of S. 14, U.P. (Temporary) Control of Rent & Eviction Act, 3 of 1947. That objection was allowed by the execution Court but disallowed by the lower appellate Court. The connected execution second appeal has arisen out of the order of the latter Court.

(7) After the regular second appeal had been filed in this Court, the plaintiff respondent, on 3-7-1948, obtained a permission from the Additional District Magistrate in the following terms:

"I, therefore, permit Kunwar Sen to file a civil suit for the ejectment of Mohan Lal if necessary and also for the execution of the civil Court's decree for ejectment if required."

(8) Considerable argument has turned in this case on the question of the effectiveness of this permission, a matter with which I shall deal hereafter.

(9) Mr. S. B. L. Gaur, learned counsel for the defendant-appellant, has raised in the main two points (1) that the aforesaid Act, 3 of 1947, applied to the present case, although it came into force after the suit had been filed & that, therefore, in the absence of a ground mentioned in any one of the various clauses of s. 15 of the Act, there could be no question of ejectment at all and (2) the notices served by the plaintiff were invalid and for this reason also no decree for ejectment should have been passed.

(10) As regards the first point, as we know, the U. P. Act, 3 of 1947, came into force on 1-10-1946, as provided by s. 1(3) of the same, although it was published later on 1-3-1947. The suit giving rise to the appeal had been filed much earlier on 10-1-1945. The argument of the learned counsel for the appellant is that, unless this suit, though filed at a time when the Act was not in existence, satisfied the conditions enjoined by the Act, a decree for ejectment could not be passed. On the face of it the argument appears to be strange, for it is not intelligible how a plaintiff can be refused relief merely because he had not done something prior to his suit, which he had never been required by any law to do, and this only because some law had later on been enacted which required him to do that particular thing. The argument was based on the explicit provisions of s. 3 of the Act. That section no doubt requires the landlord to obtain the permission of the District Magistrate before he files

his suit for ejectment. Obviously the section would apply where the suit has to be filed after the Act has come into force. To suits pending on the date of the commencement of the Act, however, the rule contained in s. 15 of the Act would apply. This latter section expressly provides that, in suits pending on the date of the commencement of the Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in s. 3. 'Ex facie', it may be argued that the section, being confined only to the grounds mentioned in s. 3, excludes and has nothing to do with a suit based on grounds other than those mentioned in that section, and it was on this interpretation of s. 15 that the learned counsel for the defendant-appellant argued that the section could not help the plaintiff-respondent who had sued for the defendant's eviction on a ground other than those mentioned in s. 3.

Learned counsel for the latter, however, relied on the authority of the Bench decision of this Court in — 'Raj Narain v. Sita Ram Shri Kishen Das', AIR 1952 All 584 (B), to which I was a party, and contended that the present case is governed by s. 15. In that case s. 15 was interpreted to mean that, where a suit for ejectment on a ground other than those mentioned in cls. (a) to (f) of s. 3 of the said Act, had been filed prior to the commencement of the Act a decree could no doubt be passed if the plaintiff had obtained the permission of the District Magistrate. On this point the following passage occurs in the judgment of the Bench :

"This Amendment Act (44 of 1948) attempts to make it clear that, if any of grounds (a) to (f) exists, then a suit for ejectment of a tenant can be filed, and it is not necessary to go to the District Magistrate for his permission. There being no other provision restricting the right to file suits for ejectment in the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) a suit for ejectment need not be confined to grounds (a) to (f), provided the permission of the District Magistrate has been obtained. The result of interpreting s. 15 differently is that we get this anomaly that, while in all suits pending on the date when the Act came into force, the orders of ejectment could be passed only on the restricted grounds mentioned in cls. (a) to (f) of s. 3, in suits filed after the Act came into force the tenant could be ejected on any grounds whatsoever, provided the permission of the District Magistrate had been obtained. Reading the two sections together we are inclined to the view that s. 15 was intended to mean that the provisions of s. 3 would be applicable to all pending suits and that a tenant could be ejected on grounds (a) to (f) without the permission of the district Magistrate, but that, in a case where the permission of the District Magistrate was obtained, he could be ejected on any ground."

(11) This view was followed in a later Bench case in —'Manzoor Ali v. Lal Devi', AIR 1951 All 396 (C). The word 'suits' in s. 15 of the Act, it is now settled, includes appeals, and so far as the present litigation is concerned it would be perfectly correct to say that the suit was pending when the Act in question came into force. There would, therefore, be no difficulty in applying the earlier part of s. 15 of this case. Nor would there be any difficulty in this behalf on the ground that the section, as it reads, confines itself only to 'one or more of the grounds mentioned in s. 3', as in the two cases just mentioned it has been held that the section would apply where the landlord was seeking the tenant's ejectment on a ground outside cls. (a) to (f) of s. 3 and he had been granted a permission by the District Magistrate to obtain such a relief.

(12) Mr. S. B. L. Gaur, on behalf of the defendant-appellant, however, contended that the permission in this case, having been obtained by the plaintiff-respondent during the pendency of this appeal and not prior to his filing the suit, cannot stand him under s. 15 of the said Act. He pointed out that the permission relied upon by the landlord in both the cases referred to above had been obtained prior to the institution and not during the pendency of the suit. That undoubtedly is a fact, but I do not consider that this was the 'ratio decidendi' of the judgments in those cases. In the first place, if the word 'suits' in s. 15 includes 'appeals' as already held by this Court, so that the 'suit' in this case was pending on the date of the commencement of the Act, and if, as held in the two cases mentioned above, a decree for eviction can be passed in such case even on a ground outside cls. (a) to (f) of s. 3 if the landlord has obtained the permission of the District Magistrate, it must necessarily follow that the permission may be of a date subsequent to the institution of the suit. In the second place, the language of the section itself, unlike that of s. 3, explicitly shows that the existence of a ground under any one of the aforesaid clauses or, as held in those rulings, of the permission of the District Magistrate is a condition precedent not to the institution of a suit but to the passing of a decree for eviction. In contradistinction to the words "no suit shall without the permission of the District Magistrate, be filed in any civil court" in s. 3, we have in s. 15 the words "no decree for eviction shall be passed". Indeed, the said words in s. 3, would have carried no meaning if repeated in s. 15 of the Act, and the Legislature in the latter section, therefore, only required a certain circumstance to exist before 'a decree for eviction could be passed'. On the bare language of s. 15 that circumstance was the existence of "one or more of the grounds mentioned in s. 3" and, under the two Bench decisions referred to above, it could also be a permission of the District Magistrate on a ground other than those grounds.

(13) In support of his contention that the permission of the District Magistrate must precede the filing of the suit learned counsel for the appellant called my attention to the decision (not yet reported) of a learned Judge of this Court in —'Motilal v. Mahabir Prasad', Second Appeal No. 664 of 1948 D/- 25-1-1951 (All (D). That was a case expressly under s. 3, in which the suit, unlike the present case, had been filed after and not before the commencement of the Act. There was, therefore, no question of applying s. 15 in that case, and as such the ruling is on the face of it distinguishable. Considering every aspect of the matter I am positively of the opinion that the permission obtained by the plaintiff in this case from the District Magistrate on 3-7-1948 was quite effective to entitle him to a decree.

(14) As regards the second point raised by the learned counsel for the appellant relating to the invalidity of the notice the position is much simpler. As already mentioned, both the parties are agreed that the tenancy commenced on the 1st day of each Hindi month. The plaintiff had required the defendant to vacate the premises on the 1st day of the month following the month in which the notice was given. As such, the notice expired with the end of the month of the tenancy. As a further precaution the plaintiff had allowed the defendant to vacate the premises on such day

of the Hindi Calendar month as the latter himself believed to be the date on which the tenancy expired. In such circumstances, I must hold that the notices given by the plaintiff were perfectly valid. Indeed, in the present context, much of the enthusiasm with which the argument on this point had commenced gradually abated.

(15) As regards the execution second appeal, the appellant's objection, as I have already said, was based on s. 14, U. P. Act, 3 of 1947. Having held that s. 15 applied to the case, I cannot possibly hold that s. 14 applied. The failure of the regular second appeal must entail the failure of the execution second appeal.

(16) For these reasons, I dismiss both the appeals with costs.

(17) Leave to appeal to a Bench is granted.

B/R.G.D. Appeals dismissed.

A.I.R. 1953 ALL. 600 (Vol. 40, C. N. 298)

RAGHUBAR DAYAL AND CHATURVEDI, JJ.

Dwarka Prasad Agarwal, Applicant, v. Krishna Chandra and others, Opposite Party.

Criminal Misc. No. 16 of 1952, D/- 16-3-1953.

(a) Contempt of Courts Act (1952), S. 1 — Publication of article during pendency of proceeding.

In India the same Magistrate who has directed the investigation and has been informed of its result is authorised to try the case himself. Hence, whenever the accused is taken before a Magistrate or papers are sent to him concerning a case, any order passed by a Magistrate cannot be taken to be an order passed by a criminal Court. Further it is not correct to say that as soon as a person has been arrested as a result of a report made against him, the case starts and any matter published with respect to that incident must be taken to have been published during the pendency of proceedings in a Court of law. In this respect the procedure in England being different from that in India, the English decisions bearing on this question cannot be followed and held that proceedings in Court start as soon as a warrant has been issued or an arrest made. (1903) 2 K. B. 432; (1910) 103 L. T. 636; (1927) 1 K. B. 845, Expl. and Disting. (Paras 7, 12)

(b) Contempt of Courts Act (1952), S. 1. — Publication of news or articles.

Contempt proceedings cannot be taken in connection with the publication of news or articles as long as a criminal case is during the course of investigation and has not actually come to the Magistrate's Court for enquiry or trial. A case does not come to Court by the issue of a warrant of arrest. (1923) 68 Law Ed 293 (301); AIR 1951 S. C. 207, Rel. on; AIR 1943 Lah 329 (FB); AIR 1941 Pat 185; AIR 1947 Cal 414 (FB), Distinguished. (Paras 19, 20)

(c) Contempt of Courts Act (1952), S. 1 — Contempt with respect to proceedings imminent.

The extending of the punishment for contempt to cases which are only imminent, is not justified on the circumstances as they exist in this country. AIR 1939 Mad 257 (SB), Expl. (Para 23)

P. C. Chaturvedi, for Applicant, S. N. Dwivedi for Nos. 1 and 2 and S. N. Kakar for Nos. 3 to 5 for Opposite Party; H. L. Kapoor for the State.

CASES CITED:
(A) (1903) 72 LJ KB 839: (1903) 2 KB 432
(B) (1906) 75 LJ KB 104: (1906) 1 KB 32
(C) (1910) 27 TLR 32: 103 LT 636
(D) (1927) 96 LJ KB 352: (1927) 1 KB 845
(E) (1945) 114 LJ KB 417: (1945) KB 435
(F) ('43) AIR 1943 Lah 329: 45 Cri LJ 445 (FB)
(G) ('44) AIR 1944 Lah 196: 46 Cri LJ 174 (SB)
(H) ('41) AIR 1941 Pat 185: 42 Cri LJ 225
(I) ('47) AIR 1947 Cal 414: ILR (1948) 1 Cal 441 (FB)
(J) (1923) 263 US 255: 68 Law Ed. 293
(K) ('51) AIR 1951 SC 207: 52 Cri LJ 775 (SC)
(L) ('39) AIR 1939 Mad 257: 40 Cri LJ 533 (SB)

CHATURVEDI J.: This is an application filed by Dwarka Prasad Agarwal for taking contempt proceedings for alleged contempts of Court said to have been committed by the opposite parties. In the application the alleged contempts are said to have been committed on three occasions. The first was an article published in a daily newspaper, known as 'Jagram', on 6-6-1952. The second act of contempt was committed on 8-6-1952 when opposite party No. 2 through Babu Lal, along with certain other persons, sent a resolution passed by the City Congress Committee to the District Magistrate and to the Superintendent of Police. The third contempt was said to have been committed on 9-6-1952 when the opposite parties Nos. 1 and 2 are said to have organized a public meeting at which speeches were delivered. The writing and the printing of the article as well as the passing of the resolution and sending it to the District Magistrate and the Superintendent of Police are not denied on behalf of the opposite parties, but the delivering of speeches at a public meeting on 9-6-1952 has not been admitted and the learned counsel for the applicant withdrew his complaint with respect to this third act. He has confined his case to the first two acts of alleged contempt.

(2) An incident happened on 2-6-1952, at the shop of one Jagdish Prasad Sharma in Manik Chowk, Jhansi. Two reports of the incident were lodged in the police station, one by Sumer Singh servant of Jagdish Prasad and the other by Dwarka Prasad applicant. A reading of these two reports shows that there was a quarrel at the shop of Jagdish Prasad, and simple injuries were also caused but the versions of the two informants are naturally different. As a consequence of the reports Jagdish Prasad applicant was arrested by the police on 2-6-1952, but was released on bail the same day. On the 3rd of June one Satya Narayan alias Sathoo was arrested and was released on bail on 4-6-1952. On 6-6-1952 Ram Swarup presented himself in Court and was released on bail the same day. Satya Narayan and Ram Swarup are co-accused with Dwarka Prasad. On 11-6-1952, Dwarka Prasad filed a complaint concerning this incident before a Magistrate and the police sent a charge sheet against Dwarka Prasad, Satya Narayan and Ram Swarup on 4-7-1952 charging the three persons of having committed offences under Ss. 323, 326 and 452, I. P. C.

(3) From the narration of facts given above it would appear that the two alleged acts of contempt in publishing the article and sending a resolution concerning this incident were committed on 6th of June and 8th of June, 1952 respectively.

They were thus committed after the incident and also after Dwarka Prasad and Satya Narain had been arrested and released on bail and also after Ram Swarup had been released on bail, but before either Dwarka Prasad filed the complaint or the police sent up the charge sheet prosecuting Dwarka Prasad and others. The first question, therefore, that arises in the case is whether contempt proceedings can be taken in respect of offensive articles or resolutions etc., before the institution of any proceeding actually in Court. The contentions of the learned counsel for the applicant on this point are two. He first contends that offensive statements would amount to contempt even if certain proceedings in Court are imminent though they have not actually started, and secondly that proceedings in criminal Court start at least from the date that the accused are brought before the Magistrate and are granted bail or remanded to custody. These are, therefore, the two questions that we have to consider as regards this preliminary point.

(4) It is certainly desirable that people do not publish or resort to any other propaganda concerning matters which are likely to be 'sub judice'; at the same time, regard must be had for the liberty of speech of the citizen. Our Constitution guarantees to the citizen liberty of speech with certain safeguards including a safeguard against committing contempts of Courts. On the one hand, as stated above it is desirable that the parties or their friends do not indulge in any propaganda, but the difficulty is to what length a Court of law should go in stopping this type of propaganda. Should all speeches concerning a particular incident be prohibited as soon as the incident has occurred, or the prohibition should be imposed at some later stage but before the matter has come to Court? In the present case we have to consider whether the publishing of an article in a cognizable case, in which the police are proceeding with the matter, is a contempt or not, before actually the police send up the charge-sheet. It very often happens that even in cognizable cases the police make arrests and continue investigations for months, but ultimately they drop the proceedings when they find that there is not sufficient evidence to go to Court, or the allegations of the complainant are incorrect.

(5) In this connection, we propose to consider certain provisions of the Criminal Procedure Code which lay down the procedure to be followed by the investigating authorities before actually sending up the case to the Court for trial. Section 156, Criminal P. C., lays down that any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case. Under S. 157 he is entitled to investigate into facts where he has reason to suspect the commission of a cognizable offence though no report has been made to him about the occurrence. Under section 160, Cr. P. C., an investigating officer is authorised to require the attendance of all witnesses before him by orders in writing, and under S. 161 examine such witnesses. Section 165, Cr. P. C. gives power to an officer in charge of a police station to make search under certain circumstances, and under S. 167 he is directed to forward the accused and the copy of the entries in the diary of the case to the nearest Magistrate. Under section 169 if it appears to the officer that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond to appear before a Magistrate if and when so required. Under S. 170 the officer is directed to send the accused, if in custody, to the Magistrate entitled to try the accused if the officer finds that there is sufficient evidence against the accused, or there are reasonable grounds of suspicion to continue investigation. Section 173 directs an officer in charge of the police station to forward a report to the Magistrate concerning every investigation made by him giving in detail the names of the parties, the names of the witnesses and also stating whether the accused has been released on bail or not. Under sub-section (3) of this section, the Magistrate is authorised to pass such orders for the discharge of the bail bonds or otherwise, in case the accused has been released on bail.

(6) We have given above the powers of the investigating officer conferred upon him by certain sections of the Code of Criminal Procedure. We might also mention here the powers of a Magistrate before he takes cognizance of a case. Section 155, sub-s. (2), authorises a Magistrate to direct investigation by the police even in a non-cognizable case and sub-s. (3) empowers the Magistrate to direct investigation concerning a cognizable case. Under S. 157 the officer in charge of a police station is directed to send the report to a Magistrate having jurisdiction to take cognizance of the offence, where the officer suspects the commission of a cognizable offence. Where a cognizable case has not been investigated into because it was of a trivial nature or because there was not sufficient ground for entering on an investigation, the reasons for dropping the investigation have to be mentioned in the report sent to the Magistrate under S. 157. Section 159 empowers the Magistrate to direct an investigation into a matter which the station officer proposes to drop and for which he has sent in his report. Where an investigation has not been completed within twenty-four hours and the police officer wants more time to investigate into the matter, but there are grounds for believing that the accusation or information is well-founded, the police officer is to send a copy of the case diary and the accused to the nearest Magistrate; and the Magistrate may authorise the detention of the accused for a term not exceeding fifteen days. But the Magistrate is to send a copy of his order to the District Magistrate or the Sub-Divisional Magistrate containing the reasons for his further detention. We have already stated that after conclusion of the investigation if the police officer thinks that there is sufficient evidence against the accused, the accused, if in custody, shall be forwarded to the Magistrate authorised to take cognizance of the offience. Sections 170 and 173 of the Code appear to refer to the concluding stage of enquiry by an officer in charge of the police station. Section 170 refers only to those cases where it appears to the officer that there is sufficient evidence against the accused or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate; whereas S. 173 appears to refer to all investigations irrespective of the fact whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate or not. It may be noticed that under both these sections the accused is to be sent to the Magistrate empowered to take cognizance of the offence, whereas under S. 167 the accused is forwarded to the nearest Magistrate.

(7) A resume of the powers of the investigating officer as well as the Magistrate shows that the Magistrate is not only a court but also a person in charge of the administration of the district or the local area, and he is to be kept informed of all investigations being made by the police officers

under his jurisdiction. He has further the right to direct further investigation into any case cognizable or otherwise, and the police officer is to act according to the directions given by the Magistrate. The same Magistrate who has directed the investigation and has been informed of its result is authorised to try the case himself. In this state of affairs a confusion arises as to when a Magistrate is acting as an Executive Officer in charge of the administration of a district or a local area, and when he acts as a Court and not as an Administrative Officer. The learned counsel for the applicant has argued that whenever the accused is taken before a Magistrate or papers are sent to him concerning a case, any order passed by a Magistrate must be taken to be an order passed by a criminal Court. But we find ourselves unable to agree with this contention, because we find from the different provisions of the Code of Criminal Procedure given above that the Magistrate has actually been given power to direct investigations, and also to accept or not to accept a report of a police officer dropping the proceedings against a particular accused. It is quite obvious that an investigation is certainly the stage or proceeding before the case is taken to the Court, and the argument of the learned counsel would lead to the result that the 'Court' is required to pass orders, even before a case has been launched before it. The learned counsel for the applicant contends that as soon as a person had been arrested as a result of a report made against him, the case starts and any matter published with respect to that incident must be taken to have been published during the pendency of proceedings in a Court of law. In support of his contention, the learned counsel has cited a number of cases of English Courts, but before proceeding to consider those cases it would be better to briefly mention the salient points of criminal procedure obtaining in England, as the procedure obtaining there is different in material particulars from the procedure obtaining in this country. The first step in the ordinary course of criminal procedure in England is to bring a person charged with a crime before a justice or justices of the peace in order that the charge may be investigated. This attendance is secured either by summons or by arrest under a warrant or otherwise. Summonses and warrants of arrest are issued by a justice on an information being laid before him, (vide Halsbury's Laws of England, Hailsham Edition, Volume 9, para. 102). Such information is sufficient if it contains a statement of the specific offence with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge. A warrant cannot issue unless there is an information in writing and on oath. A summons may be issued on an oral and unsworn information.

(8) Criminal prosecutions, except where there are statutory provisions to the contrary, may be commenced at any time after the commissions of the offence. A prosecution is commenced, when an information is laid before a justice, or the accused is brought before him to answer the charge, or when an indictment is preferred. (vide para. 100).

(9) It would thus appear that a prosecution commences in England as soon as an information has been laid before a justice, or the accused has been brought to answer the charge, or, if there is no preliminary examination before the justice, when an indictment is preferred. The cases cited by the learned counsel are cases where an information was laid on oath before a justice, and a warrant was issued on the basis of such information. It is quite obvious that in such a case, according to the English procedure, a prosecution is started immediately. But it may be noted that in cases where there is no preliminary examination before a justice, a prosecution only starts when an indictment has been preferred. Justices of the peace sit in England either as Courts of summary jurisdiction or to hold preliminary enquiries when a person is charged with an indictable offence. They clearly act as Courts of law, and, when holding a preliminary enquiry into an indictable offence, are practically in the same position as a Magistrate in India holding an enquiry into a case triable by the Court of Sessions. When doing such work, the Court of the justices is known as Court of petty sessions.

(10) In — 'Rex v. Parke', (1903) 2 KB 432 (A), it was held that where a matter was published in a nawspaper tending to interfere with the fair trial of the charge after the accused has been charged before the petty sessions with an indictable offence triable only at the assizes, the Court of King's Bench had jurisdiction to punish the publisher for contempt, even though the person charged had not till then been committed for trial. After saying that publications like the one in question in that case had a tendency to reduce the Court which had to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned, the learned Judge remarks:

> "If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular Court which is thus sought to be deprived of its independence, and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will & must be constituted, and that when constituted it and it alone can take cognizance of the particular offence which is the subject of the preliminary inquiry."

Later on the learned Judge says:

> "It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

A number of authorities were cited, but the main point argued appears to be that the King's Bench Division could not take cognizance of a contempt of court of the petty sessions, and the decision was against this contention. It would thus appear that before the publication of the article the accused had been charged before the petty sessions, and it appears from a reading of the judgment that the proceedings before the petty sessions were treated as proceedings before a Court. No question appears to have been raised that the proceedings before the petty sessions were not proceedings before a Court and, as a matter of fact, no such question could have been raised. The case, therefore, is no authority for the proposition that the publication of an article concerning a matter before it has come to Court at all can amount to contempt. As stated above, this case only lays down that the High Court can deal with contempts of subordinate Courts and there appears to be no doubt that the Court of petty sessions is a Court.

(11) The next case cited by the learned counsel is reported in — 'Rex v. Daves', (1906) 1 KB 32 (B). In this case also the main point decided was that the King's Bench Division had jurisdiction to punish for contempt of inferior Courts, including the Court of petty sessions; and it appears to have

been assumed that the proceedings before the petty sessions were proceedings before a Court. The case of —'Rex v. Parke', (A) was followed and it was further held that the King's Bench Division had also the power to punish for contempts of inferior Courts.

(12) In — 'Rex v. Clarke', (1910) 103 LT 636 (C), it was held that after an information on oath had been laid against a person charging him with an offence which may ultimately be tried in the High Court, and after a warrant had been issued and the accused arrested, any statement published which tends to prejudice the fair trial of the charge amounted to contempt of Court. In this case information on oath was laid before one of the metropolitan police Magistrates, and warrants were issued commanding the arrest of Harvey Crippen. Crippen was arrested somewhere outside Quebec. While Crippen was still detained in Quebec and his case had not been disposed of by the Judge who was to act under the Fugitive Offenders Act, the newspaper published an offensive article. While dealing with this point the learned Judge remarked:

"No case has been cited to us which says that where the person has been arrested and is in custody upon a warrant, proceedings are not pending against him. The warrant has been declared by my brother A. T. Lawrence in a case before the Divisional Court, which has been mentioned by my brother Pickford, to be of itself a judicial act; and yet we are asked to say that after the Magistrate performed a judicial act upon sworn information laid before him there are no proceedings against the accused person ....In my opinion it would be gravely to narrow the jurisdiction of this Court to lay down any such rule as that."

The decision of this case was based on the practice in England of lodging information on oath before issue of a warrant by a Magistrate, and the act of the Magistrate in issuing the warrant has been held to be a judicial act by itself. After this procedure had been followed, it was held that the proceedings in the case had been started. Under the Code of Criminal Procedure there is no such laying of information on oath and in the initial stages before the case has to come to Court, the Magistrate is authorised to supervise even the investigation. Under S. 167, Cr. P. C., he issues a warrant on a police report and, in our opinion, while issuing such a warrant, the Magistrate does not act as a Court but as an officer superior to the officer conducting the investigation. The investigating police officer has also an authority to arrest persons without a warrant and also to release persons on bail and the Magistrate has only given wider powers. The procedure in England being different from that in India, we find ourselves unable to follow the decision in the above noted English case, and to hold that proceedings in Court start, as soon as a warrant has been issued or an arrest made.

(13) The next case referred to is one reported in — 'Rex v. Daily Mirror', (1927) 1 KB 845 (D). In this case one Edgar William Smith had been arrested upon a charge of shooting a police officer and had been brought before the justices upon that charge. But before those proceedings had been completed, the articles in question had been published giving photographs of the accused person. It was held that the publishing of photographs was likely to prejudice the accused in his identification by the witnesses and was as much contempt of Court as the publication of an article giving the facts of the case. In the course of the judgment Hon'ble Chief Justice Lord Hewart says:

"We are not called upon to consider the question whether there may be contempt of Court when proceedings are imminent but have not yet been launched. In the present case the question did not arise, for there was a charge and there had been an arrest, and proceedings, therefore, had begun. Some day that question may have to be decided."

The above passage will show that it was taken for granted in the case that proceedings had actually begun, and our comments with respect to this case are the same as with respect to the case of — 'Rex v. Clarke', (C).

(14) The next case cited is — 'Rex v. Davies', (1945) KB 435 (E). This case merely lays down that a criminal cause remains 'sub judice' until the time has expired within which notice of appeal to the Court of Criminal Appeal may be given until the appeal has been heard and determined. This case does not touch the point arising before us and need not be considered in any detail.

(15) We might now come to the cases of Indian Courts cited before us. The first case cited is the one reported in 'In re Subrahmanyan AIR 1943 Lah 329 (F.B.) (F)'. This is a Full Bench case and a number of authorities are considered, but proceedings for contempt were dropped and the application dismissed on the ground that the contempt was merely a technical one and not a substantial contempt; and, also, on the further ground that the proceedings before the Court were not imminent to the knowledge of the editor and publisher at the time when the articles were published. Both Hon'ble Harries C. J. and Munir J. referred to some of the English cases cited above, and were inclined to take the view that it was not necessary in a case of a criminal trial for a publication to be classed as contempt of Court that the accused should have been committed for trial or even for him to have been brought before a Magistrate provided that he has been arrested and was in custody. The learned Judges actually decided the case on different points, and they accepted the decisions of the English Courts without considering the question as to whether the procedure provided in the Criminal Procedure Code is the same as the procedure obtaining in England. We have already made our comments on the English cases on which the observations in this case are based; and, as stated above, the decision of the case was on different points.

(16) The other Lahore case cited is also a Full Bench case reported in — 'Homi Rustomji v. Sub-Inspector Baig', AIR 1944 Lah 196 (SB) (G). In this case the counsel for the accused had been arrested by the police while he was preparing to move a Habeas Corpus application before the Court. This action was held to amount to a contempt of Court. The action here complained of was depriving the party of having recourse to a Court of law. The case is no authority for the proposition advanced by the learned counsel for the applicant, in the present case.

(17) In — 'Supdt and Remembrancer of Legal Affairs Bihar v. Murali Manohar Prasad', AIR 1941 Pat 185 (H), out of the two articles complained of one was published before the criminal proceedings started and the other was after the proceedings had actually commenced in Court. It was held that the opposite parties were guilty of contempt and the articles tended to interfere with the proper administration of justice. One article having been published after the case had come to the Court of the Committing Magistrate, the question whether the first article also con-

stituted contempt of Court did not really have any importance; and the point whether the first article also constituted contempt because it was published before the case came to the Court of the Committing Magistrate has not been considered.

(18) The last case cited by the learned counsel for the applicant is —'Emperor v. J. Choudhury', AIR 1947 Cal 414 (I). In this case it was held that an article commenting on an incident which was under police investigation and which was written before any arrest was made in connection with the incident, could not be made the subject of contempt of Court proceedings, provided the editor had neither knowledge nor reasonable grounds for believing that proceedings were about to be launched in respect of the incident. In the course of the judgment Biswas J. remarked:

> "As a general rule, it may be laid down, the essence of the offence in this class of cases is that proceedings should be pending when the offending publication appears, but the question as to from what stage and up to what stage a proceeding will be deemed to be pending for the purposes of this rule, has been the subject-matter of considerable discussion."

After this the learned Judge considered the English decisions mentioned above and also most of the Indian decisions already mentioned by us. In the end he was of the opinion that it was not necessary that the accused should be committed for trial or have been brought before the Magistrate and it would be sufficient if he had been arrested and was in custody. Further on the learned Judge remarks that it was not shown that the opposite parties knew or had reason to believe that the proceeding was about to start in connection with the said incident. The other learned Judge, Roxburgh J., also considered the English cases but he did not clearly express any view of his own. After summarising the facts of the English cases, the learned Judge has simply stated that in some of those cases the knowledge of the proceedings and the knowledge that they were imminent was, therefore, clear and the imminence was of a very certain character. The third learned Judge, Akram J. simply said that in the circumstances in which the article appeared to have been published he agreed that the rule should be discharged. The order which their Lordships actually passed could have been passed assuming that the decisions of the English Courts laying down when a proceeding should be taken to have commenced were applicable to proceedings in India also. One of the learned Judges considered it necessary to say that the proceedings in one of the English cases were imminent and this imminence was of a very certain character; the third learned Judge did not express any opinion on this point.

(19) We have considered above all the cases cited by the learned counsel for the applicant; and, as stated above, in none of those cases the position of a Magistrate during the course of the investigation proceedings was considered, nor did the decision of any of the Indian cases depended on a decision of the point which we are called upon to decide in this case. As stated above, we are of the opinion that contempt proceedings cannot be taken in connection with the publication of news or articles as long as a criminal case is during the course of investigation and has not actually come to the Magistrate's Court for enquiry or trial. We might in this connection refer to certain observations made by Holmes J. in — 'Craig v. Hecht', (1923) 68 Law Ed 293 (J). At page 301 the learned Judge observes:

> "I think that the sentence from which the petitioner seeks relief was more than an abuse of power. I think it should be held wholly void. I think in the first place that there was no matter pending before the Court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published."

The case cited above also arose out of contempt proceedings though the actual point that arose in the case was different.

(20) The Hon'ble the Supreme Court of India has laid down in —'R. R. Chari v. The State of Uttar Pradesh', AIR 1951 SC 207 (K) that a Magistrate takes cognizance when the police have completed their investigation and come to the Magistrate for the issue of a process. It has further laid down that when the Magistrate applies his mind for the purpose of ordering investigation under S. 156 (3), or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence. In this case the above observations were made in connection with the question as to whether the sanction to prosecute the applicant had been obtained before the Magistrate took cognizance of the case or it was subsequently obtained and the argument on behalf of the applicant was that the Magistrate took cognizance as soon as the Magistrate issued a warrant for his arrest. The learned Judges repelled this plea and held that a Magistrate does not take cognizance of a case simply because he has issued a warrant of arrest. We are further of the opinion that a case does not come to Court by the issue of such processes and the publication of an article concerning the incident before the case has come on the file of a Magistrate, as a Court, does not amount to contempt of Court.

(21) We might now consider the question as to whether the publication of an article would amount to contempt when the institution of proceedings is imminent and the publisher has knowledge that they are so imminent. Excepting the observations in some of the Indian cases cited above, none of the English cases have laid down that the publication would amount to contempt if the prosecution was imminent.

(22) In '(1927) 1 KB 845 (D)' cited above, Lord Chief Justice Hewart observed as follows:

> "We are not called upon to consider the question whether there may be contempt of Court when proceedings are imminent but have not yet been launched. In the present case the question did not arise, for there was a charge and there had been an arrest, and proceedings therefore had begun. Some day that question may have to be decided."

After this case no case has been brought to our notice in which this question has been decided by the English Courts. But in one of the Indian cases reported in —'Tuljaram v. Governor, Reserve Bank of India', AIR 1939 Mad 257 (L) it was remarked that comment on a case which is about to come before the Court with knowledge of the fact is just as much a contempt as comment on a case actually launched. This case arose out of the publication of a letter in the Madras Mail during the course of the pendency of liquidation proceedings for the compulsory winding up of the Travancore National and Quilon Bank Limited. The application for winding up was presented on 22-6-1933 and the letter was published on 22-7-1938. The petitioner's complaint in the

case was that the letter in question constituted contempt of Court inasmuch as it expressed an opinion that the winding up petition should be granted and it was held that there was much force in this contention. There was a scheme of reconstruction under consideration at the time, though the scheme was actually put up before the Court after the publication of the letter; but the winding up proceedings were already pending and the question under consideration by us, in our opinion, did not really arise in that case. In the subsequent case of —'Rex v. Daily Mirror', (D) reference is made to 'Parke's case (A)' but the case is not taken as finally laying down the proposition that contempt proceedings can be taken even in respect of articles published when a cause is imminent. On the other hand, it was remarked that that question will have to be decided some day and the observations made in 'Parke's case (A)' were cited and distinguished. We have already mentioned the grounds on which, in our opinion, Parke's case (A)' can be distinguished from the present case.

(23) It would be very difficult to draw a line and to say that cases falling towards one side of the line are cases in which the cause was imminent and the cases falling on the other side are the cases in which the cause was not imminent. Extending the rule for the punishment of contempt of Court to cases which are imminent would unduly hamper with the freedom of speech of the citizen. In many cases, the citizen will have to take the risk of the Court coming to the conclusion that the case had become imminent, while he himself thought that it was not so imminent. It is a matter of every day occurrence that a civil suit is thought of; but, ultimately, for various reasons, the idea has to be given up and the case is never taken to the Court at all. Similarly in criminal cases, the accused persons are arrested by the police and at one stage the police is of the opinion that it would prosecute the arrested person; but subsequently, on the disclosure of some further fact or event, they decide not to take the case to the Court at all. At one time the case may appear to be imminent but subsequently it may transpire that it was not fit for the charge sheet to be submitted to Court. An arrest in England might necessarily mean the institution of criminal proceedings subsequently, but it is not so in our country. The extending of the punishment for contempt to cases which are only imminent, in our opinion, is not justified on the circumstances as they exist in this country. We, therefore, come to the conclusion that the preliminary objection should prevail; and no proceedings for contempt can be taken against the opposite parties, as the alleged acts were committed before Dwarka Prasad's complaint had been filed and long before the charge sheet had been submitted by the police to the Magistrate.

(24) We consider it desirable to discuss the other point also, as to whether the article dated the 6th of June published in Jagran and the resolution dated 8-6-1952 sent to the District Magistrate and the Superintendent of Police contained matters tending to interfere with the proper administration of justice and would have been punishable as contempt of the Magistrate, before whom the cases are pending, in case they had been published after the cases had come to Court. In our opinion, both the article and the resolution contained improper matter and would have merited punishment for contempt of Court. The article recites the incident giving the version of the opposite parties as the true facts of the case, and tries really to exaggerate it much beyond the allegations made in the police report by Sumer Singh. In this article it is said that 12 or 15 rioters attacked the shop of a businessman destroyed the goods, removed cash from cash-box, turned out the shop-keeper and his servants from the shop, and beat them mercilessly before hundreds of people. It is then said that the shop-keeper had given prior intimation to the police of the apprehended danger, but the police took no action and the persons against whom the complaint was made had committed similar incidents even before. Then it says that a few 'gundas' and rioters could after organizing themselves disturb the peace and administration of the city. The report made to the police by Sumer Singh only speaks of the beating of his master and of himself, and of the kicking of the cash-box which resulted in the dispersal of some small change and some notes. We do not want to go into any further detail, because the case is 'sub judice'. We have mentioned the contents of the article and the police report to show that the article did tend to prejudice the case against the applicant, and it very much exaggerated the offence and purported to support the version of the opposite parties. The resolution also purports to give the version of the opposite parties as the true facts of the occurrence and has tried to exaggerate the case. It also tended to interfere with the proper administration of justice and to prejudice the witnesses and others. In our opinion, the opposite parties would have been liable to punishment for contempt of Court in case the article had been published and the resolution had been passed after the institution of criminal proceedings in Court. But as they were of a prior date they do not amount to contempt of any Court. In this connection, we might also consider the question whether the prosecution of the applicant on the dates of the article and the resolution was imminent and the opposite parties knew that it was so imminent. As stated above, the police sent up the charge-sheet on 4-7-1952 nearly four weeks after the dates of the article and the resolution. The affidavit filed by the applicant does not disclose any facts which would show that the prosecution of the applicant and his companions was imminent on the 6th and 8th of June, excepting that three of the accused persons had been arrested and released on bail. It very often happens that even after such arrests, the proceedings are dropped and the case is not actually sent to court. The allegations in the report made by Sumer Singh did not disclose the commission of any serious offence, and nobody could be certain that the police would prosecute the applicant and his companions on a report containing such allegations. The very contents of the article and the resolution show that the opposite parties and their friends were not at all certain that the police would prosecute the applicant and the article as well as the resolution were written and published, or sent to the Superintendent of Police and the District Magistrate, in order that the accused might be prosecuted. The article and the resolution actually contain criticism of the inactivity of the police, and give reasons why the police should take action when offences like this are committed. They by no means show that the prosecution of the applicant's party was imminent and was known by the opposite parties to be imminent. The affidavit itself does not disclose any other fact to prove this, nor has any other evidence been led on behalf of the applicant to prove the said fact. As regards the complaint filed by the ap-

plicant on 11-6-1952, the opposite parties might very well have thought that the applicant would not like to go to Court at all; and he actually filed a complaint after nine days of the incident, which is an unusually long period taken for filing the complaint. No facts have been disclosed in the affidavit which would show that the opposite parties knew that the applicant was going to file a complaint on 11-6-1952. There is thus no proof of the fact that the institution of the complaint by the applicant was imminent on the 6th and 8th June, 1952, or the opposite parties knew that it was imminent. In our opinion, the applicant has totally failed to prove that the institution of any proceeding concerning this incident was imminent on the dates when the article was published or the resolution was passed. Nor could the opposite parties be said to have the knowledge on those dates that the proceedings were imminent. We, accordingly, dismiss this application, but taking into consideration all the facts of the case, we think the parties should bear their own costs.

(25) The learned counsel for the applicant has prayed for leave to appeal to the Hon'ble the Supreme Court. The question of law decided by us is one of general and public importance; but we have also held, on facts, that it has not been proved that any proceedings were imminent on the relevant dates, or that the opposite parties knew that any proceedings in Court were imminent on those dates. We, therefore, refuse to grant the leave prayed for.

B/V.S.B. Application dismissed.

A.I.R. 1953 ALL. 606 (Vol. 40, C. N. 299)

V. BHARGAVA J.

Ratan, Plaintiff-Appellant v. Achhey Lal, Defendant-Respondent.

Second Appeal No. 2018 of 1947, D/- 21-11-1950.

Registration Act (1908), S. 17(1)(b) — Future interest — Agreement to divide property before its purchase — Registration of.

An agreement before the purchase of certain property that, after its purchase in the name of A, the property would belong in equal shares to A and B does not require registration at all, as it does not declare any right even in future which might be called a vested or a contingent right: AIR 1938 Lah 721 and 89 Pun Re 1908, Relied. (Para 2)

Anno: Regn. Act, S. 17 N. 19 Pts. 2, 3.

Prem Narain Shukla, for Appellant; S. B. Johri and S. S. Varma, for Respondent.

CASES CITED:

(A) ('38) AIR 1938 Lah 721: 182 Ind Cas 220
(B) ('08) 145 PWR 1908: 89 Pun Re 1908

JUDGMENT: This is a plaintiff's appeal whose suit for possession over half portion of the disputed house by ejectment of the respondent has been dismissed by the lower appellate court. The plaintiff-appellant claimed that he was the sole owner of the whole house in dispute and that the respondent had been living in half the house with his consent, by which he meant that the respondent was a mere licensee. The trial court accepted the plea of the appellant and decreed the suit. The lower appellate court, however, disagreed with the trial court and held that the respondent's plea that he was himself the owner of half the house was correct and, therefore, dismissed the suit. The appellant challenges this finding of fact given by the lower appellate court.

(2) The lower appellate court's decision that the respondent is the owner of half the disputed house is based on a number of pieces of evidence including an agreement, dated 14-7-1937, which was entered into between these parties. The only question of law that has been urged on behalf of the appellant in this appeal is that the lower appellate court was wrong in admitting this agreement in evidence because it was not registered whereas, under S. 17, Registration Act, its registration was compulsory. The learned counsel for the appellant relied on the provisions of cl. (b) of subsection (1) of S. 17, Registration Act, his contention being that the agreement, dated 14-7-1937, purported to declare a right in future in an immovable property of the value of more than Rs. 100/- in favour of the respondent. The facts found by the lower appellate court, however, show that on 14-7-1937, when this agreement was executed, neither the appellant nor the respondent had any right or interest in this house. This house was purchased, for the first time in the name of the appellant and three other persons on 28-7-1937, from one Lachhman. On 14-7-1937, it appears that this purchase was under contemplation. In drafting the agreement, however, the language used was such as to indicate that the house had already become the property of these parties. The mere use of this language cannot be held to establish that there was any vested right in this property in either the appellant or the respondent at the time when this agreement was executed. The right was only acquired by means of the sale-deed, dated 28-7-1937. The agreement of 14-7-1937, could not, therefore, declare any right even in future which might be called a vested or a contingent right. This agreement has to be treated as an agreement that, after the purchase of this property in the name of the appellant, the property would belong in equal shares to the appellant and the respondent. Such an agreement does not require registration at all. This view of mine is supported by the view taken by a Division Bench of the Lahore High Court in — 'Dalip Singh v. Jagat Singh', AIR 1938 Lah 721 (A) which followed a previous decision of the same court in — 'Bhan Singh v. Thakar Das', 89 Pun Re 1908 (B). The facts of these two cases are very similar to the case before me. The learned counsel for the appellant has not been able to show any case law at all to the contrary. The decision of the lower appellate court that this agreement was admissible in evidence is, therefore, correct. The evidence provided by this agreement and the rest of the evidence believed by the lower court clearly lead to the inference that the defendant-respondent is the owner of half the share in the house so that the order passed by the lower appellate court is quite correct.

(3) The appeal fails and is dismissed with costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 ALL. 607 (Vol. 40, C. N. 300)

MALIK, C. J. AND AGARWALA J.

M. Amba Sahai, Plaintiff-Appellant v. Gopeshwar Babu Mehra and another, Respondents.

Second Appeal No. 813 of 1949, D/- 10-3-1953.

Custom (U. P.) — Custom of non-transferability of sites by Riyayas — Presumption as to.

The general presumption of custom as to non-transferability of sites by Riyayas that applies to an agricultural village and is recorded in village records like a 'wajibularz' will not be deemed to apply to such portions of the village as have ceased to be agricultural. In such a case the plaintiff has to prove by positive evidence that even in the portion which has become non-agricultural the custom of non-transferability prevails: AIR 1949 All 410 Rel. on; AIR 1927 All 605, AIR 1927 All 609 and AIR 1947 All 388 Distinguished. (Para 6)

P. M. Verma, for Appellant; H. P. Gupta, Gopalji Mehrotra, Gopal Behari and D. D. Seth, for Respondents.

CASES CITED:

(A) ('27) AIR 1927 All 605: 102 Ind Cas 596
(B) ('27) AIR 1927 All 609: 102 Ind Cas 586
(C) ('47) AIR 1947 All 388: 1947 All LJ 71
(D) (49) AIR 1949 All 410: ILR (1949) All 888

AGARWALA J.: This is a plaintiff's appeal arising out of a suit for possession over a house. The plaintiff alleged that he was the zamindar of mohal Basanti Har Prasad in village Nekpur Gauntia Beldaran, that the house in dispute was in the occupation of a 'riyaya', Rajjoo Lal, who was arrayed in the suit as defendant 2, that in August, 1935, the house was sold by Rajjoo Lal in execution of a simple money decree against him and was purchased by one Chet Ram who sold it to Gopeshwar Babu Mehra defendant 1, that there was a custom in village Nekpur Gauntia Beldaran that no 'riyaya' could transfer the site of the house, that the transfer of the house in execution sale was contrary to the custom and was not binding on the plaintiff-zamindar and that, therefore, he was entitled to take possession of the house.

The plaintiff further pleaded that Rajjoo Lal was a 'chantidar' (licensee), that he had executed an 'Ijazatnama' and had paid rent for the site over which he had constructed the house in dispute and that as such the custom prevalent in the village applied to him. Rajjoo Lal did not contest the suit; only Gopeshwar Babu Mehra defendant 1 contested it. His case was that the plaintiff was not the owner of the site, that village Nekpur Gauntia Beldaran was not an agricultural village, that the custom pleaded by the plaintiff did not prevail in the village and that the execution sale of the house was perfectly valid. The trial Court held that the village was divided into two portions — one portion was to the north of the railway line and the other was to the south of it — that the portion to the north of it, in which the house in dispute was situated, had ceased to be agricultural and was a part of the city of Bareilly for, at least, 20 years before the institution of the suit, that Rajjoo Lal and his ancestors, who were 'beldars', were 'riyayas' of the plaintiff who was the owner of the site, that the custom alleged by the plaintiff prevailed in the entire village including the portion which had ceased to be agricultural and in which the house in dispute was situated and that, therefore, the execution sale of the house and its transfer by Chet Ram to Gopeshwar Babu Mehra defendant 1 was void. In the result, it decreed the suit of the plaintiff.

The lower appellate Court differed and held that the portion of village Nekpur Gauntia Beldaran, in which the house in dispute was situated, had ceased to be an agricultural village, that there was no presumption that the custom of non-transferability of the sites by 'riyayas' applied to the portion which had ceased to be agricultural, that the mere fact that Rajjoo Lal was a 'beldar' did not imply that he was a 'riyaya' of the plaintiff, that Rajjoo Lal was not, in fact, an agricultural labourer and that it was not established that the house in suit was given to him or to his ancestors by the plaintiff under a license. Therefore, it allowed the appeal of the defendant. Against this order of the lower appellate Court, the plaintiff has come to this Court by way of second appeal.

(2) There are two main points to be considered in the case:

" (1) Whether Rajjoo Lal was in occupation of the house in dispute as 'riyaya' or licensee, and

(2) If so, whether there was a custom in the locality in which the house was situated prohibiting the 'riyaya' from transferring the right of residence."

(3) To determine both these points it is necessary to find whether the locality in which the house is situated is an agricultural village or not. Both the Courts below have found that the village Nekpur Gauntia Beldaran was at one time an agricultural village. This village is divided into two portions by a railway line. The house in dispute is situated in the portion lying to the north of the railway line. It is the concurrent finding of both the Courts below that this portion had become a part of the city of Bareilly and is no longer an agricultural village for at least the last 20 years. In an agricultural village the zamindar is the owner of every inch of the land. If a resident is an agriculturist or is a workman whose services are needed in the interest of the village community, the presumption is that such a person occupies his house with the leave and license of the zamindar and is, therefore, a licensee. But if the occupier of the house is neither an agriculturist nor a person such as described above, his occupation is not presumed to be by leave or license. He will then be deemed to be in occupation by adverse possession. Since the portion of the village in which the house in dispute is situated has ceased to be village, no presumption of his residence therein by leave and license of the zamindar can be raised. In his case evidence will have to be led to show that he came into occupation of his house at a time when the locality was agricultural, in which case the presumption about his residence being by leave and license will be drawn, and once drawn will continue to be drawn, or it will have to be established that in fact the person in question came into occupation of his house by leave and license of the zamindar.

The plaintiff's case was that at one time the village was agricultural and that at that time Rajjoo Lal's ancestor Ganga Ram was in occupation of the house, and that since he was a 'beldar', i.e., a labourer, he should be presumed to be in possession as a 'riyaya'. The plaintiff's case further was that Rajjoo Lal himself was a licensee having executed a deed of license (chantinama). None of these contentions can be accepted. Ganga Ram seems to have occupied some house in the village but there is no evidence to show that he occupied the house in dispute. Indeed this could not be so because Rajjoo had purchased the materials of the house from certain persons, and

had not therefore inherited it from his ancestors. The fact that Ganga Ram or Rajjoo Lal was a 'beldar' does not establish that he was in occupation of his house by leave or license of the zamindar. It is not the caste of the occupier that matters, it is his 'occupation' that enables the presumption of his possession as a licensee to be raised. It has been found by the Courts below that Rajjoo Lal does not work as a labourer. Therefore no presumption can be raised about Rajjoo Lal occupying the house as a licensee. His occupation would, therefore, be deemed to be adverse to the zamindar and he acquired proprietary title thereto after 12 years' possession.

(4) As to the contention that Rajjoo Lal was a licensee because he executed a deed of license, it has been found by the Courts below that the 'chantinama' was a suspicious document and that the receipts of the rent were also of the same type. Therefore Rajjoo Lal's occupation as a licensee has not been established. This alone is sufficient for the dismissal of the plaintiff's suit.

(5) Even if Rajjoo Lal was a 'riyaya', we have to see whether it was established that the custom of transferability of the right of residence applied to him. In agricultural villages the presumption is in favour of the existence of such a custom. But here again since the locality has ceased to be agricultural no such presumption can be raised. There is a 'wajibularz' of 1899 in which a custom prohibiting transfer of sites by 'riyayas' is recorded. Learned counsel has argued that the custom recorded in the 'wajibularz' should be deemed to apply even to areas of the village which have, after preparation of the wajibularz, ceased to become agricultural. Learned counsel has relied on several cases in support of his contention. In — 'Sheo Shankar Das v. Ram Tahal Koeri', AIR 1927 All 605 (A), Sir Iqbal Ahmad had a case in which a certain area of an agricultural village was included within the municipal limits. The learned Judge held that the mere fact that a portion of the village was included within municipal limits did not destroy the presumption of the prevalence of the custom. In that case, it was not found that the portion, which had been included within municipal limits, had ceased to be an agricultural area. The same remarks apply to the case of — 'Rafiullah Khan v. Mt. Mumtaz Begum', AIR 1927 All 609 (B). The case of — 'Ram Sahai v. Hari Shanker', AIR 1947 All 388 (C), was, no doubt, a case in which an area of part of an agricultural village had become non-agricultural and had been included within the limits of a town. A learned Single Judge of this Court, however, held on the evidence on the record that the custom was established. The learned Judge did not base his decision on any presumption of prevalence of the custom in the area which had become non-agricultural. Even, in a non-agricultural area, a custom of non-transferability can be established if satisfactory evidence be adduced. The learned Single Judge held that, in that case, there was sufficient evidence to prove the custom. In the present case, however, as already stated the Court below has held that the evidence adduced by the plaintiff failed to establish the custom in village Nekpur Gauntia Beldaran. This finding has not been challenged before us. The matter was discussed by a Bench of this Court, of which one of us was a member, in — 'Patan Ram v. Dhanushdhariji', AIR 1949 All 410 (D), where it was held that where a plaintiff challenges a tenant's right to transfer a house in a town, it is for him to show that the custom upon which he relies is continuous and invariable and to explain away the instances of unobjected transfers. It was observed:

> It is clear that the plaintiff in order to succeed in this case must show that either there is a custom or a contract which prohibits the transfer of a house or a site by a resident in a town. The plaintiff has relied upon Ex. 1 for the custom or contract which prohibits the transfers in the present case. It is for him to show that 'Iqrar-i-malikan Deh', Ex. 1, does apply in the present case. It has already been pointed out that, at least, a portion of village Chak Gaura Patti was included within the municipal limits of Faizabad city in 1869 four years before the 'Iqrar-i-malikan Deh' was prepared. The prohibitions imposed on the right to transfer materials of the house or the contingencies under which a house escheats to the proprietor relate specifically and pointedly to 'bashindagan-i-Deh', that is, residents of the agricultural portion of the village. This must be so also because clearly a certain portion of Chak Gaura Patti was already included within the city of Faizabad and was no longer part of the agricultural village. It would thus appear that the restrictions imposed apply only to the residents of the agricultural portion of the village and not to residents of that portion which had already been included within the city of Faizabad."

The case is, no doubt, distinguishable from the present case on the ground that, in that case, the portion of the village in dispute had ceased to be agricultural before the 'Iqrar-i-malikan Deh' was prepared whereas, in the present case, the same cannot be said so far as the 'wajibularz' of 1899 is concerned. Nevertheless, that case makes a distinction between a portion of the village which has ceased to be agricultural and the portion which still remains to be agricultural.

(6) In order that the general presumption may arise, what one has to see is the state of affairs on the date on which the cause of action arose. If, on that date, the disputed property is part of a non-agricultural village or town, the general presumption of custom that applies to an agricultural village and is recorded in the village records like a 'wajibularz' will not be deemed to apply to such portions of the village as have ceased to be agricultural. A 'wajibularz prepared at a time when the village was agricultural and applying by its very terms to an agricultural community cannot apply to a village or a portion thereof which has ceased to be agricultural as the circumstances of the life of the residents of the village or of the portion concerned, have materially altered. In such a case the plaintiff has to prove by positive evidence that even in the portion which has become non-agricultural the custom of non-transferability prevails. As already stated, the plaintiff has failed to establish this.

(7) There is no force in this appeal and we dismiss it with costs.

B/G.M.J. Appeal dismissed.

A.I.R. 1953 ALL. 608 (Vol. 40, C. N. 301)

WALLI ULLAH AND AGARWALA JJ.

Mt. Sukhwanti Mata Ghulam, Applicant v. Hon'ble Board of Revenue, U. P. through Registrar and others, Opposite Party.

Writ Appln. No. 341 of 1950, D/- 3-11-1950.

Tenancy Laws — U. P. Tenancy Act (XVII (17) of 1939), Sch. II, List II, Serial No. 13 — 'Party' — Meaning of — Civil P. C. (1908), O. 41, R. 11.

The word 'party' in Serial No. 13 cannot be said to be used as distinguished from the pleader acting on behalf of the party. It is not at all necessary for the Board of

Revenue to hear either a party or his pleader before disposing of an appeal under O. 41, R. 11, Civil P. C. (Para 4)

Anno: Civil P. C., O. 41, R. 11 N. 2.

G. P. Bhargava, for Applicant.

ORDER: This is an application under Art. 226 of the Constitution praying for the issue of a writ of 'certiorari'. The application is supported by an affidavit in which the facts are set out.

(2) It appears that the applicant instituted a suit for division of cerain holdings under S. 49, U. P. Tenancy Act, and claimed one third share therein. The suit was dismissed by the Revenue Officer and on appeal, the order of dismissal was confirmed by the Additional Commissioner. Thereafter a second appeal was filed before the Board of Revenue. In due course, the appeal came on for hearing under O. 41, R. 11, Civil P. C., and it was dismissed summarily on 22-11-1949. Consequent upon the dismissal of the appeal, an application for the review of judgment was filed which was also dismissed on 15-6-1950. It appears from the affidavit in support of the application that the appellant had engaged a lawyer to argue her appeal before the Board of Revenue but no opportunity was given to the pleader to argue the appeal and it was dismissed under O. 41, R. 11, Civil P. C.

(3) Learned counsel for the applicant contended that the Board of Revenue was bound to give the appellant, or her pleader, an opportunity to be heard before it dismissed the appeal on 22-11-1949. In this connection, reference has been made to the second schedule, appended to the U. P. Tenancy Act 1939. In list II of the second schedule certain sections and orders of the Code of Civil Procedure are specified and it is provided that they would apply to suits or proceedings under the Tenancy Act with the modifications stated against each. Serial No. 13 in list II relates to O. 41, R. 11, Civil P. C. The modification contained in the third column reads as follows:

"Nothing in this rule shall require the Board to hear any "party" before rejecting an appeal summarily."

(4) Learned counsel has had to concede that, by reason of this modification, the Board of Revenue was not bound to hear the "party" i.e., the appellant in support of her appeal. His contention, however, is that there is a sharp distinction between three classes of persons dealt with by O. 3 of schedule 1, Civil P. C. His argument is that Rule 1 of Order 3 draws a distinction between the "party", his "recongnised agent" and "a pleader on party's behalf" and therefore the modification of Order 41, Rule 11, Civil P. C. introduced in List II of the second Schedule of the Tenancy Act, where it speaks of a "party", must be interpreted in the sense that the word "party", is used as distinguished from the "pleader acting on behalf a party". Learned counsel, therefore, argues that the Board of Revenue was bound to hear the 'pleader' for the party in support of the appeal before it could summarily dispose of it under O. 41, R. 11, Civil P. C. In our opinion, there is no substance in this argument. If a party has no right to be "heard", a pleader representing such a party has no locus standi and can have no right to be "heard". When the modification of Rule 11 was made by the U. P. Tenancy Act, it seems to us, the legislature deliberately introduced the modification in regard to the question of hearing arguments in support of an appeal, before rejecting it summarily. A modification in the same term was also made by the Agra Tenancy Act of 1926 (Vide the second schedule, list II, serial No. 15 of that Act). It has been a long standing practice in the Board of Revenue to dispose of an appeal summarily under O. 41, R. 11 without hearing either the counsel or the party in a particular case. We have no doubt in our minds that the legislature by introducing the modification of O. 41, R. 11 of the Civil P. C. into schedule 11 of the Tenancy Act clearly intended to give statutory recognition to the practice recognized by the Board of Revenue for a long number of years. We think that it was clearly intended by the legislature that it was not at all necessary to hear either a party or his pleader before disposing of an appeal under O. 41, R. 11, Civil P. C. We accordingly overrule this contention. No other point has been pressed before us. The application fails and we accordingly dismiss it.

C/D.H. Application dismissed.

A. I. R. 1953 ALL 609 (Vol. 40, C. N. 302)

MALIK C. J.

Tula Ram, Plaintiff-Applicant v. Bhajan Singh, Defendant-Opposite Party.

Civil Revn. No. 115 of 1948, D/- 29-11-1950.

Civil P. C. (1908), O. 4, R. 1 — Time of presentation (Plaint — Presentation).

Though a judicial officer is not bound to accept a plaint or an application presented to him after court hours, as far as possible, if that is the last day of limitation, he should, if it is not too inconvenient, accept the plaint or application and direct it to be put up before him the next day in Court for further orders. Returning plaint to lawyer after such acceptance is illegal. (Paras 2, 3)

Anno: C.P.C., O. 4 R. 1 N. 6.

Brij Lal Gupta, for Applicant.

CASE CITED:

(A) ('12) 34 All 482: 9 All LJ 743 (FB)

ORDER: On 22-8-1944, the defendant Bhajan Singh is said to have borrowed a sum of Rs. 700/- from the plaintiff Tula Ram on the basis of a promissory note. On 22-8-1947, the plaintiff on his return to his house in Najibabad discovered that that was the last day for the filing of the suit on the basis of the promissory note. He had a plaint hurriedly drafted and went to Nagina, where the court is situate, and at 9-30 P.M. Mr. Ranbir Singh, Vakil for the plaintiff, went to the residence of the learned Munsif and wanted to file the plaint. The learned Munsif passed the following order on the back of the plaint:

"Presented to me by Mr. Ranbir Singh Vakil at 9-30 P.M. on 22nd August 1947, at my house. I do not think it proper to accept it at this late hour and, therefore, refuse to accept it and return it back to the said Vakil."

It is against this order that this revision has been filed. The opposite party is not represented before me.

(2) In a Civil Revision under S. 115, C.P.C. this Court can interfere only on a question of

jurisdiction and while it is desirable that a claim should not be allowed to get time-barred by a judicial officer refusing to accept a plaint presented after court hours on the last day of limitation, which through some honest mistake could not be filed earlier, yet I am not prepared to hold that a Judicial Officer has no jurisdiction to refuse to accept a plaint presented to him after court hours and must, therefore, accept a plaint presented at any time from early in the morning till 12 o'clock in the midnight. The Limitation Act, which prescribes the period of limitation for a suit, no doubt does not lay down that on the last day of limitation the plaint should be filed within court hours after which it would get time-barred. In this connection I may refer to the case of — 'Din Ram v. Hari Das', 9 All LJ 743 (FB) (A), where a memorandum of appeal presented at the residence of the District Judge on the last day of limitation after court hours was held to be not time-barred. After court hours, however, a judicial officer is not bound to do judicial work and he is, therefore, not bound to accept plaints or applications at his residence. The difficulty is not felt so much by a court of appeal as S. 5, Limitation Act, applies to appeals and on sufficient cause being shown delay can be condoned, but in a court entertaining original suits the refusal to entertain a plaint filed after court hours puts an end to the claim of the plaintiff if that is the last day of limitation as S. 5, Limitation Act, does not apply to original suits. To my mind therefore though a judicial officer is not bound to accept a plaint or an application presented to him after court hours, as far as possible if that is the last day of limitation he should, if it is not too inconvenient, accept the plaint or application and direct it to be put up before him the next day in court for further orders.

(3) In this case the plaint was presented to the learned Munsif within time and he received the plaint and endorsed on it an order in his own hand on the back of the document. After having done so he should not have returned it to the lawyer concerned. When the court receives an application and passes an order thereon it becomes a part of the record of the court and it cannot be returned to counsel or to parties. The learned Munsif might have refused to accept the plaint but having taken it and written on the back of it an order that it was presented that day, he should not have returned the document to the lawyer concerned.

(4) In this view of the matter the revision must be allowed and the order of the learned Munsif returning the document to the lawyer set aside. The plaint having been presented to him within time on 22-8-1947, it must go back for trial according to law. I notice, however, that a court-fee stamp of only Rs. 5/- was paid on the plaint. I direct that the court-fee should be realised according to the provisions of the Court-fees Act.

C/D.H. Revision allowed.

A. I. R. 1953 ALL 610 (Vol. 40, C. N. 303)

AGARWALA AND CHATURVEDI, JJ.

Soney Lal and another, Applicants v. State, Criminal Appeal No. 1004 of 1950, D/- 16-3-1953.

(a) High Court Rules and Orders — Allahabad H. C. Rules, Chapter 23, Rule 28 — Validity — (Constitution of India, Arts. 132(1), 134(1)(c)).

Under Rule 28, Chapter 23, High Court Rules, application for leave to appeal has to be made before or at the time of delivery of judgment — Rule is not ultra vires. (Para 2)

(b) Constitution of India, Art. 134(1)(c) — Question involved purely one of fact — No certificate. **(Para 2)**

S. N. Misra, for Applicants.

AGARWALA, J.: This in an application for leave to appeal to the Supreme Court against a decision of this Court dismissing the appeal of the applicants against their conviction under S. 325 read with S. 149, I. P. C. The application was not made before, or at the time of, the delivery of judgment as required by Rule 28, Ch. 23 of the Rules of the Court but was made later on. The application is liable to be dismissed on the ground that it has not been made in accordance with the aforesaid rule. But it is contended by learned counsel that the rule itself is 'ultra vires.' We are not prepared to accept this contention.

(2) Rule 28, Ch. 23 of the Rules of the Court provides:

"An application for a certificate under Art. 132 (1) or 134(1)(c) of the Constitution in a Criminal proceeding shall be made to the Court orally or in writing before or at the time when any judgment, final order or sentence is passed. The Court shall thereupon record an order granting or refusing to grant such certificate".

The provision regarding an application being made "before any judgment, final order or sentence is passed" at first sight would appear to be peculiar and impossible of compliance. But this provision is intended for the convenience of counsel who after the close of the arguments wish to absent themselves from the Court when the judgment is being delivered or if the judgment is reserved when it is to be delivered on a future date, so that they may in that case make an oral request to the court that in case the case is decided against their clients they may be granted leave to appeal to the Supreme Court. The provision is merely enabling and not obligatory. The application may be made at the time of delivery of judgment. No objection can be taken to the provision that the application should be made at the time when any judgment final order or sentence is passed. Judgments are delivered in open court and counsel can at once apply to the Court, either orally or in writing, whether they want a certificate under Art. 132(1) or Art. 134(1)(c) of the Constitution.

The bar to an application being made later on is intended to prevent accumulation of work in this Court and waste of the time of the Court in hearing the application later on. If the application is made at the time when the judgment is delivered, all the facts of the case are in the minds of the judges deciding the case and they can decide the application forthwith without wasting any time. We do not think that Rule 28 is 'ultra vires' of the powers of the Court.

However we have heard learned counsel in support of the application and considered the facts of the case on their merits and have come to the conclusion that there is no force in this application. The Court believed the

prosecution witnesses and disbelieved the defence. The eye witnesses had implicated all the applicants and it was not necessary in the circumstances to examine the individual cases of the applicants because the evidence against each of them was identical. The common object of the applicants was found to be the giving of a severe beating to the deceased. The inference as to the common object may be deduced from the circumstances appearing in the case. It is not necessary, and indeed often impossible, that there should be direct evidence of common intention. The question involved in the case was purely one of fact and we do not think that we will be justified in granting the certificate prayed for by the applicants.

(3) The application is rejected.

A/R.G.D. Application dismissed.

A. I. R. 1953 ALL 611 (Vol. 40, C. N. 304)

AGARWALA AND P. L. BHARGAVA JJ.

Bahadur Singh and another, Appellants v. Ram Prasad, Respondent.

Ex. First Appeal No. 53 of 1947, D/- 28-9-1951.

Debt Laws — U.P. Debt Redemption Act (13 of 1940), S. 17 — Section 16, Rules under — Rr. 3, 4 — Powers of Civil Court.

Where the judgment-debtors in their objection clearly claimed the relief provided in S. 17, the question whether the mortgaged property, which was sought to be sold in execution of the decree, was protected land could only be determined by the Collector in accordance with Rr. 3 and 4. AIR 1949 All 752 and AIR 1950 All 94, Rel. on. (Paras 5, 7)

S. B. L. Gour, for Appellants; A. P. Gupta, for Respondent.

CASES CITED:

(A) ('49) AIR 1949 All 752: 1949 All LJ 222

(B) ('50) AIR 1950 All 94

P. L. BHARGAVA J.: This is a judgment-debtors' appeal. The facts and circumstances which have given rise to this appeal are these: The appellants, Bahadur Singh and his son Durag Singh, were indebted to different persons and their ancestral zamindari property, for which they paid less than Rs. 250/- as land revenue, was burdened with three mortgages, — one in favour of Gopal, the other in favour of Chunni and the third in favour of Ram Prasad, who is respondent in this appeal. The appellants also owed some money to Ganga Sahai, who obtained a simple money decree in respect thereof. In execution of that decree, the property mortgaged under the three mortgages aforesaid was attached and sold. It was purchased by Durag Singh appellant and the three mortgagees were notified at the time of the sale. After the execution sale just mentioned, Gopal and Chunni also obtained decrees on the basis of their respective mortgages, and in execution of their decrees, self-liquidating mortgages were executed in respect of the mortgaged property. Then Ram Prasad, the respondent, also obtained a decree on the basis of his mortgage and put the decree in execution by sale of the mortgaged property. The execution of the decree was transferred to the Collector, under S. 68, Civil P. C. and under R. 3 of the Rules framed by the Government, under S. 16, U. P. Debt Redemption Act, 1940. During the pendency of the execution proceedings in the Court of the Collector, the appellants filed an objection, purporting to be under S. 47, Civil P. C. In this objection, it was alleged by them that the execution of the decree had been transferred to the Collector; that they formed a Hindu joint family and paid less than Rs. 250/- as land revenue; and that under new law (evidently the reference was to the U. P. Debt Redemption Act, 1940) the mortgaged property was not liable to sale, although it could be transferred by means of a self-liquidating mortgage.

(2) The learned Civil Judge of Aligarh, before whom the objection was filed, entertained it and proceeded to dispose it of. He recorded a finding that Durag Singh, by virtue of the sale in his favour, became owner of the property and as he had admittedly purchased only the equity of redemption, the property was not "protected" in the hands of Durag Singh, who was only a subsequent purchaser subject to the mortgages. Accordingly, he dismissed the objection. Against the order dismissing the objection, the present appeal has been filed by the appellants.

(3) Learned counsel for the appellants has challenged the finding of the trial Judge to the effect that Durag Singh had become the owner of the property and that it was liable to sale. On behalf of the respondent, it has, however, been contended that the Court below had no jurisdiction to entertain the objection, as the objection being in substance for obtaining relief under S. 17, Debt Redemption Act, it should have been filed before the Collector.

(4) A reference has already been made to R. 3 of the Rules framed by the Government under S. 16, Debt Redemption Act. That rule provides:

"3. The execution of all decrees to which the Act applies in which a civil Court has ordered any land situated in the United Provinces or any interest in such land, to be sold or otherwise transferred, shall be transferred to the Collector."

The next R. 4 is in these terms:

"(1) On receipt of a decree for execution under R. 3, the Collector shall, having regard to the provisions of cl. (c) of S. 3, and the first proviso of sub-s. (1) of S. 17 of the Act, proceed to determine the local rate payable by, or recoverable from the judgment-debtor, or each of the judgment-debtors where there are more than one.

(2) Where the local rate determined under sub-r. (1) in regard to any judgment-debtor does not exceed Rs. 25/-, the whole of his land shall be determined as protected land.

(3) Where the local rate so determined in regard to any judgment-debtor exceeds Rs. 25/-, the Collector shall, with due regard to the wishes of the judgment-debtor, proceed to determine what portion of the land shall be protected land.

(4) The Collector shall also see that the area of the land determined under sub-r. (3) is as far as possible compact, and is situated in a village in or near which the judgment-debtor resides."

The rule just quoted empowers the Collector to determine the local rate and then to decide whether the land sought to be sold in execution of the decree is protected land or not. Section 17, Debt Redemption Act provides that notwithstanding anything contained in S. 16 or in any other law for the time being in force, the land of an agriculturist, the local rate payable by whom does not exceed twenty-five rupees per annum, shall not be sold or otherwise transferred in execution of a decree to which this Act applies, nor shall a final decree for foreclosure be passed in respect of such land. The section also provides that the Court may execute a decree to which this Act applies by granting to the decree-holder a self-

liquidating mortgage for a specified period of such land as is protected from sale, transfer or foreclosure by the provisions of that section.

(5) The appellants in their objection clearly claimed the relief provided in S. 17, Debt Redemption Act and the question whether the mortgaged property, which was sought to be sold in execution of the decree, was protected land could only be determined by the Collector in accordance with the rules to which reference has already been made. The civil Court having transferred the execution of the decree to the Collector and also in view of the provisions of the rules to which reference has already been made above had no jurisdiction to grant the relief which was claimed by the appellants.

(6) Our attention has been invited by the learned counsel for the respondent to a decision of this Court in — 'Har Prasad v. Budh Singh', AIR 1949 All 752 (A), where it was pointed out that the Civil Court has no jurisdiction to determine an objection claiming the benefit of S. 17 (1) (a), Debt Redemption Act, and that by virtue of R. 4, Debt Redemption Act Rules, the jurisdiction vests solely in the Collector and the civil Court has no jurisdiction in such matters. In our opinion, the law has been correctly laid down in the case cited above. This view is also supported by a decision of the Division Bench of the Lucknow Bench of this Court: — 'Jitendra v. Ballabh Das', AIR 1950 All 94 (B).

(7) In our opinion, the objection filed by the appellants in the Court below was not maintainable and, as such, it should have been returned for presentation to the proper Court.

(8) Accordingly we allow this appeal, set aside the order of the Court below and send back the case to the Court below with a direction that the objection filed by the appellants shall be returned to them for being presented to the proper Court.

(9) The respondent is, however, entitled to costs of this appeal.

C/D.H. Appeal allowed.

A. I. R. 1953 ALL 612 (Vol. 40, C. N. 305)

BRIJ MOHAN LALL J.

Mahesh Chand, Appellant v. Brij Mohan, Opposite Party.

Civil Revn. No. 399 of 1950, D/- 22-11-1950.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3-A, 5 — Rent assessed under S. 3-A — Tenant cannot refuse to pay agreed rent until rent is taken under S. 5(4). (Para 7)

Jagnandan Lal; Vishwa Mittra and Shanti Bhushan for Appellant; S. B. L. Gaur, for Opposite Party.

ORDER: This is an application in revision by a plaintiff whose suit for arrears of rent in respect of a shop has been dismissed by the learned Judge, Small Cause Court of Meerut.

(2) The shop in question was constructed after June 1946. It was let out to the opposite party by the applicant on a monthly rent of Rs. 200/-. On 1-4-1949 the parties entered into an agreement by which the rent was reduced, with the consent of the parties, to Rs. 150/- per mensem, in addition to house tax. It was paid before the tenth day of the succeeding month, a rebate of Rs. 25/- per mensem would be granted to the opposite party.

(3) Sometime in January 1950 the opposite party got reasonable annual rent fixed by the District Magistrate under S. 3-A, U. P. Temporary Control of Rent and Eviction Act (3 of 1947). The District Magistrate fixed the reasonable annual rent at Rs. 80/- per mensem.

(4) The applicant instituted this suit for the recovery of Rs. 82/8/- as one month's rent. His case is that the rent amounted to Rs. 150/-, as agreed, and the house tax amounted to Rs. 12/8/-. This brought the total to Rs. 162/8/-. A sum of Rs. 30/- had been paid by the opposite party in cash and a sum of Rs. 50/- had been appropriated by the applicant towards rent out of a certain fund which had been placed by the opposite party at the applicant's disposal and out of which appropriation towards rent could be made at the rate of Rs. 50/- per mensem.

(5) The defence was that since the District Magistrate had fixed the reasonable annual rent at Rs. 80/- per mensem and since a sum of Rs. 30/- had been paid in cash and the balance of Rs. 50/- had been appropriated towards rent out of the aforesaid fund, nothing more was recoverable from the defendant. The whole dispute therefore narrowed down to the question whether the rent which could be recovered by the plaintiff-applicant was Rs. 150/- plus Rs. 12/8/- as house tax or Rs. 80/- as fixed by the District Magistrate.

(6) The learned Judge Small Cause Court, was of the opinion that since the rent had been fixed by the District Magistrate under section 3-A of the Act, nothing more could be recovered by the plaintiff-applicant. It is contended before me by the learned counsel for the applicant that this view is erroneous. I have heard both parties, and I am of the opinion that the contention put forward by the learned counsel for the applicant is well-founded.

(7) Section 5(1) of the Act lays down that:

"Except as hereinafter provided in this section, the rent payable for any accommodation, to which this Act applies, shall be such as may be agreed upon between the landlord and the tenant".

Thereafter it is provided that, if the tenant feels that the agreed rent is in excess of the annual reasonable rent, he may institute a suit for fixation of rent in the court of the Munsif or the Civil Judge, according to the valuation of the claims. It was, therefore, open to the opposite party to avail of this provision of law and to institute a suit in appropriate court to get the agreed rent, which was much in excess of the annual reasonable rent, reduced. After the rent had been reduced by court, the rent fixed by the court would have been the rent payable by the tenant to the landlord under S. 5(5) of the Act. But so long as that step was not taken, the agreed rent was the rent payable by the tenant. The mere circumstance that the annual reasonable rent had been assessed by the District Magistrate at a figure lower than the agreed rent was not by itself sufficient to entitle the defendant to pay the annual reasonable rent in place of the agreed rent.

(8) The opposite party has not yet taken the step provided by S. 5(4) of the Act and has not instituted a suit of the kind contemplated by that sub-section. He cannot, therefore, contend that it is the annual reasonable rent which is payable by him in place of the agreed rent.

(9) The amount of house tax has not been determined by the lower court and the suit has to be remanded.

(10) The revision is allowed. The decree of the Judge, Small Cause Court, is set aside. The case is remanded to the learned Judge, Small

Cause Court, to readmit it to its original number, to determine the amount of house tax and thereafter to dispose of the suit according to law. The applicant shall get his costs of this Court. Costs of the trial court shall be in the discretion of the learned Judge, Small Cause Court.

C/D.H. Order accordingly.

A. I. R. 1953 ALL 613 (Vol. 40, C. N. 306)

RAGHUBAR DAYAL AND AGARWALA JJ.

Smt. Bimla Devi, Petitioner v. Chaturvedi and others, Opposite-Party.

Criminal Misc. Case No. 2733 of 1951, D/- 12-3-1953.

(a) Constitution of India, Arts. 226 and 227 — Scope — (Abducted Persons (Recovery and Restoration) Act, 1949), S. 8.)

Section 8, Abducted Persons (Recovery and Restoration) Act does not affect the High Court's power to issue writs or orders or directions to the tribunal under Art. 226 or 227 of the Constitution. (Para 5)

(b) Government of India Act (1935), Sch. VII — Entries — Interpretation — (Civil P. C., (1908), Preamble) — (Interpretation of Statutes).

The entries are construed in their broadest sense subject only to the limitation imposed by a similar construction of the entries in the other Lists. It is only when there is a conflict between entries in different Lists and a need arises to attempt a reconciliation between apparently conflicting jurisdictions that an entry in one List may be read as having been used in a modified sense. (Para 8)

Anno: Civil P. C., Preamble N. 9.

(c) Government of India Act (1935), Sch. VII, List 1, Entry 3 — "Implementing of treaties and agreements with other countries".

The phrase "implementing of treaties and agreements with other countries", has to be read in its broadest sense which the words of the Entry are capable of. Read in this light it appears that the Legislature has power not merely to make rules as to the mode in which treaties and agreements with foreign countries should be regulated but also to make laws on the subject-matters of the treaties and agreements so that they may be given effect to in India. (Para 8)

Abducted Persons (Recovery & Restoration) Act (1949), falls under the Entry.

The true nature and character of the legislation (the Abducted Persons Recovery and Restoration Act) is the implementing of an agreement with Pakistan. The Act does not merely deal with any consequential result of the subject-matter of the agreement between India and Pakistan but it deals with the subject-matter itself. (Para 10)

(d) Constitution of India, Art. 141 — Law deliberately pronounced — (Precedents — Supreme Court — Obiter).

Where the Supreme Court deliberately with the intention of settling the law pronounces upon a question, the pronouncement is the law declared by the Supreme Court within the meaning of Art. 141 and is binding on all Courts in India. It cannot be treated as a mere 'obiter dictum'. (Para 11)

It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued before the Court, may not be considered to be binding, and in such cases the binding nature of the observation of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of counsel, when a point is not argued, are not binding but otherwise even what is generally called an 'obiter dictum', provided it is upon a point raised and argued, is binding upon the Courts in India. (Para 13)

(e) Abducted Persons (Recovery and Restoration) Act (1949), Preamble — Act is not inconsistent with Art. 19(1)(d), (e) and (g) — (Constitution of India, Art. 19(1)(d), (e) and (g).) AIR 1950 S. C. 27, AIR 1953 S. C. 10; Followed. (Para 13)

(f) Abducted Persons (Recovery and Restoration) Act (1949), Preamble — Object is not deportation of citizen but restoration of abducted persons to their relatives — (Constitution of India, Art. 19)

There is no question of deportation of an Indian citizen under the Abducted Persons (Recovery and Restoration) Act. The object of the Act is to restore abducted persons to their relatives. By his or her restoration to his or her family in Pakistan, an Indian citizen does not cease to be an Indian citizen, unless he or she of his or her free will wishes to give up that status. He or she is conveyed out of India, not on account of a prohibition to reside in India but only for the purpose of restoring him or her to his or her relations. 'Conveyance out of India' in the Act is, therefore, not at all tantamount to 'deportation.' (Paras 14 and 15)

Vishwa Mitra, for Petitioner; G. K. Daphtary, Solicitor General of India and Pt. K. L. Misra, Advocate General, U. P., for Opposite Party.

CASES CITED:

(A) ('49) AIR 1949 PC 190: 1949-2 Mad LJ 80 (PC)
(B) (1882) 51 LJ PC 77: 7 AC 829
(C) ('52) AIR 1952 Punj 309: 1952 Cri LJ 1313 (FB)
(D) ('50) AIR 1950 SC 27: 51 Cri LJ 1383
(E) ('51) AIR 1951 Bom 57: ILR (1951) Bom 576
(F) ('40) AIR 1940 All 544: ILR (1941) All 153 (FB)
(G) ('50) AIR 1950 Pat 50: 29 Pat 71 (FB)
(H) ('52) AIR 1952 All 257: 1952 Cri LJ 553

AGARWALA J.: Shrimati Bimla Devi, aged 27 years, wife of Bagh Shah, caste Khatri, resident of Deoband Town, District Saharanpur applies under Art. 226 of the Constitution of India and prays that a writ in the nature of Habeas Corpus be issued directing the police authorities, arrayed as respondents 1 to 3 to remove the police guard from the petitioner's house and not to interfere with her liberty and to prevent them from arresting or removing the petitioner to any camp or in any way interfere in her liberty of movement.

(2) The facts of the case are few. The petitioner is a citizen of India. She was formerly a Mohammedan and known as Razia Khatoon. She was married to one Hidayatullah Butt, Assistant Station Master Nagal, District Saharanpur, who migrated to Pakistan in the disturbances of 1947. The applicant was left behind in India. According to her even before her husband left for Pakistan, he had divorced her and married another lady and in those circumstances, she had sought the protection of one Bagh Shah Khatri, a cane contractor at Nagal station and after embracing the Arya Samajist faith had married him on 15-7-1947 and has since then been living with him. The case for the opposite parties is that the applicant was abducted from Miss Brow's Medical College at Ludhiana in June 1947. The applicant had two issues by her former husband — a daughter aged 4 years and a son aged 10 months. The son died in December 1947. Some time later Hidayatulla Butt put forward a claim for her recovery but by compromise gave up his claim against the applicant on condition that the daughter was restored to him. Accordingly the daughter was restored to him sometime in December 1950. This was all done through private negotiations. Then, though Hidayat Ullah was satisfied with the position, the applicant's other relatives pressed for her restoration to them.

(3) A year later in December 1951, Sri Chaturvedi Sub-Inspector D. I. S. (Opp. party no. 1) arrested the applicant at her house & wanted to remove her to a detention camp, but as she was in a highly advanced state of pregnancy she was allowed to remain at her house but a police guard was posted at her house and she was not allowed to move out. The District Magistrate (opp. party 2) refused her application for bail. She then moved the present application under Art. 226 of the Constitution for the reliefs already stated.

(4) The applicant's detention in her house & the restraint upon her liberty are sought to be justified on behalf of the opposite parties under the provisions of the Abducted Persons (Recovery and Restoration) Act, 1949. The applicant's case is that the Act is 'ultra vires' and has become void.

(5) In the year 1947 when the British Government decided to transfer power to Indian hands and to create two Dominions to be named as Pakistan and India, there were in the area which was to form the Dominion of Pakistan and in East Punjab and certain districts of Uttar Pradesh wide spread communal riots in which arson and murders were committed, property was looted and females and children belonging to one community were abducted by the members of the other community. After the two Dominions were set up an agreement was arrived at between them for the restoration of abducted persons to their former guardians. To give effect to this agreement between Pakistan and India the Abducted Persons (Recovery and Restoration) Act was enacted. This would be clear from the Preamble which recites:

> "Whereas an agreement has been reached between the Government of India and the Government of Pakistan for the recovery and restoration of abducted persons:
>
> And whereas it is expedient to provide, in pursuance of the said agreement, for the recovery of abducted persons and for their temporary detention in camps pending restoration to their relatives."

The object of the Act was, therefore, to recover and restore abducted persons to their relatives and to provide for their temporary detention in camps pending restoration. An abducted person is defined in the Act as meaning

> "a male child under the age of sixteen years or a female of whatever age who is, or immediately before the 1st day of March, 1947, was, a Muslim and who, on or after that day and before the 1st day of January, 1949 has become separated from his or her family and is found to be living with or under the control of any other individual or family, and in the latter case includes a child born to any such female after the said date."

Section 4 authorises certain police officers mentioned in that section to take into custody any person whom he believes to be an abducted person and also authorises him to search without warrant any place where such abducted person, he has reason to believe, resides or is to be found. He is then to deliver or cause such person to be delivered to the custody of the officer in charge of the nearest camp which is established by the Provincial Government for the reception and detention of abducted persons under Section 3. Section 5 empowers the Provincial Government to make regulations for the transfer of abducted persons from one camp to another. Section 7 provides that any officer in charge of such a camp may deliver any abducted person detained in the camp to such other officer or authority as is provided for by the Provincial Government and such officer in his turn may either restore such person to his or her relatives or 'convey such person out of India'.

Section 6 provides for the constitution of a tribunal by the Central Government for the purpose of deciding (a) whether a person detained in a camp is or is not an abducted person, (b) whether such person may be restored to his or her relatives or handed over to any other person, (c) whether such a person may be conveyed out of India and (d) whether such a person may be allowed to leave the camp. Section 8 provides that the decision of the tribunal is to be final and the detention order shall not be called in question in any Court. This provision of course, does not affect the High Court's power to issue writs or orders or directions to the tribunal under Art 226 or 227 of the Constitution.

(6) The grounds on which the Act has been challenged are:

(1) that the Dominion Legislature which enacted the Act had no legislative competence to do so,

and

(2) that the Act has become void because it contravenes clauses (d), (e) and (g) of Article 19(1) of the Constitution.

(7) The impugned Act was passed by the Dominion Parliament under the Government of India Act, 1935. The Dominion Legislature had power to make laws "with respect to" any of the matters enumerated in List I in Sch. 7 Government of India Act and entry 3 of List I mentions

> "External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India".

As the Preamble of the impugned Act recites, the Act was enacted in order to give effect to an agreement with Pakistan relating to the recovery and restoration of abducted persons. Apparently the subject-matter of the Act falls within the heading "implementing of treaties and agreements with other countries."

But Mr. Shanti Bhushan, learned counsel for the applicant, who has argued the case with great ability, urged that entry No. 3 dealing with the implementing of treaties and agreements with other countries does not refer to an enactment dealing with the subject-matter of a treaty or agreement between India and another country or countries, but deals with the mode or method in which treaties and agreements with other countries shall be implemented. In this connection learned counsel relied upon the words "with respect to" in S. 100 and upon the decision of the Judicial Committee in — 'Attorney General of Saskatchewan v. Attorney General of Canada', AIR 1949 P. C. 190 (A). In our opinion this argument has no force.

(8) It is well settled that the entries are construed in their broadest sense subject only to the limitation imposed by a similar construction of the entries in the other Lists. It is only when there is a conflict between entries in different Lists and a need arises to attempt a reconciliation between apparently conflicting jurisdictions that an entry in one List may be read as having been used in a modified sense. No question here arises of conflicting jurisdictions. The phrase "implementing of treaties and agreements with other countries" has, therefore, to be read in its broadest sense which the words of the Entry are capable of. Read in this light it appears that the Legislature has power not merely to make rules as to the mode in which treaties and agreements with foreign countries should be regulated but also to make laws on the subject-matters of the treaties and agreements so that they may be given effect to in India. It is obvious that, if such powers were not reserved to the Indian Legislature, then either such treaties or agreements would remain dead letters or in some cases they could only be given effect to after a cumbersome procedure had been gone through, viz. by having all the Provincial Legislatures pass the necessary enactments in cases in which the subject-matter of the treaties and agreements fell within the jurisdiction of the Provincial Legislature, or by having the enactments passed by the Central Legislature as well as the Provincial Legislatures where the subject-matter fell within the jurisdictions of both. But lest the Central Legislature may unduly affect the Provincial autonomy of the Province or of an Acceding State, S. 106, Government of India Act provided that

> "The Dominion Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for an Acceding State except with the previous consent of the Ruler thereof".

A mere reading of this section would show that what was intended by entry 3 in List I was not merely the power to make rules as to how treaties and agreements with foreign countries shall be implemented but also the power to give effect to the subject-matter of such treaties and agreements by making laws in respect thereof.

It will be interesting to notice that under the present Constitution Art. 253 does away "with the consent of the Governor or the Ruler of an Acceding State" as was provided for in S. 106, Government of India Act. The Article reads:

> "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body".

(9) In — 'A. I. R. 1949 P. C. 190 (A)', the validity of an enactment known as the Farm Security Act 1944, enacted by the Legislature of the Province of Saskatchewan, was in question. The Act provided for relief to farmers in respect of mortgages or agreements of sale effected by them. It was contended that the Act was within the competence of the Provincial Legislature because it was "in relation to" agriculture in the Province within the meaning of S. 95, British North America Act. Viscount Simon, delivering the opinion of the Judicial Committee, observed:

> "There is a distinction between legislation 'in relation to' agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is 'the true nature and character of the legislation' not its ultimate economic results — that matters — 'Russell v. Queen', (1882) 7 A. C. 829 at p. 840 (B). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase 'agriculture in the province' may be construed, and whatever advantages to farmers the reshaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture".

(10) In the present case the true nature and character of the legislation (The Abducted Persons Recovery and Restoration Act) is the implementing of an agreement with Pakistan. The Act does not merely deal with any consequential result of the subject-matter of the agreement between India and Pakistan but it deals with the subject-matter itself.

(11) Entry 17 of List I was also relied upon on behalf of the opposite parties at one stage but later on that reliance was abandoned. We need not, therefore, express any opinion as to whether the impugned Act falls within the purview of Entry 17.

(11a) The next ground of attack on the validity of the impugned Act was that it contravenes the provisions of cls. (d), (e) and (g) of Art. 19 of the Constitution. The precise question that is now raised before us was also raised before the Punjab High Court, in — 'Ajaib Singh v. State of Punjab', AIR 1952 Punj. 309 (F. B.) (C). The majority of the Judges (Khosla and Harnam Singh, JJ.) held that the impugned Act did not conflict with cls. (d) & (e) of Art. 19. Bhandari J. agreed with the decision of the majority in so far as cls. (d) and (e) were concerned but he held that the Act did infringe the freedom guaranteed in cl. (g) of Art. 19, i. e. the right to practise any profession, or to carry on any occupation, trade or business. The Full Bench unanimously, however, held that section 4 (1) of the Act was in conflict with Art. 22 (2) and that the Tribunal constituted under the impugned Act in that particular case had not been properly constituted and ordered the release of the applicant.

The State of Punjab appealed to the Supreme Court* against the decision of the Full Bench of the High Court. The Solicitor General on behalf of the State of Punjab admitted that he could not contend that the tribunal was properly constituted under S. 6 of the Act and conceded that in the

* Reported in A. I. R. 1953 Supreme Court 10

circumstances the order of the High Court directing the girl to be released could not be questioned. He, however, pressed the Supreme Court to pronounce upon the constitutional questions raised in the case. The main judgment of the Supreme Court concerns itself with the validity of S. 4 of the impugned Act with reference to Art. 22 of the Constitution. The Supreme Court held that the arrest and detention contemplated in the impugned Act did not fall within the protection of Art. 22. It also held that the Act was not inconsistent with Art. 14. Lastly in a short paragraph the Supreme Court dealt with Art. 19 (1) (d) (e) and (g). The paragraph runs as follows:

"The learned counsel for the respondent Ajaib Singh contended that the Act was inconsistent with the provisions of Arts. 19 (1) (d) and (e) and Art. 21. This matter is concluded by the majority decision of this Court in — 'A. K. Gopalan v. State of Madras', AIR 1950 S. C. 27 (D) and the High Court quite correctly negatived this contention. Sri Dadachanji has not sought to support the views of Bhandari J. regarding the Act being inconsistent with Art. 19 (1) (g). Nor has learned counsel seriously pressed the objection of unconstitutionality based on Art. 15, which, in our view, was rightly rejected by the High Court".

Learned counsel for the applicant strenuously urged that the opinion of the Supreme Court is merely an 'obiter dictum' and not binding on us, because, after deciding that the appeal must be dismissed it was not necessary for the Court to pronounce upon the validity or invalidity of the impugned Act. We are unable to accept this contention. As already stated, the Solicitor General specially pressed the learned Judges of the Supreme Court to pronounce upon the constitutional question raised in the case. The matter was argued on both the sides (it is immaterial that a counsel for Ajaib Singh was merely an 'amicus curiae' appointed by the Court'). Article 141 mentions that "the law declared by the Supreme Court shall be binding on all Courts within the territory of India". Where the Supreme Court deliberately with the intention of settling the law pronounces upon a question, the pronouncement is the law declared by the Supreme Court within the meaning of Art. 141 and is binding on all Courts in India. It cannot be treated as a mere 'obiter dictum'. Our attention was drawn to a passage in Willoughby, on the Constitution of the United States, Vol. I, Edn. 2, p. 28 where the learned author discusses the binding nature of advisory opinions delivered by the American Supreme Court, and opines that

"The weight of precedent, as well as the better reason and wisdom, is in favour of holding such opinions merely advisory. Such decisions do not arise out of or relate to any particular facts or particular purpose which might explain or limit the generality of their statements. The judges have not necessarily had the benefit of the hearing of counsel, and there has been no argument before them".

(12) It is obvious that the above view cannot hold good where the opinion is given in a particular judicial proceeding, as in the case before us, where the judges have had the benefit of the hearing of counsel and there has been argument before them.

(13) It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued before the Court, they may not be considered to be binding, and in such cases the binding nature of the observation of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of counsel, when a point is not argued, are not binding — 'Venkanna v. Laxmi Sannappa', AIR 1951 Bom. 57 at p. 63 (E) but otherwise even what is generally called an 'obiter dictum', provided it is upon a point raised and argued, is binding upon the Courts in India. In re — 'Banaras Bank Ltd., A. I. R. 1940 All 544 at p. 550 (F.B.) (F); —'Kishori Lal v. Debi Prasad', AIR 1950 Pat. 50 at p. 61 (F B) (G). In this view of the matter, the decision of the Supreme Court that the impugned Act was not inconsistent with the provisions of Article 19 (1) (d) and (e) is binding on us. As the question whether the impugned Act is inconsistent with Art. 19 (1) (g) was not pressed before the Supreme Court by the counsel concerned, we are prepared to hold that the Supreme Court has expressed no opinion on the same. But in our judgment — AIR 1950 S. C. 27 (D)', covers not only the points arising in relation to cls. (d) and (e) of Art. 19 but also the point arising in relation to cl. (g) of Art. 19. It is enough to state that the principle laid down in — 'Gopalan's case (D)' seems to be that when a person has been deprived of personal liberty according to the procedure laid down by law, he cannot complain of the consequential curtailment of the various freedoms mentioned in Art. 19. We, therefore, hold that the Act in question is not inconsistent with the provisions of cls. (d), (e) or (g) of Art. 19 (1).

(14) It was urged that the Act was bad because it empowers the Executive Government to deport a citizen of India out of India against his wishes, and thus to deprive him of all citizenship rights, and as such is a direct attack on the rights conferred by Art. 19, that — 'AIR 1950 S. C. 27 (D)', does not cover this aspect of the case and since this aspect of the matter was not considered by the Supreme Court, its decision is not binding on this Court. Reliance was placed on a decision of this Court — 'Shabbir Hussain v. State of U. P.', AIR 1952 All 257 (H). That was a case in which the validity of the Influx From Pakistan (Control) Act, 1949, was in question and it was held that a law allowing the removal from the territory of India of any citizen would be in contravention of Article 19 (1) cls. (d) and (e) of the Constitution and will, therefore, be void in view of Art. 13 (1) of the Constitution. In our opinion there is no question of deportation of an Indian citizen under the Abducted Persons (Recovery and Restoration) Act. The object of the Act is to restore abducted persons to their relatives whether in India or in Pakistan. The tribunal will decide in every case whether an abducted person is to be so restored and be conveyed out of India for the purpose. It is inconceivable that the tribunal will order the restoration and removal out of India of an Indian citizen against his or her true wishes. In these circumstances it can hardly be maintained that the Act authorizes the Executive Government to deport Indian citizens against their wishes.

(15) Further, there is nothing in the Act which prevents a person restored to his relatives in Pakistan to return to India and enjoy all the rights which the Constitution guarantees to a citizen. By his or her restoration to his or her family in Pakistan, an Indian citizen does not cease to be an Indian citizen, unless he or she of his or her free will wishes to give up that status. He or she is conveyed out of India, not on account of a prohibition to reside in India but only for the purpose of restoring him or her to his or her relations. 'Conveyance out of India' in the Act is, therefore, not at all tantamount to 'deportations'. The ruling in — 'Shabbir Husain's case (H)', is not applicable to cases arising under the impugned Act.

(16) There is no force in this application and we dismiss it. Certified that this case involves a substantial question of law as to the interpretation of the Constiution under Article 132.

A/R.G.D. Application dismissed.

A. I. R. 1953 ALL 617 (Vol. 40, C. N. 307)

MALIK, C. J. AND V. BHARGAVA J.

M/s Maheshwari Devi Jute Mills, Kanpur, Applicant v. Commissioner of Income-tax, U. P., Lucknow, Respondent.

Misc. Case No. 216 of 1949, D/- 2-2-1953.

Excess Profits Tax Act (1940), S. 2(10), Sch. I, R. 7(1) — Director's remuneration.

Sub-rule (2) of R. 7 of Sch. I, does not define 'director's remuneration'. It is an exception to sub-r. (1) and provides that remuneration which comes under the sub-rule shall not be deemed to be director's remuneration. The remuneration should first be 'director's remuneration' before the question of its being excluded from that category can arise.

If a person holds two offices, one of a director and the other an entirely independent and separate office unconnected with his office as director, then any remuneration paid to him in the latter capacity cannot be deemed to be 'director's remuneration' under sub-r. (1) of R. 7. AIR 1953 All 31, Foll. (Para 6)

G. S. Pathak, for Applicant; J. Swarup, for Respondent.

CASE CITED:

(A) ('53) AIR 1953 All 31: 1952-22 ITR 331

MALIK C. J.: This is a reference under S. 21, Excess Profits Tax Act read with S. 66(1), Income-tax Act.

(2) The assessee is the Maheshwari Devi Jute Mills, Limited, Kanpur. The assessee claimed that, in the relevant account period, it had paid a salary of Rs. 28,850/- to one Lala Hari Shankar Bagla who had been appointed along with Munna Lal Khetan as joint general manager of the company. The assessee; therefore, claimed a deduction of this amount from its assessable income which contention, however, was overruled by the Income-tax Appellate Tribunal. On an application made by the assessee, the following question has been referred to this Court for our decision:

"Q. Whether, in the circumstances of the case, the salary paid to Lala Hari Shankar Bagla amounting to Rs. 28,850/- has rightly been treated as director's remuneration in the assessment of the payer-company under sub-rule 2(1) of R. 7 of Sch. I to the E. P. T. Act read with sub-s. (1) of S. 2 of the said Act?"

(3) Lala Hari Shankar Bagla was one of the directors of the assessee company and, on 27-9-1941, at a directors' meeting at which he was present but did not vote, the following resolution was passed:

"R. B. Rameshwar Prasad Bagla reported that Company's work had considerably increased, and it was absolutely essential that two Joint General Managers, who should give their substantial time to the work, be appointed and they should be paid a suitable remuneration for such work.

It was resolved that Mr. Hari Shankar Bagla and Mr. Munna Lal Khetan be appointed as Joint General Managers from 1-10-1941, at Rs. 2,000/- (Rupees two thousand) per mensem each free of all taxes to look after the management of the Company."

That resolution was put up before an ordinary general meeting of the shareholders on 10-1-1942, at which the shareholders approved of the said resolution and confirmed it unanimously. Lala Hari Shankar Bagla, who was again present at the meeting, did not take part in either the discussion or the voting. The question arises whether this sum of Rs. 2,000/- free of income-tax, which was paid to Lala Hari Shankar Bagla per month after his appointment as one of the joint general managers, was director's remuneration and can, therefore, be not excluded from the taxable income.

(4) The word "director" has been defined in S. 2(10), Excess Profits Tax Act as follows:

"2(10) 'Director' includes any person occupying the position of a director by whatever name called and also includes any person who

(i) is a manager of the company or concerned in the management of the business; and

(ii) is remunerated out of the funds of the business; and

(iii) is the beneficial owner of not less than twenty per cent of the ordinary share capital of the company."

This definition extends the meaning of the word 'director' to include not only a director as such but also a person who is a manager and is remunerated out of the funds of the business and who is a beneficial owner of not less than twenty per cent of the share capital of the company. Lala Hari Shankar Bagla admittedly owns only 9 per cent share capital of the company and, therefore, he does not come within this extended meaning of the word 'director'. He was a director as ordinarily understood under the Companies Act. As a director, he must have been entitled to and must have received the ordinary remunerations of a director. This sum of Rs. 2,000/- paid to him per month was obviously not being paid to him for his normal work as a director but as one of the two joint general managers.

(5) The resolution of the Board of Directors quoted above would show that the chairman suggested that two persons should be appointed as joint general managers and it was open to the Board to appoint any two outsiders and it was not necessary that one of the two joint general managers should be a director of the company. It is not disputed that Munna Lal Khetan was a stranger and the mere fact that Lala Hari Shankar Bagla happened to be one of the directors does not mean that he was appointed a joint general manager because he was a director of the company. His appointment as one of the two joint general managers did not depend on the fact that he was a director and was not made dependent on his continuing as such; and even if he had resigned from the directorship or he had ceased to be a director in accordance with the provisions of the Articles of Association, he would not have ceased to be a joint general manager by merely ceasing to be a director of the company. Therefore, so far as we can see, there was no difference made in the appointments of Hari Shankar Bagla and Munna Lal Khetan as joint general managers and their position vis-a-vis the company was the same, that is, of servants of the

company working in the capacity of joint general managers. We have already said that Hari Shankar Bagla's appointment as joint general manager was not made dependant on his continuing to hold office as director of the company. Further, there is nothing to show that the work of the joint general manager was entrusted to him because he was a director.

(6) Learned counsel for the Department has, however, relied on sub-r. (2) of R. 7 of Sch. I to the Excess Profits Tax Act and has urged that 'director's remuneration' is defined in that sub-rule as meaning any remuneration paid to a director even for doing managerial or other technical work. We do not agree with learned counsel. Sub-rule (2) does not define 'director's remuneration'. It is an exception to sub-r. (1) & provides that remuneration which comes under that sub-rule shall not be deemed to be director's remuneration. The remuneration should first be 'director's remuneration' before the question of its being excluded from that category can arise. Sub-rule (2) is as follows:

"Sub-rule (2) of R. 7: In sub-r. (1) of this rule, the expression 'director's remuneration' does not include

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of excess profits tax."

Sub-rule (1) of R. 7 of Sch. I to the Excess Profits Tax Act provides that where a company is managed by directors, no deduction shall be made in respect of directors' remuneration in computing the profits or the standard profits. This sub-rule would apply, therefore, to a case where remuneration is paid to a director as such. The exception in cl. (a) of sub-r. (2) is to the effect that, if a director does not own more than five per cent. of the ordinary share capital of the company, remuneration paid to him for devoting substantially the whole of his time to the service of the company in a managerial or technical capacity does not come under sub-r. (1).

These sub-rules have been discussed by us at some length in our judgment in the case of — 'R. B. Seth Multanimal and sons, Ltd. v. Commr. of Income-tax', AIR 1953 All 31 (A). We have held in that case that, if a person holds two offices, one of a director and the other an entirely independent and separate office unconnected with his office as director, then any remuneration paid to him in the latter capacity cannot be deemed to be 'director's remuneration' under sub-r. (1) of R. 7. Argument on behalf of the department, however, is that whatever remuneration is paid to a person who happens to hold the office of a director comes under sub-r. (1) of R. 7 of Sch. I unless it is exempted by sub-r. (2) and it is not necessary that payment should be made to him by reason of the fact that he holds the office of a director. We do not agree with learned counsel and have already dealt with the point in our judgment mentioned above.

It may be useful to give an illustration. If a person is employed say as a treasurer in a company and on a fixed salary, there can be no doubt that what he is getting is pay for work done and, if after some years of meritorious service while still continuing to hold the post of treasurer he is also appointed a director, it cannot be said that the salary paid to him as treasurer becomes thenceforward director's remuneration. If a director, however, is paid some extra remuneration for some special work entrusted to him because he happens to be a director there can be no doubt that the amount paid is director's remuneration. The definition of a director has no doubt been widened and in a case coming under the Act the director must be understood in the sense defined in the Act. But it has nowhere been said that whatever amount is paid to a person must always be deemed to be director's remuneration even if the amount is paid to him for doing entirely independent work unconnected with his office as director. We are, therefore, of the opinion that on the facts and circumstances of this case there is no reason to make any distinction between the amounts paid to Hari Shankar Bagla and Munna Lal Khetan, and the amount paid to Hari Shankar Bagla cannot be deemed to be 'director's remuneration'.

(7) We answer the reference accordingly. The assessee is entitled to its costs which we assess at Rs. 300/-.

B/R.G.D. Answer accordingly.

A. I. R. 1953 ALL 618 (Vol. 40, C. N. 308)

AGARWALA J.

Mukhram and another, Applicants v. State through Sumra, Opposite Party.

Criminal Ref. No. 392 of 1950, D/- 24-9-1951.

Criminal P. C. (1898), Ss. 145 and 439 — Order under S. 145, will be revised by High Court only on very strong grounds.

(Para 2)

Anno: Cr. P. C., S. 145 N. 61.

G. Kumar, for Applicants; Govt. Advocate, for Opposite Party.

ORDER: This is a reference arising out of the proceedings under S. 145, Criminal P. C. Sumra complainant made an application under S. 145, Criminal P. C. alleging that he had cultivated the plot and grown sugarcane therein; that Mukhram and others (who will be called applicants hereafter) had forcibly cut away the crop and removed it in carts to sugar mill; that there was a danger of a breach of the peace and that the sugarcane be attached and made over to him. A copy of the application was sent to the Station Officer of the Police station concerned who reported that there was an apprehension of a breach of the peace. On receipt of this report the learned Magistrate ordered the police to attach the property and put it to auction and deposit the money recovered in auction in Court. At the same time he ordered notices to be issued to both the parties to produce evidence in proof of their respective possession on 19-12-1949. The order passed by the learned Magistrate was no doubt not strictly in accordance with the provisions of S. 145(1), Criminal P. C. The applicants filed a written statement denying Sumra's possession and alleging that they had been in possession of the plot and had sown the crop. Both parties gave evidence as to the factum of possession and the learned Magistrate, after considering the evidence, came to the con-

clusion that Sumra was in possession on the material date. He, therefore, ordered that the land in suit should remain in possession of Sumra till the applicants ejected him in due process of law. Although he made no reference to the existence of a danger of a breach of the peace in his preliminary order, he, in the final order passed by him, held that there was such danger. The applicants went up in revision to the learned Sessions Judge who after a careful review of the entire evidence on the record came to the conclusion that if the evidence is properly considered the conclusion should have been that the applicants and not Sumra were, in fact, in possession of the plot and had sown the crop. He, therefore, made this reference recommending that the order of the Magistrate be set aside and the property be put in possession of the applicants and the money recovered in auction be also paid to them.

(2) I have heard the learned counsel for the parties and have come to the conclusion that no interference with the order of the Magistrate is called for. The learned counsel appearing for the applicants is unable to say that there was no evidence on the record in support of the conclusion arrived at by the Magistrate. All that he says is that if the evidence were properly considered the only conclusion that could be arrived at was that the applicants were in possession. The learned Sessions Judge has pointed out certain circumstances which in his opinion should have led the Magistrate to draw a different conclusion from the one he actually drew. It is quite possible that if I were sitting as a Court of Appeal I might have come to the same conclusion at which the learned Sessions Judge arrived; but I think in the exercise of revisional jurisdiction this is not a proper thing to do. In cases under S. 145, Criminal P. C. a criminal Court does not finally decide the rights of the parties. It merely passes an order with the object of preventing the breach of the peace leaving one of the parties to have a declaration made from the proper Court as to his rights. Great weight should be attached to the opinion of the learned Magistrate who is answerable for the maintenance of peace in his jurisdiction as to whether there is a danger of a breach of the peace or not. If he is so satisfied his order should be interfered with only upon very strong grounds. Where there was evidence in support of the conclusion arrived at by the learned Magistrate his conclusions of fact should not be disturbed.

(3) I see no reason to interfere. I reject this reference.

C/K.S. Reference rejected.

A. I. R. 1953 ALL 619 (Vol. 40, C. N. 309)
(LUCKNOW BENCH)

MISRA J.

The State v. Raja Ram and others, Opposite Party.

Criminal Ref. No. 9 of 1951, D/- 17-4-1951.

Criminal P. C. (1898), Ss. 121, 514 — Jurisdiction of the Magistrate to forfeit bond.

In cases where security is taken and bonds are executed under S. 107 to ensure that a particular person shall keep the peace the bond cannot be forfeited on the commission of an act involving a breach of the peace beyond the jurisdiction of the Magistrate taking the bond, and no Magistrate other than the one who passed the order under S. 107 can act under S. 514 in order to effect a forfeiture. (Para 4)

Anno: Cr. P. C., S. 121 N. 3; S. 514 N. 3.

Sita Ram, Govt. Pleader, holding brief of Asst. Govt. Advocate, for the State; H. G. Walford, for Opposite Party.

ORDER: This is a criminal reference under S. 438, Criminal P. C., by the learned Sessions Judge, Bara Banki. The case arises out of an application under S. 514, Criminal P. C. for forfeiture of the security bonds executed by the opposite parties, Raja Ram, Ramanand and Sheoraj Bali. The bonds were executed in pursuance of an order of the learned Sub-Divisional Magistrate, Haidargarh, district Bara Banki dated 6-8-1947, in proceedings under S. 107, Criminal P. C. The finding of the learned Magistrate was that on account of the strained relations between the aforenamed persons and one Ram Dayal, there was an apprehension of a breach of the peace and it was necessary to bind them down for the period of one year. The bonds were duly executed on 6-8-1947.

(2) Ram Dayal invoked the jurisdiction of the Sub-Divisional Magistrate, Haidargarh, under S. 514, Criminal P. C. on 10-8-1948, because Raja Ram, Ramanand and Sheoraj Bali were tried and convicted of offences under Ss. 323 and 325, Penal Code committed during the currency of the bonds at village Tandpurwa, police station Safdarganj, tahsil Ramsanehighat. The place where the incident leading to their conviction occurred was outside the jurisdiction of the learned Sub-Divisional Magistrate, Haidargarh and Ram Dayal's application was, therefore, rejected.

(3) The learned Sessions Judge is of the opinion that the Magistrate concerned was competent to forfeit the bonds of the opposite parties inspite of the fact that the breach of the peace complained of occurred elsewhere than within his jurisdiction.

(4) Section 514, Criminal P. C. clearly provides that when a bond has been taken by a Court, it is that Court alone or the Court of a Presidency Magistrate or of a Magistrate of the first class that can determine whether or not the bonds had been forfeited. Section 121, Criminal P. C. lays down the terms in which the bonds have to be executed. The section provides that bonds by person with respect to whom an order requiring security is made under S. 106 or S. 118 shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case, the commission or the attempt to commit or the abetment of any offence punishable with imprisonment wherever it may be committed is a breach of the bond. A bond for good behaviour is thus forfeited by the commission of 'any offence' 'wherever it may be committed' but in cases where security is taken and bonds are executed under S. 107, Criminal P. C. to ensure that a particular person shall keep the peace the position is otherwise, for there the bond can be forfeited on the commission of an act involving a breach of the peace within the jurisdiction of the Magistrate taking the bond, and no Magistrate other than the one who passed the order under S. 107 can act under S. 514, Criminal P. C. in order to effect a forfeiture. This is because the terms of the bond under S. 107, Criminal P. C. are wholly different from the terms of the bonds taken from persons under S. 110, Criminal P. C. The learned Sessions Judge thinks that in so far as the bonds do not restrict the executants from committing a breach of the peace within the territorial jurisdiction of the Magistrate who passed the initial order, an offence committed anywhere

would amount to a breach. This view is contrary to the scope and intention of S. 514 read with S. 121, Criminal P. C.

(5) The learned Magistrate was in my opinion justified in refusing to act under S. 514, Criminal P. C. I, therefore, reject the reference.

C/D.H. Reference rejected.

A. I. R. 1953 ALL 620 (Vol. 40, C. N. 310)

AGARWALA AND
CHATURVEDI JJ.

Sita Ram Singh, Plaintiff-Applicant v. Gaya Prasad and others, Defendants-Opposite Party.

Civil Revn. No. 599 of 1949, D/- 20-2-1953.

(a) Debt Laws — U. P. Agriculturists Relief Act (27 of 1934), S. 1 — (U. P. Debt Redemption Act (13 of 1940), S. 1).

No doubt the Agriculturists' Relief Act and the Debt Redemption Act do affect vested rights and in that sense they are retrospective. But they cannot affect the rights of mortgagees who had before their commencement ceased to be mortgagees and had become owners of the property in their possession. (Para 3)

(b) Limitation Act (1908), Art. 148 — Starting time of limitation — (U. P. Debt Redemption Act (13 of 1940), S. 9.) — (Transfer of Property Act (1882), Ss. 60, 62).

Though a mortgage may not be a self-liquidating mortgage in the first instance, it may become a self-liquidating mortgage at a later stage, e.g. by virtue of a statutory provision. The Debt Redemption Act in reducing the rate of interest and in providing that the usufruct shall be calculated and its excess over the interest will be taken in satisfaction of the principal amount has in a way effected a revolutionary change in the terms of all subsisting usufructuary mortgages. In a sense, they may be said to have become self-liquidating mortgages. But the mortgages must be subsisting on the date on which the Debt Redemption Act came into force. If the right to redeem the mortgages had already expired before the Act came into force, there is nothing on which the Act will operate. AIR 1946 All 400; AIR 1953 All 33, Distinguished. (Para 5)

Anno: Lim. Act, Art. 148, N. 18; T. P. Act, S. 60, N. 52; S. 62, N. 11.

Ambika Prasad, for Applicant; S. S. Varma, for Opposite-Party.

CASES CITED:
(A) (46) AIR 1946 All 400: 1946 All LJ 175
(B) ('53) AIR 1953 All 33: 1952 All LJ 576

ORDER: This is a plaintiff's application in revision arising out of proceedings under S. 12, U. P. Agriculturists' Relief Act (27 of 1934) read with S. 9, U. P. Debt Redemption Act (13 of 1940). The predecessors-in-interest of the applicant executed a usufructuary mortgage, which was sought to be redeemed in the present case, in the year 1855. One of the terms of the mortgage was that the profits were to be taken in lieu of interest. It was not a self-liquidating mortgage. The application under S. 12, U. P. Agriculturists' Relief Act read with S. 9 of the Debt Redempion Act was filed in the year 1946 and it was claimed that the entire mortgage money had been paid up by the usufruct, calculating the same in accordance with the provisions of S. 9, U. P. Debt Redemption Act.

(2) The trial Court allowed the application and passed a decree in favour of the applicants holding that the entire mortgage money had been paid up by the usufruct. In appeal it was held that the application was barred by time and consequently it was dismissed. In this application in revision the only point for consideration is whether the application of the applicants under S. 12, U. P. Agriculturists' Relief Act, was time-barred. Article 148, Limitation Act provides a period of 60 years for redemption of a usufructuary mortgage. The Article runs as follows:

"148. Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years	When the right to redeem or to recover possession accrues."

(3) A suit for redemption of the mortgage in dispute became barred in the year 1915, and by virtue of S. 28 Limitation Act the mortgagor having lost his right to have possession of the property by redemption, the title to the property became vested in the mortgagee and he became the owner of the property in 1915. It is not suggested that there was any provision for the mortgage becoming self-liquidating prior to 1915. The Agriculturists' Relief Act and the Debt Redemption Act came into force in 1935 and 1941 respectively. They allow for redemption of the mortgages but there is nothing in the Acts to show that their provisions apply to mortgages, the right of redemption of which had already been lost and the mortgagees had no longer remained mortgagees but had become owners of the property mortgaged. No doubt the Agriculturists' Relief Act and the Debt Redemption Act do affect vested rights and in that sense they are retrospective in so far as they affect the rights of the mortgagees in mortgages subsisting on the dates on which the Acts were passed, but they cannot, in our opinion, affect the rights of mortgagees who had before their commencement ceased to be mortgagees and had become owners of the property in their possession.

(4) Learned counsel for the applicant has, however, relied on two decisions of this Court, — 'Ram Prasad v. Bishambhar Singh', AIR 1946 All 400 (A) and — 'Parasram v. Bindeshari', AIR 1953 All 33 (B). Both these decisions are, however, distinguishable. In 'AIR 1946 All 400 (A)' the mortgage in suit was made in November 1881. The mortgage was by conditional sale. The ordinary period of limitation for redemption of a mortgage would have expired in 1941, i.e. after the commencement of the Debt Redemption Act. The document in that case was, therefore, a mortgage on the date on which the Debt Redemption Act came into force, and therefore that Act was applicable to it. In 'AIR 1953 All 33 (B)' the mortgage in dispute was made in Jeth 1881, i.e. June 1881. In that case also the limitation for redemption had not expired before the Debt Redemption Act came into force. The two cases are, therefore, distinguishable from the facts of the present case.

(5) The law on the subject is clear. Under Art. 148, Limitation Act the period of sixty years is provided both for the redemption of a mortgage and for recovery of possession of a mortgaged property. The period of limitation in the first case begins from the time when the right to redeem accrues and in the second case begins when the right to recover possession arises. Unless there is a term in the mortgage that it could not be redeemed for a certain period, the right to redeem

accrues on the execution of the mortgage. After 60 years of the execution of the mortgage or after the expiry of the term when the right to redeem accrues, the right to redeem is barred. But in certain cases the right to recover possession of the mortgaged property may accrue later for instance, in a self-liquidating mortgage the right to recover possession of the property accrues when the mortgage money has been fully liquidated. On the satisfaction of the mortgage money, therefore, a fresh cause of action for the recovery of the mortgaged property without redemption accrues to the mortgagor. These two different cases, namely the right to redeem and the right to recover possession are separately dealt with in the Transfer of Property Act. Section 60 deals with the right to redeem and S. 62 deals with the right to recover possession. Though a mortgage may not be a self-liquidating mortgage in the first instance, it may become a self-liquidating mortgage at a later stage, e.g. by virtue of a statutory provision. The Debt Redemption Act in reducing the rate of interest and in providing that the usufruct shall be calculated and its excess over the interest will be taken in satisfaction of the principal amount has in a way effected a revolutionary change in the terms of all subsisting usufructuary mortgages. In a sense they may be said to have become self-liquidating mortgages. But the mortgages must be subsisting on the date on which the Debt Redemption Act came into force. If the right to redeem the mortgages had already expired before the Act came into force, there is nothing on which the Act will operate.

(6) There is no force in this application. It is dismissed with costs.

B/H.G.P. Application dismissed.

A. I. R. 1953 ALL 621 (Vol. 40, C. N. 311)

DESAI J.

Tunda and others, Accused-Applicants v. The State.

Criminal Revn. No. 1622 of 1951, D/- 27-4-1953.

(a) U.P. Panchayat Raj Act (26 of 1947), S. 1 — Bar of Magistrate's jurisdiction.

The jurisdiction of a Magistrate is cancelled by the Panchayat Raj Act only when a jurisdiction is vested in a Panchayati Adalat. Where, therefore, on the date on which the offence under S. 447, Penal Code was committed and even on the date on which the Magistrate convicted the applicants, there was no Panchayati Adalat which had jurisdiction to try the case, the jurisdiction of a Magistrate to try it was not lost. (Para 2)

(b) U.P. Panchayat Raj Act (26 of 1947), S. 1 — Applicability.

When an Act is in force in a certain area it only means that its provisions will be enforced there. But if the provisions of the Act do not bar the jurisdiction of a Magistrate in a certain area, the Act may be in force in that area as much as it likes, but the jurisdiction of a Magistrate will not be barred. (Para 4)

(c) U.P. Panchayat Raj Act (26 of 1947), Ss. 52, 56 — Applicability. AIR 1951 All 414, Dissented from.

The provision of S. 56 implies that there exists a Panchayati Adalat having jurisdiction. The applicability of Ss. 52, 56 etc. does not depend upon whether the absence of a Panchayati Adalat's jurisdiction over the area in which an offence is committed is temporary or permanent. If the jurisdiction of a Magistrate to try an offence of S. 447, I. P. C. committed in certain area is not lost, it is because the case is not covered by the provisions of Ss. 52 and 56. In this case, it was not covered by those provisions simply because there was no Panchayati Adalat having jurisdiction to try the offence in that area. 1950 All LJ 564, Distinguished. (Paras 3, 4)

G. Kumar, for Applicants; Aqiqi Hasan, for the State.

CASES CITED:
(A) ('50) 1950 All LJ 564
(B) ('51) AIR 1951 All 414: 1950 All LJ 863

ORDER: This is an application by Tunda etc. challenging their conviction under S. 447, I. P. C. by a Magistrate, Ist class. They plead that the learned Magistrate had no jurisdiction to try the case because the offence of S. 447, I. P. C. is exclusively triable by a Panchayati Adalat. The land upon which the applicants have been found guilty of trespassing is situated in village Dharampur which formed part of the territory of Bharatpur State. It was transferred to Uttar Pradesh and included in Mathura District by a notification dated 25-1-50. On 12-10-1950 the applicants are said to have committed the offence. On 23-6-1951, they were found guilty and convicted by the learned Magistrate. After that on 30-7-1951, the village Dharampur was included in a certain Panchayati Adalat. Till then there was no Panchayati Adalat having jurisdiction over it. Panchayati Adalats had been formed in Mathura district previously, but they were formed for villages which were included in the district at the time when the Panchayat Raj Act was enacted. As village Dharampur was included in the district on a later date, its area was not included within the jurisdiction of any Panchayati Adalat prior to 30-7-1951. I consider that on these facts the jurisdiction of the learned Magistrate to try the case was not barred by anything contained in the Panchayat Raj Act.

(2) It is clearly laid down in S. 52 of the Panchayat Raj Act that an offence of S. 447, I. P. C. if committed within the jurisdiction of a Panchayati Adalat, is to be exclusively tried by the Panchayati Adalat. This necessarily means that there must exist a Panchayati Adalat having jurisdiction over the area in which the offence of S. 352 is committed. If no Panchayati Adalat has been constituted having jurisdiction over that area, it cannot be said that the offence was committed within the jurisdiction of a Panchayati Adalat. If a Panchayati Adalat is constituted later on, it cannot have retrospective effect and the offence cannot, even after the constitution of the Panchayati Adalat, be said to have been committed within the jurisdiction of the Panchayati Adalat. The jurisdiction of a Magistrate is cancelled by the Panchayat Raj Act only when a jurisdiction is vested in a Panchayati Adalat. The Act certainly does not purport to cancel the jurisdiction of a Magistrate without creating jurisdiction somewhere else. It purports simply to transfer the jurisdiction from a Magistrate to a Panchayati Adalat. If there is no Panchayati Adalat in

existence, there cannot possibly be any transfer of the jurisdiction and the Act does not at all purport to destroy the Magistrate's jurisdiction. The view that a Magistrate's jurisdiction is destroyed without corresponding jurisdiction being created in some other authority has nothing to support it. On the date on which the offence was committed and even on the date on which the learned Magistrate convicted the applicants, there was no Panchayati Adalat which had jurisdiction to try the case. Therefore, the jurisdiction of a Magistrate to try it was not lost.

(3) There is another provision which leads to the same conclusion and that is S. 56 of the Act which requires a Magistrate, at any stage of a case, to transfer it to a Panchayati Adalat having jurisdiction on his finding that it is exclusively triable by it. This implies that there exists a Panchayati Adalat having jurisdiction. If there does not exist any Panchayati Adalat, the case cannot possibly be transferred and the provision would be meaningless. It is not that the Magistrate has to return the complaint to the complainant for presentation to a Panchayati Adalat; a complaint can be returned to the complainant for presentation to a Panchayati Adalat even if no Panchayati Adalat exists having jurisdiction over it. As far as the physical act of return is concerned, it can be performed. But the physical act of transferring the case to a Panchayati Adalat cannot be performed unless there exists a Panchayati Adalat to receive it. There is no provision in the Act dealing with the contingency of a case being triable exclusively by a Panchayati Adalat and there being no Panchayati Adalat in existence to try it. It would have been an absurd position if the legislature created an offence and provided no tribunal to try it. The Act contains no provision dealing with the situation of there being no Panchayati Adalat to try a case exclusively triable by it because the scheme of the Act does not contemplate the possibility of such a contingency. In other words, the scheme of the Act is that the jurisdiction of a Magistrate is lost only when a Panchayati Adalat is established having jurisdiction to try it.

(4) It was said that the Act came into force in the whole state as soon as it was passed. This does not at all advance the case of the applicants. When an Act is in force in a certain area it only means that its provisions will be enforced there, that is, what is written in the Act will be applied to that area. The real question, therefore, is what is the interpretation of the provisions contained in the Act. If they themselves do not bar the jurisdiction of a Magistrate in a certain area, the Act may be in force in that area as much as it likes, but the jurisdiction of a Magistrate will not be barred. It is not S. 1 or S. 2 of the Act that bars the Magistrate's jurisdiction; that is done by Ss. 52, 56 etc. The Act is in force in Lucknow city also but it will not be contended by anyone that the jurisdiction of a Magistrate to try an offence of S. 447, I. P. C. committed in Lucknow is barred. It may be that a Panchayati Adalat will never be established in Lucknow city, but that is no reason for distinguishing it from village Dharampur where there was no Panchayati Adalat in existence when the learned Magistrate convicted the applicants. As far as the non-existence of a Panchayati Adalat is concerned, Dharampur stood in the same position as Lucknow on 23-6-1951. The applicability of Ss. 52, 56 etc. does not depend upon whether the absence of a Panchayati Adalat's jurisdiction over the area in which an offence is committed is temporary or permanent. If the jurisdiction of a Magistrate to try an offence of S. 447, I. P. C. committed in the city of Lucknow is not lost, it is because the case is not covered by the provisions of Ss. 52 and 56. It is not covered by those provisions simply because there is no Panchayati Adalat having jurisdiction to try that offence and that exactly was the case with regard to the offence of S. 447, I. P. C. committed by the applicants on 12-10-50.

(5) Two authorities were cited before me. One is —'State v. Badri', 1950 All LJ 564 (A) and the other, — 'Kirpa Ram v. Ram Asrey', AIR 1951 All 414 (B). The former is a decision of the learned Chief Justice. There a Panchayati Adalat had been established but no Sarpanch had been elected by the Panches. As a Panchayati Adalat had been established, the jurisdiction of a Magistrate was lost and he could not try the case. The loss of jurisdiction depended upon the existence of a Panchayati Adalat and not upon the existence or election of a Sarpanch. Therefore that case is to be distinguished from the present case. The other was a decision of my learned brother Kidwai. There the facts were exactly similar to those here and my learned brother held that even though no Panchayati Adalat had been established the Magistrate had no jurisdiction to try the case. My learned brother has not discussed the language of Ss. 52 and 56. He has referred to S. 52 but not to the words "if committed within the jurisdiction of a Panchayati Adalat". They are material words. He has also referred to S. 56 but not to the words "transfer the case to a Panchayati Adalat having jurisdiction". In the circumstances, I think it can be said that I am not bound by that decision and with great respect to my learned brother, I dissent from it.

(6) I hold that the learned Magistrate had jurisdiction to convict the applicants on 23-6-51. The application is dismissed.

A/H.G.P. Application dismissed.

A. I. R. 1953 ALL 622 (Vol. 40, C. N. 312)

MALIK C. J. AND
V. BHARGAVA J.

Daya Shanker, Applicant v. Commissioner, Agricultural Income-tax, U. P., Lucknow, Opposite-Party.

Misc. Case No. 38 of 1951, D/-1-4-1953.

(a) U. P. Agricultural Income-tax Act, 1948 (3 of 1949), Ss. 15(3) and 44 — Rules under S. 44, R. 22(2) — Period of notice.

Rule 22 framed under the Agricultural Income-tax Act provides that the period within which the return has to be made has to be specified in the notice and it should not be less than thirty days nor more than forty-five days from the date of the delivery of notice. Where the period specified in the notice is thirty days and the return is filed after thirty days although before expiry of forty-five days the return is filed beyond time. (Para 1)

(b) U. P. Agricultural Income-tax Act, 1948, (3 of 1949), S. 24(4) — Opposite party in proceedings under.

(Obiter): The opposite party in cases arising out of application under S. 24(4), should be the U. P. Government and not the Commissioner, Agricultural Income-tax, who is merely an appellate Court from an order made by the assessing authority. (Para 2)

Surendra Nath Varma, for Applicant.

MALIK, C. J.: This is an application under S. 24, sub-s. (4), U. P. Agricultural Income-tax Act, 1948 (Act 3 of 1949). Sub-section (4) of S. 24 provides that:

"If the Board reject the application under sub-s. (2) or refuse to state the case on such application, the assessee may within three months of the communication of the order under sub-s. (3) apply to the High Court and the High Court may, if it is not satisfied about the correctness of the decision of the Board, require the Board to state the case and refer it and on receipt of such requisition the Board shall state and refer the case to the High Court."

The only point that the Board was called upon to consider was whether the applicant had filed his return within time. Learned counsel has contended that the Board as well as the assessing authority were in error inasmuch as they thought that the period within which the return was to be made was thirty days but the period really was forty-five days. The facts are that a notice was issued under S. 15(3), Agricultural Income-tax Act requiring the assessee to file his return within thirty days of the date of delivery of notice. The notice was received by Baij Nath, cousin of the applicant Daya Shanker, on 24-2-1949. No return was filed within thirty days and on 7-4-1949, the assessment was made. The assessee admitted that his cousin had handed over the notice to him but he said that his cousin did not mention the date on which the notice had been so given to him. It was not till 9-4-1949, that the return was made and it was rejected as having been filed beyond time and on the ground that the assessment had already been made. Rule 22 framed under the Agricultural Income-tax Act provides that the period within which the return has to be made has to be specified in the notice & it should not be less than thirty days nor more than forty-five days from the date of the delivery of notice. The period specified being thirty days in the notice given to the assessee the return was filed clearly beyond time. The order of the Board is, therefore, correct.

(2) We may in this connection mention that a number of applications have been filed in this Court under S. 24(4), Agricultural Income-tax Act. The opposite party in such cases should be the U. P. Government and not the Commissioner, Agricultural Income-tax, who is merely an appellate Court from an order made by the assessing authority. The office should take care to see that if the Commissioner, Agricultural Income-tax, is impleaded, the applicant should be required to make the necessary correction and notice should go to the Standing Counsel for the U. P. Government.

(3) This application is, therefore, dismissed with costs which is assessed at Rs. 50/-.

B/G.M.J. Application dismissed.

A. I. R. 1953 ALL 623 (Vol. 40, C. N. 313)

MALIK C. J. AND AGARWALA J.

Keshab Chandra, Applicant v. Inspector of Schools and others, Opposite Parties.

Civil Misc. Writ No. 245 of 1953, D/- 4-5-1953.

†(a) Constitution of India (1950), Art. 226 — Person entitled to apply.

Obiter: To hold that a student has a legal right to come to a Court of law and require the head of the institution to justify his action where he has meted out some punishment or taken any disciplinary action will be subversive of all discipline in the schools and colleges. The High Court will not interfere in such matters which are matters for the internal autonomy of educational institutions. (Para 5)

Anno: C. P. C., App. III, Constitution of India, Art. 226 N. 6.

(b) Constitution of India (1950), Art. 226 — Any other purpose.

Where an Inspector of schools passed an order of rustication against a student, for his alleged participation in a fracas in front of his school, without a report from the head of the institution and without an enquiry as to whether he did take part in the incident.

Held, that the Officer had no jurisdiction to pass the order under para 96, U. P. Education Code, 1936 Edn. in the absence of report and further the order offended principles of natural justice in that it had been passed without an enquiry and was set aside. (Para 6)

Anno: C. P. C., App. III, Constitution of India, Art 226 N. 5.

R. C. Ghatak, for Applicant; Gopalji Mehrotra, (Standing Counsel), for Opposite Parties.

MALIK C. J.: This case discloses rather an unfortunate state of affairs. On 12-9-1952, there was some trouble in front of a school known as K. R. Rastogi Higher Secondary School, Farrukhabad. One of the boys reading in that School was the applicant Keshab Chandra, son of Mukta Prasad. He was a student of XIIth class. In the fracas between the police and the students two police officers received some injuries. A report was made at the police station that about 150 to 200 students had taken part in the incident, but their names were not mentioned. The only name given in the report was that of a lecturer of the said School, Suresh Chandra Shukla.

(2) Whether the students of this particular institution had taken part in the fracas and who they were, is not a matter about which we can express any opinion. We have been informed that there is a case pending against 10 students in the Court of the Magistrate, Fatehgarh.

(3) On 9-10-1952, even before the students who had been arrested had been put up for identification the Inspector of Schools passed an order rusticating a number of boys. On 16-9-1952, the applicant was arrested but he was released on bail the same day. On 6-12-1952, he was put up for identification but no one identified him as among those who had taken part in the affray. In the affidavit in support of the application it is mentioned

that the applicant was never sent for or interrogated by the Principal of the School in connection with the incident and the Principal did not make any report against the applicant to the Inspector of Schools. It is further mentioned that neither the Director of Education, nor the Inspector of Schools made any enquiries before rusticating the applicant and some other boys on 9-10-1952. As a matter of fact in the rustication order even the name of the boy was not correctly given He was described as Kishan Chandra, son of Mukta Prasad, though his name is Keshab Chandra, son of Mukta Prasad.

(4) Notice of this application was issued to the opposite parties which included the Inspector of Schools, Farrukhabad; the Director of Education, Uttar Pradesh; the Board of High School and Intermediate Education, U. P.; and the Principal, K. R. Rastogi Higher Secondary School, Farrukhabad; and no counter-affidavit has been filed on their behalf. We must, therefore, take it that the facts given in the affidavit in support of the application are correct. It would then mean that without any enquiry whatsoever either by the head of the institution or by the Inspector of Schools or by any authority higher than him the applicant was rusticated, probably because of some private information of which we know neither the source, nor the nature.

(5) It is not necessary for us in this case to go into the question whether a student reading in an educational institution has any legal right to continue to read in that institution or whether any disciplinary action taken by the head of the institution or those in charge of maintenance of discipline can be made subject to scrutiny in a Court of law. To hold that a student has a legal right to come to a Court of law and require the head of the institution to justify his action where he has meted out some punishment or taken any disciplinary action will be subversive of all discipline in our schools and colleges and we must not, therefore, be deemed to have countenanced any such suggestion by this order. As a matter of fact in more than one case we have observed that this Court will not interfere in the internal autonomy of educational institutions.

(6) In this case, however, that question does not arise. No disciplinary action has been taken by the Principal who is primarily responsible for maintenance of discipline in the institution. The Inspector of Schools is an officer appointed by the Government to supervise the work of those who are in charge of these institutions and he is bound by certain instructions issued by the Government as to how he has to conduct himself in the discharge of his duties. Under Para 96 of the Educational Code of Uttar Pradesh, 1936 Edition, the head of an institution has been made responsible for maintenance of discipline and has been given the right to punish and even expel a boy from a school or college. In very serious cases where the student deserves severer punishment than he can inflict, i.e. where a student has not only to be expelled from the school or college but his admission in any other institution has to be debarred a report has to be made to the Inspector of Schools who passes an order debarring his admission in any other institution for a specific period. In this case the Principal took no action. He made no enquiries. The Inspector never directed him to take any steps. They made no inquiries and yet they rusticated the boy. In the circumstances disclosed in the affidavit we think that the Inspector was not justified in passing the order that he did. His action violates all principles of natural justice. He seems to have been very hasty in his action and he passed the order without even calling for a report from the Principal as to whether the boy had really taken part in the incident or not. The order being in contravention of para 96 of the Educational Code and not having been made on a report of the Principal, the Inspector of Schools had no power to make it.

(7) The result, therefore, is that we allow this writ application and set aside the order of rustication passed by the Inspector of Schools on 9-10-1952.

(8) Before we leave this case, however, we may mention that on behalf of the learned Standing Counsel the question of jurisdiction of this Court in passing the order under Art. 226 of the Constitution, when the rustication order was passed by the Inspector of Schools in contravention of the provisions of para 96 of the Educational Code and not by the Principal was not raised and we have, therefore, not considered that question. Learned Standing Counsel pointed out that if the order of expulsion had been passed by the Head of the Institution or by the Inspector of Schools in accordance with the provisions of Para 96 of the Educational Code he would have raised the point that Art. 226 could not be invoked by the applicant for the quashing of the order.

(9) We do not think that it is a case in which we should make any order as to costs.

A/M.K.S. Petition allowed.

A. I. R. 1953 ALL 624 (Vol. 40, C. N. 314)

RAGHUBAR DAYAL AND MUKERJI JJ.

J. K. Iron and Steel Co., Ltd. Kanpur, Applicant v. Labour Appellate Tribunal of India and others, Opposite Parties.

Writ Appln. No. 337 of 1952, D/-9-4-1953.

(a) Industrial Disputes—U. P. Industrial Disputes Act (28 of 1949), Ss. 3, 4, 8 — Govt. Order No. 615 (LL)/XVIII-7(LL)/51, D/-15-3-1951, Cl. 10 and Govt. Order No. 3092 (T.D.) XVIII-28 (T.D.)/1951, D/- 28-6-1951 Cl. 16 — Power of Governor to extend time.

Clause 16 of G. O. No. 3092 authorising Adjudicator and Tribunal to hear dispute and pronounce its decision within 40 days (excluding holidays) from date of reference i.e. 28-6-1951 — Period of 40 days extended up to 15-9-51 and again up to 30-9-1951 and lastly up to 1-11-1951 by orders dated 31-8-51, 24-9-51 and 17-10-1951 respectively — Award by adjudicator made on 1-11-1951 — Appeal against — Tribunal modifying it — Writ application by employer on ground that adjudicator became 'functus officio' after 14-8-1951, when the period of 40 days expired and that, therefore, the Governor could not extend the period as the effect of such order would amount to reviving the right of the adjudicator to make an award — Extension held valid it being

not necessary that such orders should have been passed before the expiry of the period which was sought to be extended — The adjudicator held remains seized of the references till he makes his award or till the reference to him is withdrawn by the Governor, and that so long as he remained seized of reference, Governor could make order extending period of decision and thus making him competent to make award — No valid objection, held could be taken to adjudicator's making award within any such extended periods. — (Ss. 508, 514 and 521 of Civil P. C. (1882) compared). Case law reviewed. AIR 1951 All 181 (FB); (1818) 106 E. R. 146; (1903) 2 Ch. 394, Distinguished. (Paras 6, 8, 12)

(b) Words and Phrases — "To extend" and "to enlarge".

To extend a certain period is the same thing as to enlarge that period. The words "to extend" and "to enlarge" are synonymous. Whenever any period fixed for doing a certain thing is extended, the extension would commence from the point of time when the earlier period ends. (Para 9)

(c) Industrial Disputes — U. P. Industrial Disputes Act (28 of 1949), S. 6 (1) — Authority of adjudicator.

Under the provision the adjudicator is bound to make an award unless the reference to him has been revoked, and in case he fails to pronounce the award within the time allowed, he should take steps to have the necessary period extended. (Para 11)

(d) Constitution of India, Art. 226 — Scope.

The writ of certiorari, which is in the discretion of the Court to issue under Art. 226, should not be issued ordinarily in cases where the applicant had failed to urge the grounds on which he claimed a writ of certiorari before the other Tribunals where he could have properly urged the grounds, unless he could show that he was unaware of those grounds when the matter was before the other Tribunals. Case law considered. (Para 24)

(e) Industrial Disputes — U. P. Industrial Disputes Act (28 of 1949), S. 6(1) — G. O. No. 3092 (T.D.) XVIII-28 (T.D.)/1951, D/- 28-6-1951 — Powers of Adjudicator and Tribunal — (Constitution of India, Art. 226).

Under the Act or the Order, the adjudicator or the Appellate Tribunal was not restricted with respect to the matters which should be taken into consideration by them in coming to a conclusion on the question referred about the justifiability of the retrenchment of the workmen.

Held that neither the adjudicator nor the Appellate Tribunal exceeded their jurisdiction in taking into consideration the various points they did consider in arriving at the conclusion and no case was made out for the issue of a writ in the nature of certiorari quashing them. (Paras 25, 26)

G. S. Pathak and R. S. Pathak, for Applicant; S. C. Khare, for Opposite Party.

CASES CITED:

(A) (1818) 1 B & Ald 396: 106 ER 146
(B) (1903) 2 Ch 394
(C) ('53) AIR 1953 SC 95: 1953 SCR 439
(D) ('51) AIR 1951 All 181: 1951 All LJ 64: 52 Cri LJ 333 (FB)
(E) ('91) 18 Ind App 55: 13 All 300 (PC)
(F) ('92) 1892 All WN 18: 14 All 343
(G) (1868) 37 LJQB 121: 3 QB 404
(H) (1874) 43 LJQB 41: 9 QB 117
(I) (1884) 13 QBD 688
(J) ('27) AIR 1927 Mad 130: 50 Mad 130 (FB)
(K) (1914) 83 LJ KB 528: 1914-1 KB 608
(L) (85-86) 9 All 191: 13 Ind App 134 (PC)
(M) (86-87) 11 Mad 26: 14 Ind App 160 (PC)
(N) (1919) 88 LJ KB 1022: 1919-2 KB 374
(O) ('53) AIR 1953 SC 53: 1953 SCR 334 (SC)

RAGHUBAR DAYAL J.: This is an application under Art. 226 of the Constitution, for the issue of a writ in the nature of certiorari to quash the award dated 1-11-1951 and the order dated 4-7-1952, of the Labour Appellate Tribunal.

(2) The petitioner is the J. K. Iron and Steel Co., Ltd., having its registered office at Kamla Tower, Kanpur. It dispensed with the services of 128 workers on 15-5-1951 and served on them a notice to this effect:

"Consequent to transfer of the Rolling Mill to Calcutta and want of scrap to work furnace department in full, the services of the persons as per list attached are dispensed with from today. Their wages and other dues in full settlement will be paid after 2 P.M."

The dismissal of the workers was challenged on their behalf by the Secretary, Iron and Steel Mazdoor Union, Kanpur.

(3) On 28-6-1951, the Governor in exercise of the powers conferred by Ss. 3, 4 and 8, U. P. Industrial Disputes Act, 1947 (U. P. Act No. 28 of 1949) & in pursuance of the provisions of cl. 10 of Government Order No. 615 (LL)/XVIII-7(LL)/51, D/-15-3-1951, subsequently to be referred to as the Order, referred this industrial dispute, between the petitioner firm and its workmen, to Sri J. N. Singh, Additional Regional Conciliation Officer, Kanpur, for adjudication. The matter in dispute was expressed thus in G. O. No. 3092(TD)/XVIII-28 (TD)/1951 dated 28-6-1951:

"Whether the retrenchment of the workmen given in the Annexure by Messrs. J. K. Iron and Steel Co., Ltd., Kanpur is unjustified? If so, to what relief are the workmen entitled?"

Clause 16 of the Order reads:

"The Tribunal or the Adjudicator shall hear the dispute and pronounce its decision within 40 days (excluding holidays observed by Courts subordinate to the High Court) from the date of reference made to it by the State Government, and shall thereafter as soon as possible supply a copy of the same to the parties to the dispute, and to such other persons or bodies as the State Government may in writing direct.

Provided that the State Government may extend the said period from time to time."

The period of 40 days commencing from the 28th June terminated on the 14th August. The Governor, however, extended the period for the decision of the adjudicator upto September 15, by an order dated the 31st August, again to September 30, by an order dated 24th September and lastly upto 1-11-1951, by an order dated 17-10-1951. It will be noted that these orders extending the period for the decisions of the adjudicator were made after the expiry of the earlier periods and not before the expiry of those periods.

(4) The adjudicator made his award on 1-11-1951.

(5) Against this award both the parties to the dispute filed appeals before the Labour Appellate Tribunal of India. The Tribunal modified the award, holding that the retrenchment was wholly

unjustified and that the case was only a case for "play off" under Standing Order 16(a), and ordering that they be reinstated and be given their full wages for the period above 12 days in every calendar month during which they were not allowed to work and were unemployed. It is against this order that this writ of certiorari is sought on the grounds that the award of the adjudicator was without jurisdiction inasmuch as the various extensions of the period for his decision were ordered after the expiry of the earlier period specified for the making of the award and that the adjudicator or the Appellate Tribunal had no jurisdiction to order that the workmen should be played off under the Standing Order 16(a), particularly when there was a genuine shortage of material for a long period.

(6) Mr. Pathak, appearing for the petitioner, urges that the adjudicator became 'functus officio' after the 14th August 1951, when the period of 40 days, commencing from the date of reference, expired and that, therefore, the Governor could not extend the period for making the award by an order passed subsequent to 14-8-1951, as the effect of such order would not be the mere extension of the period for decision which had expired, but would amount to reviving the right of the adjudicator to make an award, a right which had ceased to exist on the expiry of the period of 40 days. In support of this contention reliance was placed on the cases of — 'Brooke v. Clarke', (1818) 106 E. R. 146 (A); — 'In re Macintosh and Thomas', (1903) 2 Ch. 394 (B); — 'Strawboard v. Gutta Mill Workers Union', AIR 1953 SC 95(C) and — 'State v. Ram Kishan', AIR 1951 All 181 (FB) (D).

(7) It is contended by Mr. Khare, for opposite party no. 4, that the power of the Governor to extend the period for the making of the award under cl. 16 of the Order is not limited by any expression to the effect that such order should be passed before the termination of the period originally fixed or subsequently enlarged by an order made before the expiry of the original period or the extended period and that, therefore, the various orders extending the periods for making the award were valid orders and the adjudicator could, therefore, make the award upto 1-11-1951, on which date he did actually make the award. He relies in his support on the cases of — 'Har Narain Singh v. Bhagwant Kuar', 13 All 300 (PC) (E); — 'Ram Manohar v. Behari Misr', 14 All 343 (F); — 'Lord v. Lee', (1868) 3 Q B 404 (G) — 'Denton v. Strong', (1874) 9 QB 117 (H) and — 'May v. Harcourt', (1884) 13 Q B D 688 (I).

(8) We have considered all that had been urged on behalf of the parties and are of opinion that the various orders extending the period for the making of the award by the adjudicator were valid orders, it being not necessary that such orders should have been passed before the expiry of the period which was sought to be extended.

(9) To extend a certain period is the same thing as to enlarge that period. The words "to extend" and "to enlarge" are synonymous. Whenever any period fixed for doing a certain thing is extended, the extension would commence from the point of time when the earlier period ends. The contention, therefore, that there can be no extension when a period already fixed has come to an end in view of what is implied by the term "extension" is not of any significance when it is not disputed that extension can be made after the expiry of the period in cases where the provision authorising the making of orders extending certain periods uses an expression that such orders could be passed before or after the expiry of the earlier period. Such an expression only makes it clear that the order of extension can be passed at any time, but cannot give a different meaning to the word "extension". The argument, therefore, for the petitioner based on the implications of the word "extension" to the effect that only what exists can be extended is not sufficient for arriving at the conclusion that the orders about extension must be passed prior to the expiry of the earlier period. The provision in cl. 16 is in most general terms. It does not limit the power of the Governor to order the extension within the period to be extended, but empowers him to extend the period from time to time. In the absence of any such limitation, we are not prepared to narrow down the interpretation of this provision and to hold that the Governor must exercise his power of extending the period before its expiry.

(10) Such an order of extension merely substitutes the extended period for the period of 40 days in the main provision of the clause. It has nothing to do with the right of the adjudicator to adjudicate on the matter referred to him. There is nothing in the order with respect to the revival of his right to adjudicate. There is nothing in cl. 16 or in any other clause of this Order which provides that the right of the adjudicator to make an award will cease after the expiry of 40 days. In the absence of any such expression with respect to the cessation of the adjudicator's power or right to decide the dispute, it appears to us that it would be wrong to say that the adjudicator ceases to be an adjudicator or that his right to adjudicate ceases. Clause 10 of the Order empowers the Governor to refer any industrial dispute to an adjudicator for decision. The referring order dated the 28th June mentions that it is made in pursuance of the provisions of cl. 10 of the Order. The adjudicator derives his right to adjudicate on the dispute referred to him from the referring order made in pursuance of the powers conferred on the Governor under cl. 10 of the Order. He does not derive his power to adjudicate upon the dispute under any provision of cl. 16 of tne Order. The provisions of cl. 16 simply deal with procedural matters and provide for the adjudicator's hearing the dispute and pronouncing his decision within a certain period, which in every case is to be at least of 40 days, as mentioned in the clause and which period can be extended by the State Government. Expiry of any such period, therefore, has no effect on his right to decide the dispute. That right does not come to an end after the expiry of 40 days. He cannot exercise the right to pronounce the award once the period allowed for making the award has expired, but if that period is extended subsequently, with the result that the extended period would be deemed to be the original period fixed, the adjudicator can exercise his powers and pronounce his award. Clause 13 empowers the Governor to withdraw any such reference. There is nothing in the Order providing for the adjudicator's returning the reference undecided to the Governor in case he could not deliver the award within the time allowed. Section 6(1), U. P. Industrial Disputes Act reads:

> "When an authority to which an industrial dispute has been referred for adjudication has completed its inquiry, it shall, within such time as may be specified, submit its award to the State Government."

(11) Clause 16 of the Order says that the adjudicator shall, after recording necessary evidence, make the award within 40 days. It would appear from these provisions of the Act and the order and from the absence of any provision suggesting the return of the reference by the adjudicator, in case he could not pronounce the award within the period allowed, that the adjudicator is bound to make an award unless the reference to him has been revoked, and that in case he fails to pro-

nounce the award within the time allowed, he should take steps to have the necessary period extended.

(12) We, therefore, construe these various provisions to mean that the adjudicator remains seized of the reference till he makes his award or till the reference to him is withdrawn by the Governor, and that so long as he remains seized of the reference, the Governor can make an order extending the period of decision and thus making him competent to make the award. No valid objection, therefore, can be taken to the adjudicator's making the award within any such extended periods.

(13) Section 508, Civil P. C., Act 14 of 1882, provided for the Court's referring a matter to an arbitrator and enjoined its fixing such time as it thought reasonable for the delivery of the award and for specifying such time in the order. Section 514 authorised the Court, in certain circumstances, either to grant further time, and from time to time to enlarge the period for the delivery of the award, or make an order superseding the arbitration. Section 521 provided that no award would be valid unless made within the period allowed by the Court.

(14) In the case of — '13 All 300 (PC) (E)' the order referring the matter to the arbitrator did not specify the period within which the award was to be made but fixed a date for the disposal of the case which implied that the award was to be made before that date. The award was not made within that date. The Court, however, extended the periods for the delivery of the award successively making such orders of extension some time beyond the expiry of the period fixed earlier. The award was, however, made on a date beyond the last date of the period fixed by the last order of extension. The award was set aside in view of the provisions of S. 521. Their Lordships of the Judicial Committee of the Privy Council observed at page 304:

"When once the award was made and delivered the power of the Court under S. 514 was spent, and although the Court had the fullest power to enlarge the time under that section as long as the award was not completed, it no longer possessed any such power when once the time was passed."

The observations, therefore, mean, though it is not so expressed explicitly, that the Court was competent to extend the period within which the award was to be delivered even after the expiry of the earlier period as had happened in that case on some occasions, and that this power was limited by one consideration alone and that was that the order of extension must be made prior to the delivery of the award. This limitation was found as a result of the provisions of S. 521 and not of S. 514, as would appear from the observations of the Supreme Court in — 'AIR 1953 SC 95 (C)'. It was observed in column 2 at page 96:

"In order to give effect to S. 521 the Judicial Committee had to confine the exercise of the power to extend the time given to the Court by S. 514 to a point of time before the award had been made."

The case of — '14 All 343 (F), just followed the Privy Council case.

(15) In the case of — '(1868) 3 Q B 404 (G)', an agreement of reference to arbitration was made and signed on 8-8-1866. It mentioned no time for the making of the award. The arbitrator entered upon the reference at once and made his award on 17-1-1867. A Judge's order was obtained to the effect "that the time for the arbitrator to make his award be enlarged till the 15th of March instant." The award was taken up on the 14th March and was in favour of the plaintiff. Section 15, Common Law Procedure Act, 1864, (17 & 18 Vic., c. 125) reads:

"The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time), within three months after he shall have been appointed and shall have entered upon the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award; and it shall be lawful for the superior Court of which such submission, document or order is or may be made a rule of the Court, or for any Judge thereof, for good cause to be stated in the rule or order for enlargement from time to time to enlarge the term for making the award."

It was held that the Judge had power to enlarge the time after the award had been made and that the effect of the enlargement was the same as if it had been made by consent of the parties, viz., to ratify what had been previously done by the arbitrator without authority, and that the award was therefore valid. Blackburn J. observed at page 409:

"I am, therefore, clearly of opinion that the section gives power to the Judge to enlarge the term for making the award at any time, and under any circumstances in which he thinks there is good cause for his intervention, (of course he would not grant an order if he saw that injustice might be done thereby), and the effect of the enlargement is the same as if it had been by the parties; it amounts to a ratification and is, as if the enlarged time had been originally in the submission."

Mellow J. observed at page 410:

".....but I may say that the very form of expression used in S. 15 shows that the object was to put the parties and the arbitrator in the same position as if the original submission had contained the enlarged time, so that the arbitrator should during the whole time be clothed with the same authority as that originally given to him though for a shorter period."

Lush J. observed at page 411:

"No limit of time is given within which the Judge may enlarge the time, and he is not limited to the time within which the arbitrator himself could enlarge it, even although it be said in the submission that the arbitrator shall make his award on or before a certain date. If that is so, it cannot be any obstacle to the Judge's power that the arbitrator in the interval has done something which is at the time a nullity..... The true meaning of the statute is that when the order is once made, it annexes to the time originally limited all the intervening time and such further time as the order expresses."

(16) This case was followed in — '(1874) 9 QB 117' (H), in which the submission to arbitration mentioned that the award was to be made within a month or within such further time (not exceeding three months from the date of the submission) as the arbitrator should enlarge the time to; and again in the case of — '(1884) 13 QBD 688' (I).

(17) Mr. Pathak submits that all these cases related to arbitration and that as the parties themselves could enlarge the period during which the arbitrator could give the award, the provisions of law allowing the Court to enlarge the time for the delivery of the award were construed in that manner. It is true that the parties could enlarge the period during which the arbitrator was to

give an award, but that consideration could not have been of any importance if the provisions empowering the Courts to extend the time could not be legally interpreted to mean that the order extending the time could be made even after the expiry of the period. It is only when the expressions to be interpreted are capable of more than one meaning that their true meaning is deduced with reference to other matters having a bearing on the point. Mr. Pathak also submits that the Court under Ss. 508 and 514, Civil P. C. of 1882 had the power to fix the initial period for the delivery of the award and had the power to enlarge that period and that, therefore, the expressions empowering the Court to extend the time could be interpreted differently from the provisions empowering the State Government to extend the time fixed in clause 16 of the Order for the delivery of the award by the adjudicator. We do not see any good reason for this consideration affecting the interpretation of the expression in Cl. 16 empowering the State Government to extend the period from time to time.

(18) The case reported in — 'AIR 1953 S C 95' (C), in which the Supreme Court held that the adjudicator became 'functus Officio' after the expiry of the time, related to the adjudicator's making an award after the date which had been specified in the order of reference and in circumstances when there was no provision in the Act or in the order notified under its provisions about extending the period originally specified. It was observed in Column II, page 97:

"In view of the language of S. 6 of the U. P. Act and in the absence of a rule like the proviso to R. 16 referred to above it must follow that the State Government had no authority whatever to extend the time and the adjudicator had become functus officio on the expiry of the time specified in the original order of reference and therefore the award which had not been made within that time must be held to be without jurisdiction and a nullity as contended by Dr. Tek Chand."

In the absence of any provision for extending the period for the making of the award it must follow that the adjudicator's power to adjudicate comes to an end at the expiry of the period. The same, however, cannot be said when there is provision for extending the period unless such a provision limits the time for making the order of extension within the period sought to be extended, because in that case that power of extending the period could not be exercised after the expiry of the period fixed earlier.

(19) The case of — 'AIR 1951 All 181 (FB)' (D) referred to an Act ceasing to be in force after the period expressed for its enforcement, and it was held that once the Act had ceased to operate, any order passed subsequently for the continuation of that Act would be invalid. As already mentioned, there is nothing in the U. P. Industrial Disputes Act or the order dated 15-3-1951, which provides that the adjudicator's power to adjudicate ceases on the expiry of the period of forty days mentioned in clause 16 of the order. This case, therefore, is not of any help.

(20) In — '(1818) 106 ER 146' (A), an author's right of copyright had come to an end before the enactment of another Act which granted the right of copyright for the lifetime of the author in case the author was alive at the expiry of twenty-eight years after the first publication. It was in this setting that Lord Ellenborough C. J., said at page 148:

"The word 'extension' imports the continuance of an existing thing and must have its full effect given to where it occurs.... and it seems to me that predicating the purpose to be to benefit the author by the extension of his right in adopting a very different idea from recreating an expired right. The word 'extension' is too strong for me to grapple with; and if the Court were to get rid of its operation, a great public injury would be effected by calling back a right that, by lapse of time, had become extinct."

It may be noted that on the cessation of the author's right of copyright at the expiry of twenty-eight years after the first publication any person was free to publish that work, and if a different interpretation had been given, it would have meant divesting the public in general of a right which had accrued to them on the extinction of the right of copyright in the author at the expiry of twenty-eight years after the first publication. This case is also distinguishable as there the right had ceased while in the present case, as already mentioned, the right or power of the adjudicator to decide had not come to an end.

(21) In the case of — '(1903) 2 Ch 394' (B) an order of the Court authorised the taxing Master to make his certificate in a month unless the said Master extended the time to enable him to make the certificate, and provided that, in default of the Taxing Master's making of the certificate within such time, that order would be of no effect. The taxing Master's right to proceed with the matter after a month was questioned. Byrne J. observed at p. 401:

"I think that the force of the words 'or this order is to be of no effect' destroys the proceeding altogether: that there is no longer a proceeding under which the taxation can take place, and that the power to enlarge the time is meant to be power to enlarge the time while there is a pending matter. But for the final words 'or this order is to be of no effect' I think the order would be a substituting order and the time could be extended."

These observations, to our mind, do not support the contention for the petitioners. There is nothing in the provisions of the Order to the effect that the reference to an adjudicator under para. 10 would be of no effect if the adjudicator did not make his award within the period of forty days specified in para. 16. When the judgment of Byrne J. went in appeal it was reversed on the ground that sub-rule 57 of R. 27 of O. 65 authorised the Taxing Master to extend the time even after the expiry of the time fixed in that order. This sub-rule reads:

"The Taxing Officer shall have power to limit or extend the time for any proceeding before him, and where, by any general order, or any order of the Court or a Judge, a time is appointed for any proceeding before or by a Taxing Officer, unless the Court or Judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms, if any, as the justice of the case may require, and although the application for the same is not made until after the expiration of the time appointed, it shall not be necessary to make a certificate or order for this purpose, unless required for any special purpose."

Romer L. J. observed at page 408:

"First it is said that under the very terms of the order it ceases to have any effect after the expiration of the appointed time. The certificate not having been made within the month and there being no extension of time within the month, it is said that the order was dead and could not be revived. In my opinion that is not the right view to take of this order. I do not think that it was dead in that sense. It is more like a case of suspended animation, if I may be permitted to say so. In my opinion

the power to extend the time in this order meant power to extend it according to the rules—that is, according to sub-rule 57."

Something to the same effect can be said with respect to the proceedings pending with the adjudicator after the expiry of the period of forty days and till the order extending the period is made.

(22) It follows that the cases relied on by Mr. Pathak are distinguishable and not quite apposite to the present case. The cases relied upon on behalf of the opposite party are more in point and support the view we have expressed earlier to the effect that the Governor is free to make the order extending the period for the making of the award even after the expiry of the period of forty days or any extended period and that therefore the adjudicator had jurisdiction to make the award in suit on 1-11-1951.

(23) A "preliminary objection" was raised by Mr. Khare at the conclusion of the arguments of Mr. Pathak that in view of the failure of the petitioners to raise an objection before the Appellate Tribunal with respect to the adjudicator's having no jurisdiction to act as an adjudicator after 14-8-1951, they should not be granted a writ of certiorari. Reliance was placed on the cases of — 'Lakshmanan Chettiar v. Commr. of Corporation of Madras', AIR 1927 Mad 130 (FB) (J) and — 'Rex v. Williams', (1914) 1 KB 608 (K). These cases support his contention. In — '(1914) 1 KB 608' (K) a writ of certiorari was refused on the ground that the aggrieved party failed to raise any objection to the jurisdiction of the Court below at the hearing before that Court. Channell J. said at page 613:

"No objection was taken to the jurisdiction of the Court below at the hearing before that Court; that being so, it is the rule of this Court not to grant a writ of certiorari except upon an affidavit which negatives knowledge on the part of the applicant when he was before the Court below of the facts on which he bases his objection."

He further observed at page 613:

"A party may by his conduct preclude himself from claiming the writ 'ex debito justitiae', no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of certiorari."

In — 'AIR 1927 Mad 130 (FB)' (J) it was observed at page 134:

"The point taken by Mr. Krishnaswami Ayyangar is that failure to object to the jurisdiction of the Court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the lower Court and does not apply to a contention of law. We see no warrant in the cases for drawing any such distinction because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue the case on its merits before that Court. If so, he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate. We are of opinion that the applicant has so conducted himself as to preclude this Court from exercising a discretionary jurisdiction in his favour."

Mr. Pathak argues that this right of an aggrieved person to a writ of certiorari is lost only when he fails to bring to the notice of the Court below facts on the basis of which its general jurisdiction to deal with that matter would cease and will not be lost in cases in which the facts were well known and the question of jurisdiction was purely a question of law, the principle behind this view being that in view of the acquiescence of the aggrieved party to the proceedings in the Court below the discretion of issuing a writ of certiorari should not be exercised in his favour. The case of — 'AIR 1927 Mad 130 (FB)' (J) does not draw this distinction and clearly lays down that failure to raise a point of fact or of law affecting the jurisdiction of the Court below will preclude the aggrieved party from claiming a writ of certiorari as a matter of right. Mr. Pathak relies on para 1178 at page 532 of Volume 8, Halsbury's Laws of England and on the cases of — 'Ledgard v. Bull', 13 Ind App 134 (PC) (L) and — 'Meenakshi Naidoo v. Subramaniya Sastri', 14 Ind App 160 (PC) (M). The aforesaid para. 1178 states:

"Where, by reason of any limitation imposed by statute, charter, or commission, a Court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled."

This refers to the jurisdiction of a Court to entertain any action or matter. In the present case the objection is not to the jurisdiction of the adjudicator to entertain the reference made to him by the Governor in pursuance of Cl. 10 of the Order. If the reference had been bad for any reason, there would have been an initial lack of jurisdiction in the adjudication to decide the dispute and no acquiescence or consent of the parties could have conferred jurisdiction on the adjudicator. The adjudicator had jurisdiction to decide the reference. We have already said that his jurisdiction had not ceased. Even if it had ceased, it was for the petitioners to raise the objection before the adjudicator with respect to his jurisdiction and to raise it again before the Appellate Tribunal. Their failure to raise this objection could be excused only if they were ignorant of it. This is not alleged. In fact what is urged by Mr. Pathak is that because the other party as well as the adjudicator knew of the provisions of Cl. 16 and of the expiry of the period of 40 days from the date of the reference, it was not incumbent on the petitioners to raise this point of jurisdiction before the adjudicator. We do not find any support for this contention that the knowledge of the facts by the other party or by the adjudicator would be of any help to the petitioners. They lose a certain right on account of their failure. It is their conduct which has to be looked into and not the conduct of the other parties concerned in the matter. The case of — '13 Ind App 134 (PC) (L) simply lays down that a defendant may be barred by his own conduct from objecting to irregularities in the institution of a suit in a Court which was competent to entertain that suit if any such irregularities had been committed, and that when the Judge has no inherent jurisdiction over the subject matter of the dispute, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. We have already pointed out that the adjudicator in the present case had jurisdiction over the dispute and that what is laid down here does not in any way go against what has been held in the case of — 'AIR 1927 Mad 130 (FB)' (J). The case of — '14 Ind App 160 (PC)' (M) is also not of much help as it only held that the High Court in that

case was inherently incompetent to hear the appeal which had been preferred to it against a certain decision of the District Judge under the Pagoda Act. Mr, Pathak also referred to the case of — 'Rex v. West Suffolk Compensation Authority', (1919) 2 KB 374 (N) where certain conduct of the appellants for a writ of certiorari was not held to be such as to disentitle them to the relief. This case does not in any way throw doubt on what had been held in — '(1914) 1 KB 608' (K).

(24) In view of the above, we are of opinion that the writ of certiorari, which is in the discretion of the Court to issue under Art. 226 of the Constitution should not be issued ordinarily in cases where the applicant had failed to urge the grounds on which he claimed a writ of certiorari before the other Tribunals where he could have properly urged the grounds, unless he could show that he was unaware of those grounds when the matter was before the other Tribunals.

(25) The second point urged by Mr. Pathak, for the petitioners, was that the adjudicator and the Appellate Tribunal exceeded their jurisdiction in deciding that the order terminating the employment of the workmen opposite party was unjustified on account of the employers' not taking action under standing order 16 (a). It is urged that they had merely to see whether the exercise of the discretion vested in the employers by standing order 20 (a) had been properly exercised, that is, had been exercised in the interest of the industry and had not been exercised arbitrarily, mala fide or with a view to victimise certain workmen. We do not find any restriction on the powers of the adjudicator and the Tribunal with respect to the matters they have to take into consideration in coming to a conclusion on the point of dispute referred to the adjudicator. The issue referred to the adjudicator was simply whether the dismissal of the workmen was or was not unjustified, and if it was unjustified, to what relief they were entitled. The adjudicator held that there was shortage of scrap iron, that the complaint that the shortage was deliberate and "management created" was not correct, that the shortage of scrap iron was of a temporary nature and would probably last for about eight or nine months, that he was not convinced that the management had any mala fide intentions, that their bona fides were clear and that he could not hold that the retrenchment was at all motivated by any harassment or victimisation on the part of the management. He, however, was of opinion that the employer company should offer the option of employment to their workmen in their new set up in Calcutta and that the retrenched workmen should be kept on the roll of the factory from immediate effect with continuity of service and they should be played off in accordance with trade reasons.

The Appellate Tribunal agreed with the adjudicator's opinion, except with respect to the standing order in accordance with which the retrenched workmen were to be played off. Standing order 15 (a) contemplates what the company is to do in the event of a fire, catastrophe, breakdown of machinery or stoppage of the power supply or some other causes beyond the control of the company and allows the company to stop any machine or department for any period, without notice and without compensation in lieu of notice. Standing order 16 (a) allows the company, in the event of shortage of orders or for any other trade reasons, to stop any machine or machines or departments, for a period, not exceeding 12 days (excluding statutory holidays) in any one calendar month, without notice and without compensation in lieu of notice. The standing order 20 (a) allows the company to terminate the employment of any permanent operator by giving 14 days' notice or by payment of 12 days wages in lieu of notice, and requires the termination of service to be recorded in writing and communicated to the operator, if he so desires at the time of discharge. It is contended by Mr. Pathak that the petitioner company exercised its discretion, given to it under standing order 20 (a) in spite of its discretion to play off for trade purposes under standing order 16 (a) and that the Tribunal had no jurisdiction to question this right exercised bona fide.

As already mentioned, we do not find anything in the U. P. Industrial Disputes Act or in the Order or in the particular order of reference to the adjudicator, which restricts the power of the adjudicator with respect to the matters he has to take into consideration in coming to the conclusion whether the retrenchment of the workmen was unjustified. He was free to take into consideration all such matters as could have a bearing on the question, and one such matter could have been to see whether it was absolutely necessary to retrench the workmen. The standing orders did contemplate the contigency of trade reasons requiring the stopping of any machine or machines or department or departments for certain periods and provided in standing order 16 (a) that in such contingency the company may stop any machine etc. for a period not exceeding 12 days in the aggregate. This implies, to our mind, that so long as it is possible for the company to play off for trade purposes under standing order 16 (a), it should not take the extreme step of dispensing with the services of its employees. We are of opinion that this consideration is very relevant to the consideration of the point which had been referred to the adjudicator and that it cannot be said that the adjudicator or the Appellate Tribunal exceeded their jurisdiction in deciding the dispute referred to the adjudicator and which came up in appeal before the Appellate Tribunal. We may refer to the case of — 'State of Madras v. C. P. Sarathy', AIR 1953 S C 53 (O). It was observed at page 58:

> "But the adjudication by the Tribunal is only an alternative form of settlement of the disputes on a fair and just basis having regard to the prevailing conditions in the industry and is by no means analogous to what an arbitrator has to do in determining ordinary civil disputes according to the legal rights of the parties."

This supports our view that the adjudicator or the Appellate Tribunal was not restricted with respect to the matters which should be taken into consideration by them in coming to a conclusion on the question referred about the justifiability of the retrenchment of the workmen. We are, therefore, of opinion that neither the adjudicator nor the Appellate Tribunal exceeded their jurisdiction in taking into consideration the various points they did consider in arriving at the conclusion.

(26) We, therefore, hold that the award of the adjudicator and the order of the Labour Appellate Tribunal are valid and that no case is made out for the issue of a writ in the nature of certiorari quashing them. We accordingly reject this application with costs, which we assess at Rs. 200/-.

A/H.G.P. Application rejected.

A. I. R. 1953 ALL 630 (Vol. 40, C. N. 315)

RAGHUBAR DAYAL AND MUKERJI JJ.

Bhagwan Das and others, Applicants v. State through Badri Prasad, Opposite Party.

Criminal Revn. No. 1737 of 1951, D/- 4-3-1953.

(a) Criminal P. C. (1898), S. 205 — "Dispense with."

The law enjoins that an accused should be present during the course of the trial more to safeguard his interests than to cause him inconvenience. In a case where the accused himself applies to the Court to be exempted from personal appearance, then a Court should grant the request unless it is of opinion that in the interests of justice it is necessary that the accused should be present throughout the course of the trial, or unless there are some other good reasons for directing the presence of the accused throughout the course of the trial. (Para 4)

Anno: Cr. P. C., S. 205 N. 3.

(b) Criminal P.C. (1898), S. 561A — Interference by High Court at an interlocutory stage — (Constitution of India, Arts. 226 and 227).

Where an application made by the accused under S. 250, Cr. P. C. has not been decided by the Magistrate before whom it is made, the High Court will not exercise any of its powers either under S. 561A, Cr. P.C. or Arts. 226 and 227, Const. of India. The applicant has his remedy in the lower Court and he should seek that remedy in that Court. (Para 7)

Anno: Cr. P. C., S. 561A N. 6.

A. P. Pandey, for Applicants; S. P. Kumar and Gopal Behari, for Opposite Party.

MUKERJI J.: These two applications have been made by certain persons who are standing their trial under S. 420, I. P. C. before a Magistrate at Bareilly. The applicants are residents of Orissa and they have a business office at Calcutta. They are the producers of certain vegetable products in the nature of vegetable ghee, etc. and the complainant entered into an agreement with them on which, according to his case, he was appointed a sole distributor of the products of the Company which is sponsored by the accused applicants, for the Uttar Pradesh and Delhi Province. According to the complainant he parted with a total sum of Rs. 25,000/- by way of security to the Company sponsored by the accused and that the accused used deception in getting this money from the complainant. The complainant wanted his money back but the accused have not so far refunded the money which they took under the pretext of its being a kind of security deposit.

(2) On 14-8-1951, the accused moved an application, through counsel, in the Court of the Magistrate for being exempted from personal appearance on the dates of hearing of the complaint. On 27-8-1951, they moved another application before the learned Magistrate under the provisions of S. 250, Criminal P. C. for quashing the complaint and for award of compensation against the complainant. The two matters before us, namely, the one, which is a revision and the other which is a miscellaneous application under S. 561A, Cr. P. C. and under Arts. 226 and 227 of the Constitution, arise out of the two applications to which reference has just been made.

(3) The application of 14-8-1951, which was for exemption of personal appearance, was rejected by the learned Magistrate by his order dated 31-8-1951. The learned Magistrate made an exceedingly short order in these words:

"The grounds of exemption are not sufficient. As this application, as the counsel says, has been presented on the instructions of the accused, he may be directed to produce all the accused on the next date. Case be put up on 20.9."

The other application, namely, the application of 27-8-1951, for the quashing of proceedings under S. 250, Criminal P. C. has not yet been decided by the learned Magistrate, at any rate counsel appearing on either side have not been able to state anything to the contrary.

(4) An application in revision was preferred to the Sessions Judge from the order rejecting the prayer for the exemption of personal appearance and that revision was rejected by the learned Sessions Judge. Revision No. 1737 of 1951 is directed against that order of the learned Sessions Judge. As we have pointed out, the applicants are residents of the State of Orissa and normally reside in a place called Chatrapur in the District of Ganjam of that State. Their main business office is situate at Calcutta at 26 Jhautola Road, Calcutta. So that for them to come all the way from either Chatrapur or Calcutta to be present for the trial which is pending at Bareilly would, 'prima facie', be not only inconvenient but positively difficult. The law enjoins that an accused should be present during the course of the trial more to safeguard his interests than to cause him inconvenience. In a case where the accused himself applies to the court to be exempted from personal appearance, then a court should grant the request unless it is of opinion that in the interests of justice it is necessary that the accused should be present throughout the course of the trial. Under the circumstances of this case, we are of the opinion that it would be a hardship for the accused to be present during the course of the trial in the Court of the Magistrate which may, for all we know, be a protracted and lengthy one.

(5) In the circumstances, therefore, we direct that the learned Magistrate will exempt the personal appearance of the accused on such terms as he may consider fit. This order of ours does not, however, restrict the power of the Magistrate to direct the presence of the accused if he is of the opinion that such presence on some particular occasion may be necessary for a proper decision of the case. In the event of the Magistrate making any such direction in regard to the presence of the accused, the Magistrate will see that the case is taken up on that date and not adjourned to another date involving unnecessary waste of time and money for the accused.

(6) In the result, we allow revision No. 1737 of 1951 in the above mentioned terms.

(7) Miscellaneous Case No. 2508 of 1951 has been directed against the prayer which was made by the applicants by their application dated 27-8-1951, for the quashing of the criminal proceedings initiated on the complaint of the opposite party. As we have already pointed out, this application has not yet been disposed of by the learned Magistrate. We have no doubt that this application will come up before the Magistrate in due course when he will decide it in accordance with law. By the application to this Court the applicants wish us to exercise our inherent powers under S. 561A, Cr. P. C. and the extraordinary powers conferred on us by Arts. 226 and 227

of the Constitution. We are not inclined to exercise any of our powers under those sections for the simple reason that the matter has not yet been decided by the trial court. The applicant has his remedy there and, as a matter of fact, he should seek that remedy in that court. The fact that the application has not been decided so long is not a good ground for our deciding it now, for the delay that has been caused has been caused to a large extent by the fact that the applicants themselves rushed up to this Court and had the proceedings in the court below stayed. We accordingly dismiss Miscellaneous Case No. 2508 of 1950 in the terms indicated above. The record of this case will be sent back to .the Court of the Magistrate immediately so that he may be able to proceed with the trial of the case at an early date.

B/V.S.B. Ordered accordingly.

A. I. R. 1953 ALL 632 (Vol. 40, C. N. 316)

MALIK C. J. AND AGARWALA J.

Mst. Fahmida Begam and others, Plaintiffs-Appellants v. Chobey Sambho Nath and others Defendants-Respondents.

Second Appeal No. 621 of 1949, D/-9-3-1953.

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 13 — Applicability of, to secured creditor.

Under S. 13 a secured creditor has not been given the option either to claim the money in the Encumbered Estates Act proceedings or to stand outside it and then to proceed to enforce his rights under the law by an independent suit. (Para 3)

B. Dayal, for Appellants; S. N. Katju, for Respondents.

MALIK, C. J.: Learned counsel for the appellants has raised a very ingenious point in the case but we do not think that the point has any force.

(2) On 6-1-1908 one Zebulnissa made a simple mortgage of three houses and seven Sihams of zamindari share to Fayyaz Ali Khan and Wajid Ali Khan mortgagees for Rs. 2000/-. On 19-1-1921 she sold to Wajid Ali Khan two Sihams out of the seven Sihams and transferred to the two mortgagees Fayyaz Ali Khan and Wajid Ali Khan the three houses mortgaged for Rs. 5000/-. The only property that remained thus encumbered was five Sihams zamindari. The plaintiffs are the legal representatives of Fayyaz Ali Khan mortgagee who has died and they claim that they have acquired the equity of redemption from Wajid Ali Khan of his interest in the mortgage. No date is mentioned of this transfer of mortgagee rights and it is not necessary for us in this case to consider this matter further, though it is very doubtful whether there was any such transfer. In the year 1922 Srimati Zebulnissa is said to have gifted to Wajid Ali the remaining five Sihams of the Zamindari and Wajid Ali on the basis of the oral gift got his name mutated in the village papers and got possession of the property. He remained in possession till 1936 when he filed an application under the U. P. Encumbered Estates Act and showed these five Sihams as property belonging to him.

Neither Fayyaz Ali nor the plaintiffs made any application to be included in the list of creditors. No claim to the five Sihams having been made by anybody the property was included in the list of properties belonging to Wajid Ali and the list of properties was sent to the Collector, from which the debts due to the landlord-applicants from Wajid Ali were to be satisfied. The Collector in satisfaction of the decrees passed by the Special Judge transferred these five Sihams to, we understand, the defendants first set. The plaintiffs got a suit filed in the year 1944 for realization of Rs. 2956/- on the basis of the mortgage dated 6-1-1908 and claimed that they were entitled to sell up these five Sihams in the possession of the defendants first set in satisfaction of the amount due under the mortgage. The lower appellate court dismissed the suit on the ground that the plaintiffs not having claimed the amount under the Encumbered Estates Act, the debt must be deemed to have been satisfied.

(3) Learned counsel has urged that under the U. P. Encumbered Estates Act a secured creditor has been given the option either to claim the money in the Encumbered Estates Act proceedings or to stand outside it and then to proceed to enforce his rights under the law by an independent suit. He has drawn our attention to ss. 4, 6, 7, 8, 9 and 13 where the provision is made as regards claims against "the persons or the property of the landlord". Learned counsel has urged that while in the sections mentioned above claims against the person as also against the property are mentioned, in s. 13 claim against the person only is included and not claim against the property so that if a secured creditor has not claimed his debt under the Encumbered Estates Act proceedings, his remedy to file a suit to enforce the security is not barred. Section 13 reads as follows:

> "Every claim decreed or undecreed against the landlord in respect of a private debt, other than a debt due to a Co-operative Society registered under the Co-operative Societies Act, 1912, by its members, shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged."

The section applies to all claims against the landlord in respect of a private debt. This section is differently drafted from the other sections. A reference is made in this section to claims "decreed or undecreed". Naturally it was not found necessary to repeat the words "against the property", as the decree must be against a person, though it might be confined to the property in his hands. The U. P. Encumbered Estates Act was enacted in 1934 and a large number of claims have been disposed of and liquidated under the provisions of that Act. It has always been held in this Court that the analogy of the Provincial Insolvency Act is not a true or complete analogy and the purpose underlying the Act is that the Collector should have before him a complete list of liabilities and assets of the landlord-applicant and find out the best way of satisfying the liabilities and at the same time to save as much of the property as possible.

There is no reason why secured debts should have been excluded from the purview of the Act and a mortgagee should be given

the right either to prove his claim or to stand out. This would give rise to various complications. The property included in the list sent to the Collector by the Special Judge is entirely under his control and he has the right to dispose it of either by mortgage, lease or sale as he considers desirable. We may also refer to s. 18 of the Act which provides that when a decree is passed under s. 14 on the basis of a mortgage, the effect of the decree shall be to extinguish all the rights, if any, of the claimant under that mortgage. The Act, read as a whole, leaves no doubt that the mortgagee has to prove his claim against the landlord in the proceedings under the U. P. Encumbered Estates Act and he cannot claim to stand out of it. Section 13, to our minds, was clearly applicable and the mortgagee had to prove his debt before the learned Special Judge. His failure to do so must be deemed to have discharged that debt.

(4) The appeal has no force and is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 ALL 633 (Vol. 40, C. N. 317)

SAPRU AND CHATURVEDI JJ.

Sheo Kumar and another, Applicants v. V. G. Oak and others, Opposite Party.

Civil Misc. Writ No. 96 of 1953, D/- 19-3-1953.

†(a) **Constitution of India, Arts. 226 and 324(1) — Petition against Election Tribunal.**

A High Court has jurisdiction to entertain a writ petition against an Election Tribunal. (Para 5)

†(b) **Representation of the People Act (1951), Ss. 37 and 82 — "At the election."**

The words "at the election" have reference to the actual time when the voting takes place. Therefore, a candidate who withdraws his candidature under S. 37 of the Act cannot be regarded as a candidate who was duly nominated at the election and hence it is unnecessary to implead him as a party to an election petition. (Paras 4, 7, 13 and 19)

(c) Representation of the People Act (1951), S. 81 — "Any candidate."

The words "any candidate" cannot obviously include a person who withdrew himself from the contest before the election was over. The candidate must be a person, if the polling takes place, who continues as a candidate right up to the time that the election is held. (Para 18)

(d) Constitution of India, Art. 226 — Error of law in decision of Election Tribunal — Issue of writ — (Representation of the People Act (1951), S. 82).

An error of law in the decision of the preliminary issue whether a candidate who withdrew his candidature was a necessary party to the election petition which the Election Tribunal was competent to determine is no ground for quashing the order of the Tribunal in the exercise of powers of issuing a writ of 'certiorari'. AIR 1952 SC 179, Foll. (Para 23)

(e) Representation of the People Act (1951), S. 82 — Question of impleading — Collateral fact — Jurisdiction of Tribunal.

The question whether a candidate who withdrew his candidature should be impleaded or not is not in the nature of a collateral fact upon the existence of which the jurisdiction of the Election Tribunal depends. (Para 24)

Gopalji Mehrotra, Kamat Nath Seth, for Applicants; Gopi Nath Kunzru, for Opposite Party.

CASES CITED:

(A) ('53) AIR 1953 Bom 293: (Civil Appln. No. 2017 of 1952, D/- 19-12-1952 Bom)

(B) ('52) AIR 1952 SC 179: 1952 SCR 519 (SC)

(C) ('52) AIR 1952 SC 319: 1952 SCR 696 (SC)

(D) (1952) 1 All ER 122

SAPRU J.: This is an application under Art. 226 of the Constitution of India praying that this Court may be pleased to issue a writ of certiorari quashing the order passed on 13-11-1952, by opposite parties 1 to 3 and a writ of prohibition directing opposite parties 1 to 3 not to proceed with the election petition No. 316 of 1952, — Saling Ram Jaiswal v. Sheo Kumar'.

(2) The facts which have given rise to this petition may be stated briefly.

(3) The first general elections under the Constitution of India were held in the district of Allahabad in January 1952. The Sirathu-Manjhanpur constituency from which the applicants were seeking election in this district was a double-member constituency with a seat reserved for scheduled caste candidate. For the election there were as many as nine candidates, viz. opposite parties 4 to 15. Sri Sheo Kumar Pandey and Sri Sukhi Ram Bhartiya were among the duly nominated candidates for the Uttar Pradesh Legislative Assembly. Both of them were standing on the Congress tickets. Sri Salig Ram Jaiswal and Shrimati Sushila Devi were set up as candidates on behalf of Kisan Mazdoor Praja Party.

(4) Election at the aforesaid constituency was held on 28-1-1952, and after the counting of votes petitioners 1 and 2 were declared elected on 9-2-1952. Thereafter Salig Ram Jaiswal, opposite party 4, presented an election petition challenging the election of the petitioners, before the Election Commissioner of India, New Delhi. That election petition was sent for disposal to the Allahabad Election Tribunal consisting of opposite parties 1 to 3 with opposite party 1 as Chairman.

One Ganga Prasad has also filed his nomination which was scrutinised and accepted by the Returning Officer. He, however, withdrew his candidature subsequently and did not contest the election. The petition filed by opposite party 4 was objected to by the petitioners on the ground, 'inter alia', that inasmuch as the petitioners had failed to implead this Ganga Prasad as a party the petition was liable to be dismissed. This question was decided by the Tribunal by its judgment dated 13-11-1952. The Election Tribunal having held that it was unnecessary for opposite party 4 to implead Ganga Prasad, the petitioners have now come up to this Court under Art. 226 of the Constitution.

(5) Before considering the various points which have been raised in the case, reference may be made to the fact that it is conceded by both the parties that the Election Tribunal which is functioning in Allahabad is subject to the jurisdiction of this Court under Art. 226 of the Constitution. Article 324 of the Constitution vests, 'inter alia', the powers of appointing election tribunals for the decision of doubts and disputes arising out of or in connection with elections to

Parliament and to the Legislatures of States in the Election Commission. Article 329 lays down that an election to the Union or State Legislature can be questioned only by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

The Act has laid down the constitution of the Election Tribunals to which petitions may be referred for disposal by the Election Commission to try the petitions. No provision in the Constitution takes away the power of superintendence which this Court exercises under Art. 227 or the power of issuing writs to an Election Tribunal once it has been constituted to hear a petition. It is unnecessary to dilate on this point further as it is the common case of both the parties that this Court has jurisdiction to entertain a writ petition against an Election Tribunal.

(6) The case of the petitioners is that even though Ganga Prasad withdrew his candidature on the date of scrutiny, he remained a duly nominated candidate and that it was not competent to the Election Tribunal to hear the election petition without Ganga Prasad having been impleaded. The short question, therefore, in this petition is whether the failure of opposite party 4 to implead Ganga Prasad is fatal to the maintainability of the election petition presented by opposite party 4.

(7) On the date of the nomination as many as nine candidates were nominated. Among them was one Ganga Prasad. He survived his scrutiny under S. 36, Representation of the People Act, 1951, (hereinafter called the Act), but withdrew his candidature under S. 37 of the Act on the date fixed under cl. (c) of S. 30. The question that has to be considered is whether, under these circumstances, he can be said to have remained a duly nominated candidate on the date of polling.

(8) As much controversy has centred round S. 82 of the Act, we consider it necessary to reproduce it. It runs as follows:

" 'Parties to the petition'. — A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated."

(9) It is contended that S. 82 must be read in the context of S. 79. Both Ss. 79 and 82 occur in Part VI. The heading of this part is "Disputes Regarding Elections" and Chap. 1 has the heading "Interpretation". It is urged that the words "at the election" in S. 82 really are synonymous with "for the election" and that they are wide enough to include a candidate who was a duly nominated candidate on the date of the nomination but who ceased to be a candidate on the date when the polling actually took place. Section 79 is in the nature of a definition clause and defines a "candidate" as meaning

"a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate."

Clearly a wide definition had to be given to the word "candidate" as the object appears to have been to prevent corrupt or improper practices. The words "at any election" in S. 79, would in cases in which an actual election takes place, have reference to the exact time when the polling takes place. It is vital to note that the definitions given in S. 79 are subject to the context otherwise requiring. On this part of the case, we may invite particular attention to S. 52 in Chap. III of Part V which brings out the difference contemplated by the Legislature between the position of a candidate who withdraws his candidature on the date of scrutiny and a candidate who dies before the actual polling takes place.

If a duly nominated candidate dies after the date fixed for the scrutiny of nominations and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer is under an obligation, upon being satisfied of the fact of the death of the candidate, to countermand the poll and report the fact to the Election Committee. In such a case all proceedings with reference to the election have to be commenced anew in all respects as if for a new election. Even a candidate who has withdrawn his candidature can have himself renominated under those circumstances as a candidate for the election.

(10) A perusal of S. 52 of the Act will show that the consequences which ensue when a duly nominated candidate dies before the election takes place are very different from those which follow the withdrawal of a duly nominated candidate from the election. In the former case proceedings have to begin afresh, while in the latter case the candidate simply goes out of the electoral picture and the election takes place from among the other duly nominated candidates as if he had never sought election.

(11) It has been pointed out that Part V of the Act deals with the conduct of elections. Chapter I lays down the rules and procedure for the nomination of candidates. Under S. 30 the Election Commission has to appoint the last date for making nominations, the date for the scrutiny of nominations, the last date for the withdrawal of candidature and the date or dates on which a poll shall, if necessary, be taken. Each of these four acts has to be done after giving a notice of the intended election in such form and manner as may be prescribed, inviting nominations of candidates for the election and specifying the place at which the nominations are to be filed. Now, under S. 32 it is open to any person to have himself nominated as a candidate for election to fill a seat in any constituency if he is qualified to be chosen to fill that seat under the provisions of the constitution of this Act.

Clause (1) of S. 33 lays down the manner in which each candidate shall, either in person or by his proposer or seconder, between the hours fixed in that section deliver to the Returning Officer at the place specified in that behalf, in the notice issued under S. 31 a nomination paper completed in the 'prescribed' form and subscribed by the candidate himself as assenting to the nomination and by two persons referred to in sub-s. (2) as proposer and seconder. Section 33(2) enables any person whose name is registered in the electoral roll of the constituency and who is not subject to any disqualification mentioned in S. 16 of the Act, to subscribe as proposer or seconder as many nomination papers as there are vacancies to be filled but no more, subject to the proviso contained therein.

Clause (3) of S. 33 requires that the nomination paper delivered under sub-s. (1) must be accompanied by a declaration in writing subscribed by the candidate that the candidate has appointed as his election agent for the election either himself or another person who is not disqualified under the Act for the appointment and who shall be named in the declaration, and by such other declarations, if any, as may be prescribed. It is to be noted that under this clause no candidate shall be deemed to be duly nomi-

nated unless such declaration is, or all such declarations are, delivered along with the nomination paper.

Sub-Clause (5) makes it incumbent on the Returning Officer to satisfy himself that the names and electoral roll numbers of the candidate and his proposer and seconder as entered in the nomination paper are, subject to the correction of any clerical error, the same as those entered in the electoral rolls. Clause (6) of this section enables the Returning Officer to require the person presenting the nomination papers to produce, if his name is not registered in the electoral roll of the constituency for which he is the Returning Officer, either a copy of the electoral roll in which the name of the candidate is included or a certified copy of the relevant entries in such roll. Section 34 lays down that a candidate, in order to be deemed to be duly nominated, must deposit or cause to be deposited a certain sum in the Reserve Bank of India or in a Government Treasury.

It will be seen that the fulfilment of these conditions is necessary for being a duly nominated candidate. Section 35 deals with notice or nominations and the time and place for their scrutiny. Section 36 deals with the important question of scrutiny and nomination papers and casts upon the Returning Officer a duty to refuse any nomination on any of the grounds mentioned in Section 36 (2), Cls. (a) to (e). Section 36 enables a candidate to withdraw his candidature either himself by a certain date fixed under cl. (c) of Section 30, by a notice in writing in person or by his proposer, seconder or election agent authorised to withdraw the candidature.

It is vital to note that under sub-s. (2) no person, who withdraws his candidature, is allowed to cancel the notice of his withdrawal. It is equally vital to note that under sub-section (3) the Returning Officer, on receiving a notice of such a withdrawal, has to cause a notice of the withdrawal to be affixed in some conspicuous place in his office. Under S. 38, the Returning Officer, after the scrutiny & withdrawal have taken place, has to prepare and publish a list of valid nominations in such manner as may be prescribed.

It is clear from the scheme outlined above that it is only from among the list of duly nominated candidates who have not withdrawn their candidature and taken back their deposit that the list of valid nominations can be drawn up. It will also be seen that for the purpose of the election the candidate who allows himself to be nominated with due formalities, who survives the scrutiny of his nomination paper but withdraws his nomination before or on the date fixed for the withdrawal of the deposit ceases to be any kind of candidate at the election.

(12) Now it must be noticed that what Section 82 does is to lay down that a petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself, if he is so nominated. The right of presenting petition on one or more of the grounds specified in sub-ss. (1) & (2) of S. 100 & S. 101 to the Election Commission has been given under S. 81 to any candidate at such election or any elector in such form and within such time, but not earlier than the date of publication of the name or names of the returned candidate or candidates as such election under S. 67, as may be prescribed.

(13) Mr. Gopalji Mehrotra's contention is that the candidates referred to in S. 82 are the candidates who were duly nominated, regardless of the fact whether they withdraw their candidature or not. He contends that notwithstanding the fact that the candidate has withdrawn his candidature and his name does not appear in the list of valid nominations, he still remains a duly nominated candidate and therefore, must be impleaded as a necessary party. Mr. Gopalji Mehrotra has strenuously argued that there is a distinction between a candidate who is duly nominated and a candidate who is validly nominated. According to him a candidate becomes a validly nominated candidate after his name appears in the list of nominations published by the Returning Officer. But so far as the duly nominated candidate is concerned he is merely a person whose nomination has been accepted as laid down in the manner enumerated above by the law.

The argument is that the withdrawal of a duly nominated candidate has no effect so far as the obligation of the petitioner to make him a party to the petition is concerned. Now it strikes us that this argument ignores the fact that the expression used by the Legislature is not "all the candidates who were duly nominated" but "all the candidates who were duly nominated 'at the election'." Great significance has to be attached to the words "at the election". If the object of the Legislature was that all candidates, whose nominations had been accepted by the Returning Officer regardless of the fact whether they withdrew their nominations and contested the election or not, should be made parties to an election petition, it is hard for us to understand why the expression "candidates who are duly nominated" is qualified by the words "at the election."

It strikes us that the distinction between a "candidate for election" and "Candidate, at an election" is one which cannot be ignored. It is well-known that long before the election takes place a candidate nurses his constituency. A person may be nominated, proposed and seconded, may deposit the necessary security and yet on the date of scrutiny, after calculating his chances, may come to the conclusion that the best thing for him to do is to withdraw himself from the contest and not allow the electorate any opportunity of recording votes for or against him. During the period that he was holding himself out as a candidate he was a candidate for election. But after he withdraws from the contest, intimates his withdrawal and gets back the security he cannot be said to be a candidate 'at the election'.

The words "at the election" have reference to the actual time when the voting takes place. Assuming election to be a continuous process with nomination as a preliminary requisite for standing as a candidate, the words "at the election" would seem, 'in the context in which they are used' in Section 82, to refer to the period when the actual polling takes place. Incidentally we may note that the word "election" is defined in Murray's Dictionary in the following manner:

> "The formal choosing of a person for an office, dignity, or position of any kind; usually by the votes of a constituent body ..... The choice by popular vote of members of a representative body (in the United Kingdom, chiefly of members of the House of Commons); the whole proceedings accompanying such a choice".

(14) We may also quote the definition of the word "election" given in the Shorter Oxford English Dictionary, Ed. 2, which is as follows:

> "The choice by popular vote of members of a representative assembly, e. g. the House of commons. The exercise of deliberate choice".

(15) We may, on this part of the case, refer to an unreported decision of Chagla C. J. and Dixit J. of the Bombay High Court in — 'Sitaram Hirachand v. Yograjsing Shankarsing', (since reported

in AIR 1953 Bom. 293 (A)) with which we are in agreement.

(16) Now it has been argued that the word "candidate" has been defined in Section 79 (b), that the definition is wide enough to include a duly nominated candidate who withdraws his candidature and that that is the interpretation we should give to that word under Section 82. Now it strikes us that it is not until the Returning Officer publishes the list of valid nominations under S. 38 that everybody knows which among the duly nominated candidates are the candidates "at the election". Section 79 gives a definition of the words "Candidate" and "returned candidate". But there is no definition of the words "duly nominated" in S. 79. That has to be gathered from the other sections to which reference has been made by us. On a survey of the relevant provisions the inference appears to us to be irresistible that the words "at the election" have been used in S. 82 in its popular sense.

(17) We cannot understand how and why a person who completely wipes himself off so far as the election is concerned, by withdrawing himself from the contest should be regarded as vitally interested in the election in the same manner as other duly nominated candidates who contest the election. His position cannot be higher than that of any voter at an election. Indeed, it is possible to imagine that in the party or groups he belongs to, some persons may have, because of their standing with their group or party, a more living interest in the election than the withdrawn candidate. Now it is open to a voter to present an election petition but the law does not make it obligatory on him to implead all the voters to an election petition. We are totally unable to understand why an exception should be made in the case of a withdrawn candidate.

(18) Learned counsel for the opposite parties has drawn our attention to several sections in which the distinction between "at the election" and "for the election," has not been borne in mind and the words have been used interchangeably. We are free to say that the Act does not appear to have been artistically drawn up. We, however, think that the proper course for us is to give to the words "at the election" a natural meaning. It was sought to be argued that a candidate who allowed himself to be duly nominated and thereafter withdrew his candidature should be placed on a higher footing than an average voter inasmuch as a petition can be filed by him even if he is not a voter in the constituency. We are unable to discover any provision in the Act which would enable a withdrawn candidate who is not a voter to present such an election petition.

Reliance is placed for the above proposition upon Section 81. But here it is obvious that the words "any candidate" are qualified by "at such election". They cannot obviously include a person who withdrew himself from the contest before the election was over. Nomination may be an essential prerequisite to election and may be process in election but it does not constitute the whole process of election. Our interpretation of Section 81 is that the candidate must be a person, if the polling takes place, who continues as a candidate right up to the time that the election is held.

(19) References were made to the decisions of certain election tribunals. We allowed them to be cited before us but we do not think it necessary to consider them at length. We are unable to agree with the view expressed by one of those election tribunals that a duly nominated candidate who has withdrawn himself from the contest has an interest in the election as his withdrawal may have been due to the fact that he wanted by such withdrawal to help the candidature of some other candidate of his by way of persuasion. The fact is that the withdrawn candidate is no candidate at all. He has simply gone out of the picture. We, therefore, think that the Tribunal has taken a correct view of the meaning of S. 82. In our opinion, Ganga Prasad was not a necessary party.

(20) The question as to what the proper meaning of the words "duly nominated candidate at the election" in Section 82 is, is a question of law on which the Election Tribunal's view should be regarded as final. It is well known that 'certiorari' and prohibition are not granted to rectify pure errors of law. We may refer on this part of the case to the recent case of — 'Parry & Co. Ltd. Dare House, Madras v. Commercial Employees' Association Madras', A. I. R. 1952 S C 179 (B), where the Supreme Court has held that the High Court cannot issue a writ of 'certiorari to quash a decision passed with jurisdiction by a Labour Commissioner under the Madras Shops and Establishments Act, 1947, on the mere ground that such decision is erroneous in law.

The appellant before the Supreme Court, was a limited liability company carrying on business in Madras. The respondent was the Association of Clerical Employees including those under the appellant. A petition was presented by the respondents before the Labour Commissioner, Madras, under Section 51, Shops and Establishments Act for a determination of certain questions relating to the rights and privileges of the employees of the appellant. Notice was issued by the Commissioner calling upon the appellant to appear and answer the contention raised on behalf of the employees. After hearing the parties and considering the evidence which had been adduced before him the Labour Commissioner made his decision on six separate issues, two of which are relevant for the purposes of this case. Pointed attention may be drawn to them. They were as follows:

Issue No. 5: Whether there has been an increase in working hours from 6 to 6½ on week days from 12-10-1948, and the increase is permissible?

Issue No. 6: Whether overtime wages at twice the ordinary rates should not be paid for work done by the employees after the normal working hours?

(21) The view of the Labour Commissioner was that the business hours of the Company were six and half prior to 1-4-1948 when the Act came into force and they continued to be so even after the Act. As regards issue No. 6 the finding of the Labour Commissioner was that the employees in the company would be entitled to overtime wages only when the statutory hours were exceeded. The finding of the Labour Commissioner was challenged in a writ petition before the High Court. The learned Judges of the High Court allowed the petition in part and quashed the order of the Labour Commissioner in so far as it decided that the employees would be entitled to overtime wages only when the statutory hours were exceeded.

This view of the Madras High Court did not find favour with the Supreme Court. On the above facts their Lordships of the Supreme Court came to the conclusion that there was no error apparent on the face of the proceedings or any irregularity in the procedure by the Labour Commissioner going contrary to principles of natural justice. For those reasons they held that there was no ground which could justify a superior Court in issuing a writ of 'certiorari' for the removal of an order or proceeding of an inferior tribunal vested

with powers to exercise, judicial or quasi-judicial functions. We find it hard to distinguish that case from the present one.

(22) Reference may also be made to the earlier case of — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi', AIR 1952 S C 319 (C). In that case it was pointed out by Mahajan J. who delivered the judgment of the Supreme Court that the Legislature had not limited the jurisdiction of the Custodian General providing that such exercise would depend on the existence of any particular state of facts as he had been constituted an appellate Court under Section 24, Administration of Evacuee Property Act in words of the widest amplitude.

The law as laid down by the Supreme Court in the case is that ordinarily a Court of appeal has an inherent jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties. Such a jurisdiction is inherent in its very constitution as a Court of appeal. Whether an appeal is competent, whether a party has 'locus standi' to prefer it, whether the appeal in substance is from one or another order and whether it has been preferred in proper form and within the time prescribed, are all matters for the decision of the appellate Court so constituted.

The question whether Ganga Prasad continued to be after his withdrawal a duly nominated candidate and for that reason a necessary party to the election petition was thus in the nature of a preliminary issue which it was competent for the Election Tribunal to determine. The fact that the tribunal was a tribunal of restricted jurisdictioin in the sense that it had been constituted only to try election cases referred to it makes no difference so far as the generality of the law relating to the powers of Court to interfere in 'certiorari' is concerned.

(23) Reference was made by learned counsel for the applicants to certain observations of the Court of Appeal in the case of 'R. v. Northumberland Compensation Appeal Tribunal', (1952) 1 All ER 122 (D), where it was held that 'certiorari' could be used to quash the decision of a statutory tribunal, not only where the tribunal had exceeded its jurisdiction, but also where an error of law appeared on the face of the record. Apart from the fact that there is no error of law apparent on the face of the record and the law has, in our opinion, been correctly interpreted by the Election Tribunal, it is unnecessary to consider the full implications of this case as this Court is bound by the decisions of the Supreme Court. We have indicated clearly that an error of law in the decision of the preliminary issue which an Election Tribunal was competent to determine is, according to the law laid down by the Supreme Court, no ground for quashing the order of the Tribunal in the exercise of our powers of issuing a writ of 'certiorari'.

(24) It was strenously contended by Mr. Gopalji Mehrotra that the question of impleading Ganga Prasad was in the nature of a collateral fact upon the existence of which the jurisdiction of the Court to hear the election petition depended. We are satisfied that there is no substance in this argument. The question whether Ganga Prasad should be impleaded or not was not in the nature of a collateral fact upon the existence of which the jurisdiction of the Court to hear the election petition depended, but was a preliminary issue which the Court was competent to determine and that being so, even on the assumption that the tribunal has taken a wrong view — and we have indicated that it has not — the view of the tribunal must be held to be final. For this reason alone, apart from the other reasons to which we have invited attention, this application must fail.

(25) We accordingly dismiss this application with costs which we assess at Rs. 300/-.

A/V.R.B. Application dismissed.

A. I. R. 1953 ALL 637 (Vol. 40, C. N. 318)

BRIJ MOHAN LALL J.

U. P. Union Bank Ltd., Plaintiff v. M/s Dina Nath Raja Ram, Defendant.

Company Original Suit No. 65 of 1952, D/- 24-4-1953.

(a) Evidence Act (1872), S. 56 — Practice of charging interest.

The practice of charging interest on the amount overdrawn is so common with the banks that the Court is justified in taking judicial notice of that practice. (Para 4)

Anno: Evidence Act, S. 56 N. 1.

(b) Companies Act (1913), S. 229 — "Rules" — Meaning of.

The word "rules" has been used as meaning the principles which regulate the affairs in insolvency proceedings. (Para 8)

Anno: Companies Act, S. 229 N. 1.

(c) Trusts Act (1882), S. 56 — Applicability — (Negotiable Instruments Act (1881), S. 31).

The provisions of the Trusts Act cannot be made applicable to deposits held by a bank and the bank cannot be said to be a trustee for the payee. (Para 12)

Anno: Trusts Act, S. 56 N. 1; Negotiable Instruments Act, S. 31 N. 1.

(d) Negotiable Instruments Act (1881), S. 7 — Payee.

The payee of a cheque is not an assignee of money in the hands of a banker. (Para 13)

Anno: Negotiable Instruments Act, S. 7 N. 1.

(e) Negotiable Instruments Act (1881), S. 64 — Right of holder to enforce claim against drawee.

The section does not deal with the rights between the payee of a cheque and the drawee and does not impliedly recognise the right of the holder of a cheque to enforce his claim against the drawee. (Para 21)

Anno: Negotiable Instruments Act, S. 64 N. 1.

(f) Negotiable Instruments Act (1881), S. 78 — Scope.

The section deals with the payee's claim against the drawer and not his right to receive payment from the bank. No right has been conferred by the section on the payee against the drawee, i.e. the bank. (Para 23)

Anno: Negotiable Instruments Act, S. 78 N. 1.

(g) Negotiable Instruments Act (1881), S. 93 — Scope — Extent of holder's right.

The section was intended to confine the holder's right of enforcing the liability to only those who are otherwise liable under the law and to whom notice has been given. It was not intended to enlarge the holder's right so as to enable him to claim damages from persons against whom he

has no remedy under the provisions of the Act. (Para 35)

Anno: Negotiable Instruments Act, S. 93 N. 1.

(h) Negotiable Instruments Act (1881), S. 84 — Payee's right to receive payment.

The payee's right to receive payment from the bank conferred by S. 84 can be exercised only in the circumstances mentioned therein. The section does not recognise the payee's right in general to receive payment from the bank. (Para 36)

Anno: Negotiable Instruments Act, S. 84 N. 1.

(i) Negotiable Instruments Act (1881), S. 129 — Right to enforce payment.

The phrase "the true owner of the cheque" undoubtedly includes the payee. To this extent a right has been conferred by S. 129 on the payee to maintain an action against the bank. But this right has been specially created by the statute in the particular circumstances mentioned in the section. The section does not confer a right on the payee in general to enforce payment of a cheque against a bank. (Para 38)

(j) Negotiable Instruments Act (1881), S. 117 — Right to enforce payment.

The section does not enforce a right on the holder to enforce payment against the drawee in general. (Para 39)

Anno: Negotiable Instruments Act, S. 117 N. 1.

Mukhtar Ahmad, for Defendant.

CASES CITED:

(A) ('42) AIR 1942 Oudh 417: 18 Luck 110
(B) (1875) 23 WR 301: 19 Eq 74
(C) (1860) 141 ER 1210: 8 CB (NS) 372
(D) ('30) AIR 1930 All 648: 52 All 696
(E) ('33) AIR 1933 Lah 176: 148 Ind Cas 379

JUDGMENT: This is a suit by the Official Liquidators of the U. P. Union Bank Limited to recover a sum of Rs. 2,677-5-8 from Messrs. Dinanath Raja Ram, a firm of cloth merchants, at Budaun. The bank being in liquidation, the suit has been instituted, by virtue of the provisions of Section 45-B of the Banking Companies (Amendment) Act (20 of 1950), in this Court.

(2) The defendant firm had a current account with the bank when it was a going concern. The defendant had overdrawn that account. The suit has been instituted to recover the amount of the overdrafts together with interest due to the bank from the defendant firm.

(3) Two pleas have been put forward in defence. In the first place, it is contended that no interest is chargeable on the overdrafts. Secondly, it is contended that the bank had wrongly refused payment of a cheque for Rs. 1,500/- to the defendant firm and the amount of that cheque should be set off against the bank's claim.

(4) The first plea can be easily disposed of. It is stated in Paragraph 1 of the plaint that the defendant had agreed

"to repay on demand the amount advanced to him together with interest at the rate of 7½ per cent. per annum."

In Para. 1 of the written statement this paragraph of the plaint is unreservedly admitted. This means that there is a clear admission by the defendant of the agreement set up by the plaintiff. In the additional places, however, it is stated that the defendant had not agreed to pay interest. This plea is inconsistent with the unqualified admission of the plaintiff's allegation contained in the earlier portion of the written statement. Moreover, the practice of charging interest on the amount overdrawn is so common with the banks that the Court is justified in taking judicial notice of the practice. It may also be pointed out that the learned counsel for the defendant did not press this plea at the time of arguments. The plea must, therefore, be rejected.

(5) In order to appreciate the second plea, it may be mentioned that one Syed Zia Ali Kazmi drew a cheque for Rs. 1,500/- in favour of the defendant firm and delivered it to it. The defendant presented the cheque to the plaintiff bank, but the cheque was dishonoured. The reason given in the Memo, attached to the cheque by the bank while returning it (the cheque) was that:

"Payment cannot be made due to the shortage of funds."

(6) It is now conceded by the bank that the drawer of the cheque had sufficient funds in his account to enable the bank to make payment. In other words, it is no longer in dispute that the cheque was wrongly dishonoured by the bank. It is the amount of this cheque which is sought to be set off against the plaintiff's claim. The argument advanced by the defendant is that wrongful refusal to pay the amount of the cheque gave rise to a claim in favour of the defendant and the amount of this claim should be deducted from the bank's claim against the defendant.

(7) Reliance is placed on S. 229, Companies Act (7 of 1913), which runs as follows:

"Application of insolvency rules in winding up of insolvent companies — In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company as may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section."

(8) It may be pointed out that by reason of this section "rules" which are in force under the law of insolvency have been made applicable to winding up proceedings. The word "rules" has been used in this section as meaning the principles which regulate the affairs in insolvency proceedings. The term "rules" has not been used in the restricted sense of the rules framed by the High Courts under S. 79 of the Provincial Insolvency Act (5 of 1920). I am fortified in this view by the case of — 'Anand Behari Lal v. Dinshaw & Co. (Bankers), Ltd.', AIR 1942 Oudh 417, at p. 421 (A), where the learned Judges held that the term "rules" as used in this section meant the "provisions" of the insolvency law.

(9) The rule sought to be made applicable to the present case is that embodied in S. 46 of the Provincial Insolvency Act. This section runs as follows:

"46. Mutual dealings and set off — Where there have been mutual dealings between an insolvent & a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against

any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

(10) It will follow that if a debtor has a counter claim against a bank in liquidation the bank cannot insist on demanding full payment of its claim without reducing it by the amount payable to the debtor. If the debtor is driven to the necessity of filing a claim against the bank he will be given a 'pro rata' payment along with other unsecured creditors. But if he is allowed to deduct the amount of his claim from the amount payable by him to the bank, he will be entitled to deduct the full amount of his claim from the amount due from him to the bank. Therefore, the defendant insists on taking advantage of this rule of insolvency law.

Needless to say that he can take this stand. But this presupposes that he must have a valid claim. The Official Liquidators contend that by wrongly refusing to make payment the bank did not incur any obligation towards the defendant. Their contention is that the bank did become liable to compensate the drawer but not the defendant who was the payee. Therefore, the whole dispute between the parties to this litigation narrows down to the simple question whether a bank possessing sufficient funds in a depositor's account incurs a liability towards the payee of a cheque by wrongly refusing payment to him.

(11) As between a payee and a bank there is no privity of contract. The payee is only an agent or messenger of the maker of the cheque to whom payment is made by the bank at his (marker's) request. If, therefore, the bank makes default it is guilty of breach of contract and liable to pay damages to the maker who is the contracting party and not to the payee who is the agent of the maker. The agent has no right of suit.

(12) It is true that by virtue of S. 56 of the Trusts Act (2 of 1882), a beneficiary has been given a right

"to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest".

In other words a right to enforce a contract may, in the case of a trust, be enforced by a person who is not privy to the contract. But certainly it cannot be contended that the bank is trustee for the payee. By no stretch of imagination can the provisions of the Trust Act be made applicable to deposits held by a bank.

(13) Nor can it be contended that the payee of a cheque is an assignee of money in the hands of a banker. The remarks made by Jessel M. R. in the case of — 'Hopkinson v. Forester', (1875) 19 Eq 74 (B), may usefully be quoted in this connection. They run as follows:

"A cheque is clearly not an assignment of money in the hands of a banker: it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honour the cheque, when he has sufficient assets in his hand; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Byles J. in the case of — 'Keene v. Beard', (1860) 8 C. B. (N. S.) 372 (C), but I am quite sure that learned Judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder."

(14) Reference may also be made to Hart on Law of Banking, Fourth Edition, page 445, where it is stated that:

"A cheque in itself is merely a request to the banker to pay a certain sum. It does not purport to be, and has not the effect of, an assignment to the payee of money in the hands of the banker. Nor is it accepted by the banker like a bill of exchange. Accordingly, the payee has in general no right of action for its dishonour against the banker on whom it is drawn. His only remedy if it is dishonoured is against the drawer or an indorser."

It will be useful also to refer to Halsbury's Laws of England, Hailsham Edition, Volume I, page 827 Para. 1348, where it is stated that:

"If a banker without justification dishonours his customer's cheque he is liable to the customer in damages for injury to credit .... The holder has no remedy against the banker, unless the banker has admitted to him that he holds money especially to meet a particular cheque."

(15) Turning to the Negotiable Instruments Act, one finds S. 31 as follows:

"The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default."

(16) It will thus appear that the drawee has been made liable to compensate the drawer, but he has not been made liable to compensate the payee. Had it been the intention of law to invest the payee with a right of action against the drawee, the Legislature would not have failed to say so in S. 31.

(17) Section 30 of the Act runs as follows:

"The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided."

(18) It will be noticed that this section confers a right on the holder but this right has been given to him against the drawer and not against the drawee.

(19) It will, therefore, follow that no 'prima facie' valid reason exists for departing from the well-recognized rule of law that a person who is not privy to a contract cannot enforce any right under it. But the learned counsel for the defendant referred to certain provisions of the Negotiable Instruments Act as impliedly creating rights in favour of the payee. Section 64 of the Act was referred to in this connection. The relevant portion of this section runs as follows:

"Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder..."

(20) The word "respectively" used in this section makes it clear beyond doubt that the word "cheque" is to be read with the word "drawee". form as follows:

In other words, this section reads in a simplified

"Cheque must be presented for payment to the drawee thereof by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder."

(21) The argument advanced by the learned counsel for the defendant is that this section implies that, in the event of presentation being properly made the holder can maintain a claim against the drawee. This connection is not sound.

This section does not lay down the rights and liabilities as between the holder and the drawee. It is confined to the rights and liabilities against the "other parties". The words "other parties" were the subject of interpretation in the case of —'Banaras Bank Ltd. v. Hormusji Pestonji', AIR 1930 All 648 (D). It was held that this phrase meant parties other than the drawee qua a cheque. This view was followed by the Punjab High Court in the case of — 'Devi Ditta Mal Kirpal Singh v. Pratap Singh Harnam Sing', AIR 1933 Lah 176 (E). In the circumstances, I am not prepared to accept the contention put forward by the learned counsel for the defendant, viz., that impliedly this section recognizes the right of the holder of a cheque to enforce his claim against the drawee. As pointed out above, this section does not deal with the rights between the payee of a cheque and the drawee.

(22) The next section referred to during the learned counsel's argument is S. 78 of the Act. It runs as follows:

"Subject to the provisions of S. 82, Cl. (c), payment of the amount due on a promissory note, bill of exchange or cheque must in order to discharge the maker or acceptor, be made to the holder of the instrument."

(23) It is argued that this section recognizes the right of the holder of an instrument to demand payment from the bank. This contention also is not sound. This section lays down what payment by the bank will discharge the maker of a cheque. If the bank makes payment to a wrong person who is not the holder of cheque within the meaning of the term as used in S. 8 of the Act and the payee is thereby denied payment, the payee can certainly turn back and enforce his claim against the maker thereof. But if the payment has been made to the holder of the cheque, the payee cannot enforce such a claim against the drawer. It is significant that the section deals with the payee's claim against the drawer and not his right to receive payment from the bank. No right has been conferred by this section on the payee against the drawee, i.e., the bank.

(24-34) Section 93 which was next referred to runs as follows:

"When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque."

(35) It is argued that Para. 1 of this section confers a right on the holder of a cheque to enforce his claim subject to the giving of notice of dishonour and Para. 2 dispenses with the necessity to give notice to the drawee of a dishonoured cheque. It is contended that reading the two paragraphs together one is led to the conclusion that in case of the dishonour of a cheque the holder can sue the drawee without giving notice to him. The language of the section does not, in my opinion, bear this interpretation. In this section also, as in S. 64, the important words are "others parties".

This section too defines the rights as between the holder and parties other than the drawee. In the case of dishonour of a cheque, the holder may have his remedies against several persons, e.g., the maker and the persons (whose number may be large) who had endorsed the cheque before it came to his hands. He has first to select which of these persons he seeks to make liable and then to give notice to him or them. The section was intended to confine the holder's right of enforcing the liability to only those who are otherwise liable under the law and to whom notice has been given. It was not intended to enlarge the holder's right so as to enable him to claim damages from persons against whom he has no remedy under the provisions of the Act. I am, therefore, of the opinion that this section also does not help the defendant.

(36) Section 84 which was next referred to relates to a special set of circumstances. It says that if a cheque is not presented to the drawee within a reasonable time and if within this period the drawee, i.e., the bank goes into liquidation, the payee cannot enforce his remedy against the maker of the cheque. Since he is deprived of this right against the maker, the section confers on him a special right to obtain from the bank 'pro rata' payment in respect of the amount of the cheque.

Since the payee is responsible for the delay in presentation of the cheque and for the consequent loss incurred thereby, he is penalised by depriving him of his remedy against the maker but is practically compensated by being invested with the right to receive 'pro rata' payment from the bank which right his drawer would have otherwise availed of. This right to receive payment is a special creature of the statute and can be exercised in the aforesaid circumstances only. Section 84 which creates this right does not recognize the payee's right in general to receive payment from the bank.

(37) Similarly, S. 129 creates a special right to be exercised in special circumstances. It runs as follows:

"Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

(38) It lays down that if a banker makes payment of a crossed cheque otherwise than to a banker or to the special banker to whom the cheque is crossed he is liable to "the true owner of the cheque" for any loss he may sustain owing to the cheque having been so paid. The phrase "the true owner of the cheque" undoubtedly includes the payee. To this extent a right has been conferred by S. 129 on the payee to maintain an action against the bank. But this right also has been specially created by the statute in the particular circumstances mentioned in the section. Because of the negligence on the part of the bank it has been made liable to compensate the payee in certain given circumstances. This section does not confer a right on the payee in general to enforce payment of a cheque against a bank.

(39) Lastly, S. 117 was relied upon by the learned counsel in support of his contention. The opening paragraph of this section runs as follows:

"The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, shall be determined by the following rules:

.....".

Then follow the rules which determine the amount payable. It is argued that this section confers

on the holder of a cheque a right to enforce payment against the drawee. With this contention I am unable to agree. The language of the section indicates beyond doubt that this section is confined to laying down the rules for the calculation of compensation. It does not purport to lay down which party is liable to pay compensation to whom. The liability to make payment is to be determined by other sections of the Act. If any party is "liable to the holder", this section will come into play, otherwise it will not. The language of the section does not lend support to the contention that it confers a right on the holder to enforce payment against the drawee in general.

(40) Having given the matter my best consideration, I have come to the conclusion that the bank did not, by refusing payment of the cheque to the defendant, incur any liability to the defendant. The result, therefore, is that the defendant has no legitimate claim against the bank and there is nothing which can be set off against the bank's claim.

(41) The bank's claim succeeds in toto. The suit is decreed for the recovery of Rs. 2,677-5-8 with 'pendente lite' and future interest at six per cent. per annum and with costs.

A/V.R.B. Suit decreed.

AIR 1953 ALLAHABAD 641 (Vol 40, C. N. 319)

MOOTHAM AND GURTU JJ.

Babu Ram Sharma, Applicant v. State of Uttar Pradesh, and others, Opposite Parties.

Misc. Writ No. 556 of 1952, D/-27-4-1953.

(a) Motor Vehicles Act (1939), S. 55 — Right to obtain permit to ply bus depends on possession of bus and not its ownership. AIR 1952 S. C. 192, Ref. (Paras 11, 51)

(b) Constitution of India, Art. 226 — Finding of fact by Tribunal—Interference — Error of law — (Motor Vehicles Act (1939), S. 60(c)).

The Regional Transport Authority and the State Transport Tribunal are administrative bodies exercising quasi-judicial functions as regards the issue and cancellation of permits. (Para 12)

The High Court is not, in the exercise of its powers under Art. 226 of the Constitution, entitled to usurp the jurisdiction vested in those bodies or to constitute itself a Court of appeal from their decisions. The High Court would have no power, save possibly in very exceptional circumstances, to interfere with the decision of the State Transport Tribunal on a question of fact in any case in which there is conflict of evidence. (Para 12)

But where the Regional Transport Authority and the State Transport Tribunal have arrived at a finding to the effect that the permit was obtained by fraud and misrepresentation which is not only unsupported by any evidence but is contrary to such evidence as there is, it amounts to an error of law if not to a violation of the principles of natural justice. An error of law apparent on the face of the proceedings is recognised as good ground for the issue of an order of certiorari. (1952) 1 All ER 122; AIR 1952 SC 192, Relied on. (Para 12)

Writ of certiorari was issued, quashing the orders cancelling the permit of the Regional Transport Authority. (Paras 13, 15)

V. D. Bhargava, for Applicant; Gopalji Mehrotra (Standing Counsel), for Opposite Parties.

CASES CITED:

(A) ('51) AIR 1951 All 257 (FB)
(B) ('52) AIR 1952 SC 192: 1952 SCR 583
(C) (1952) 1 All ER 122
(D) ('52) AIR 1952 SC 319: 1952 SCR 696

MOOTHAM, J.: This is a petition under Art. 226 of the Constitution in which the petitioner prays, first for the issue of a writ of certiorari to quash two orders of the Regional Transport Authority, Meerut, dated respectively the 21st July and the 3rd November, 1951, and an order of the State Transport Tribunal dated 6-8-1952, and secondly, for a writ of mandamus to issue to the State Transport Authority, Lucknow, to compel it to accept the replacement of one motor vehicle by another.

(2) The petitioner is engaged in the business of plying stage carriages and he has been doing so since the year 1930. The facts upon which the petitioner relies are set out in the affidavit which accompanies his petition; and it is of importance to observe that no counter-affidavit has been filed. He states that in September, 1949, the Provincial Transport Authority was prepared to sanction the issue to him of a temporary permit, but as the petitioner had sold the vehicle which previously he had owned and was not possessed of sufficient money to purchase a new vehicle, he approached a financier named Chatter Sen for financial assistance. On the 23rd September Chatter Sen purchased a stage carriage for the sum of Rs. 16,500/- and on the 29th October — learned counsel are agreed that the date (?) September" in paras. 9, 10 & 11 of the affidavit should be the 29th October — he sold the vehicle to the petitioner, and as a form of security for the protection of Chatter Sen the petitioner executed on that date four documents, namely

(i) an agreement wherein, after reciting that he had resold the stage carriage to Chatter Sen for Rs. 19,000/-, the petitioner undertook to be responsible for such application and affidavit as may be required to complete the transfer, and Chatter Sen undertook to pay such taxes on the vehicle as might become due;

(ii) a letter addressed to the Regional Transport Officer, Meerut, stating that the stage carriage had been sold to Chatter Sen;

(iii) a power of attorney in favour of Hukum Chand, the son of Chatter Sen, authorising him to draw petrol for vehicle, to deposit the road taxes, renew the permit and to file applications and affidavits on behalf of the petitioner in connection with the vehicle; and

(iv) a form of declaration intended to "serve as evidence and be of use when needed" acknowledging that he had sold the vehicle and the permit therefor, to Chatter Sen for Rs. 19,000/- and had recevied this amount.

(3) The petitioner says that when he executed these documents on the 29th October, the documents were not dated and blanks were left to be filled in when the registration number of the vehicle and the number of the permit were known. No date has been inserted in letter to the Regional

Transport Officer. The 9th November, 1949, was subsequently inserted as the date of execution of the agreement and the power of attorney and the receipt are now dated 29-11-1949. The petitioner says that these dates were inserted by Chatter Sen. The petitioner further states in para. 7 of his affidavit that similar documents had been executed by him at the request of Chatter Sen when he had acquired vehicles from the latter in 1943 and 1944 and that after he had paid the purchase price the documents were all returned to him.

(4) On the 29th October — the date upon which the petitioner says the abovementioned documents were executed — a temporary permit No. 43M(T) was issued to him, and on the 10th November of that year the vehicle was registered in the petitioner's name and given the registration No. USL 3167.

(5) In May 1950, this Court in the case of — 'Moti Lal v. The State of Uttar Pradesh', AIR 1951 All 257 (FB) (A) commented adversely on the practice of the Transport Authorities in issuing only temporary permits, and as a consequence of the judgment in that case the Motor Vehicles Department invited the holders of temporary permits to apply for permanent permits. The petitioner did so, and on 30-9-1950, his application was published in the official gazette in accordance with the provisions of S. 57, Motor Vehicles Act. No objection to the application having been lodged, the petitioner was granted a permanent permit on 13-12-1950. The permit was numbered 133 and was declared to be valid up to 13-12-1953.

(6) The petitioner says that Chatter Sen then started creating trouble and tried forcibly to stop the petitioner from running the stage carriage No. USL 3167, and that as a consequence of this the petitioner applied to the Transport Authorities on 15-1-1951, to be allowed to replace vehicle No. USL 3167 by another vehicle No. USL 3810. This application was allowed by the Regional Transport Officer subject to confirmation by the Regional Transport Authority.

(7) On 23-1-1951, Chatter Sen filed a suit against the petitioner in the Court of the Civil Judge, Meerut, for a declaration that he was the owner of permit No. 133 and he applied for an interim injunction to restrain the petitioner from plying vehicle No. USL 3167. The Court refused to grant an interim injunction and its decision was upheld by this Court on appeal. On the 31st January Chatter Sen also addressed a letter to the Regional Transport Authority objecting to the petitioner's application for the replacement of one vehicle by another on the ground that he was the sole owner both of vehicle No. USL 3167 and of permit No. 133.

(8) On 21-7-1951, the petitioner's permit No. 133 was suspended by the Regional Transport Authority and notice was issued to him to show cause why it should not be cancelled. At the same time the Regional Transport Authority refused to allow the petitioner's application for replacement.

(9) On 3-11-1951, the Regional Transport Authority, Meerut, made the following order:

"The original permit was Mt. No. 43 covering vehicle No. 3167. It is established by deed dated 9-11-49 that Babu Ram sold the vehicle and the permit in favour of L. Chattersen. Chatter Sen has all along been in possession of that vehicle and has been running it. Babu Ram could not sell the vehicle and the permit without obtaining the permission of the R. T. A. Blanks to fill in number, etc., were only left in the deed dated 9-11-49. Babu Ram later wrote out an application addressed to the R. T. O. that he has sold the vehicle and permit to Chatter Sen. Babu Ram is not, therefore, entitled to retain the permit. The permit No. 133 is a successor of permit No. Mt 43. Permit No. 133 is cancelled. The question of transfer of permit does not arise as no permission for transfer was taken."

Against that order the petitioner appealed to the State Transport Authority which heard the appeal on 6-8-1952. The State Transport Authority had properly cancelled the permit No. 133 under S. 60 (d), Motor Vehicles Act, on the ground that the permit was obtained by misrepresentation. It also held that at the time when the petitioner asked for the replacement he was not in possession of vehicle No. USL 3167, and that, therefore, the permit was liable to cancellation under S. 60(c) of that Act. It accordingly dismissed the appeal.

(10) The petitioner contends that at all material times he was in possession of the vehicle and he denies that he obtained the permit, No. 133 by any fraud or misrepresentation. He says that there is no evidence to support any finding to the contrary and that this Court can and should give him the relief which he seeks on the ground that the order is vitiated by an error apparent on the face of the record and that it amounts to a violation of the principles of natural justice.

(11) It is common ground that on the 29th October the motor vehicle USL 3167 was sold by Chatter Sen to the petitioner and that the latter was given possession of it. The petitioner swears that on that date he signed the several documents to which I have referred although the documents were not then dated and blanks were left for the insertion of certain particulars. He also swears that these documents were executed solely for the purpose of affording Chatter Sen security for the payment by the petitioner of the purchase price of the vehicle. There is, as I have said no counter affidavit, the only evidence to which the opposite parties can refer in order to disprove the statements made by the petitioner being the documents themselves. But the documents are, in my view, clearly consistent with the petitioner's version of what occurred, and I find it hard to appreciate for what purpose the vehicle was admittedly sold to the petitioner if on the same day he resells it to his vendor for the same price. Be that as it may, the question which is of importance is not the legal title to the vehicle but who was in possession of it, for the right to obtain a permit depends on possession and not ownership: — 'Verappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 (B).

Now it is clear that the petitioner was in possession of the vehicle on the 29th October; according to his affidavit (para. 17) he was in possession in January 1951, and that that was as appears clearly to be established by the fact that it was in that month that Chatter Sen tried unsuccessfully to obtain from the civil Court an injunction to prevent him from using the vehicle. I can find no evidence whatever to show that the petitioner was not in fact in possession of the vehicle at all material times. Any finding, therefore, that the Regional Transport Authority was entitled to cancel the permit under S. 60(c) is, in my opinion, unsupported by any evidence. Nor can I find any evidence to show that the applicant obtained the permit No. 133 fraudulently or by misrepresenting that he was in possession of stage carriage USL 3167 when that was not the case.

Our attention has been drawn to the application form P.St.S.A. which is the form of application for a permit applicable in the present case under R. 50(a)(ii), U. P. Motor Vehicles Rules, 1940. It is pointed out to us, and I think correctly, that fraud or misrepresentation could arise only in

respect of the particulars to be entered in either cl. (10) or cl. (14) of this application. Clause (10) requires the applicant to give particulars of any stage or contract carriage permit valid in the State which is held by him. On the date on which the application for a permanent permit was made the petitioner held a temporary permit, No. 43 M. (T). In cl. (14) of the application the applicant is required to state whether he was then in possession of the vehicle in respect of which the permanent permit was applied for. The evidence in my view is all one way and shows that the petitioner was in possession of the vehicle USL 3167.

(12) The Regional Transport Authority and the State Transport Tribunal are administrative bodies exercising quasi-judicial functions as regards the issue and cancellation of permits. I am fully conscious of the fact that this Court is not in the exercise of its powers under Art. 226 of the Constitution entitled to usurp the jurisdiction vested in those bodies or to constitute itself a Court of appeal from their decisions. This Court would have no power, in my view, save possibly in very exceptional circumstances, to interfere with the decision of the State Transport Tribunal on a question of fact in any case in which there is conflict of evidence. But that, in my judgment, is not the case here, for as I have said I have been unable to find any evidence that the petitioner was not in possession of vehicle USL 3167 at material times or that he obtained permit No. 133 by fraud or misrepresentation. The result is, therefore, that the Regional Transport Authority and the State Transport Tribunal have arrived at a finding of fact which is not only unsupported by any evidence but is contrary to such evidence as there is; and to come to a finding of fact in the absence of any evidence amounts, in my view, to an error of law if not to a violation of the principles of natural justice. An error of law apparent on the face of the proceedings is recognised in England as good ground for the issue of an order of certiorari; — 'R v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw', (1952) 1 All E R 122 (C), and although our attention had not been drawn to any case in India in which the same view has expressly been taken it would appear to be in accordance with the pronouncement of the Supreme Court in — 'AIR 1952 SC 192 at p. 195 (B)' where Chandrasekhara Aiyar, J. delivering the judgment of the Court, said:

"Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record.."

(13) For the reason I have stated I am of opinion that the petitioner is in this case entitled to relief, and I would direct the issue of a writ of certiorari quashing the orders of the Regional Transport Authority dated the 21st July and the 3rd November, 1951, and the order of the State Transport Tribunal dated 6-8-1952.

(14) As regards the second of the petitioner's prayers, I do not think it would be proper for this Court to direct the State Transport Tribunal to accept the replacement of vehicle USL 3167 by vehicle USL 3810, but I think that this Court can properly direct that that authority should now proceed to consider the petitioner's application for replacement on its merits. The petitioner is entitled to his costs.

(15) GURTU, J.: This is an application under Art. 226 of the Constitution of India. The applicant prays that a writ of 'certiorari' or such other writ, order or direction, as the Court may deem fit, be issued whereby the orders of the Regional Transport Authority dated 21-7-1951 and 3-11-1951 as also the order of the State Transport Tribunal dated 6-8-1952 be cancelled. The applicant also prays that a writ of mandamus be issued to the opposite party No. 3 commanding him to accept the replacement of vehicle No. USL 3167 by USL 3810 and to allow the applicant to run the same and to return the permit.

(16) The applicant is an operator who has been plying motor stage-carriages on permits since the year 1930. In September 1949, the Provincial Transport Authority decided to issue temporary permits which the applicant desired to apply for. The applicant was not then possessed of enough money to purchase a stage-carriage to enable him to apply and he approached one Lala Chatter Sen for financial assistance. On 23-9-1949 Lala Chatter Sen purchased a stage-carriage bearing temporary Registration No. 476 T from India Automobiles, Delhi, for a sum of Rs. 16,500/-. The aforesaid vehicle was on 29-10-1949 transferred to the applicant, the fact of sale being endorsed on the present receipt issued by the Indian Automobiles to Lala Chatter Sen.

(17) At the same time, the applicant, as first party, and Lala Chatter Sen, as second party, executed an agreement wherein the applicant stated that for a consideration of Rs. 19,000/-, the applicant had re-sold the said stage-carriage under a receipt to Lala Chatter Sen. It was stated in that agreement that the parties would be bound by the terms of the agreement which, 'inter alia' were that the applicant would have no concern with the permit of the stage-carriage or the stage-carriage itself and that when an application for transfer was made, the applicant would make the necessary affidavit. It was also agreed that Lala Chatter Sen would, in every way, be the owner of the stage-carriage and that the applicant would have no objection thereto and further that Lala Chatter Sen would have the right to sell the said stage-carriage.

(18) This agreement was executed, according to the applicant, on 29-10-1949, the space for filling in the permit number later when assigned and the Registration number also when assigned being left blank. These numbers, according to the applicant when subsequently assigned were filled into the agreement. At the same time, according to the applicant, an application addressed to the Regional Transport Officer, Meerut, was also signed by him wherein it was stated that the stage-carriage had been sold and that the name of Lala Chatter Sen should be substituted on the permit and the Registration.

(19) A power of attorney was also executed by the applicant in favour of Shri Hukum Chand Jain, son of Lala Chatter Sen, authorising Hukum Chand Jain to draw petrol ration of the stage carriage, deposit the road taxes, renew the permit and fitness of the vehicle and further authorising him to file applications and affidavits on behalf of the applicant in connection with the stage-carriage.

(20) On the same day, the applicant gave a receipt for the purchase-money received in respect of the sale of this stage-carriage, including the permit and all rights, to Lala Chatter Sen.

(21) According to the applicant, all these documents were executed on 29-10-1949, although the receipt and the agreement bear the date 9-11-1949; the explanation being that the dates in the latter documents were filled in later after the Registration and permit numbers had been obtained.

(22) The applicant alleges that all these documents were agreed to be returned when the money due in respect of the stage-carriage, which Lala Chatter Sen had purchased and had transferred to him, was paid to Lala Chatter Sen and that the documents were merely taken by Lala Chatter Sen as security and to safeguard his position.

(23) The applicant further alleges that consequent to a judgment of this Court, which questioned the legality of the grant of temporary permits for stage-carriages which were regularly operating, applications for the issue of permanent permits were called and the applicant applied for the issue of a permanent permit in place of his temporary permit. The application of the applicant for a permanent permit was published in the U. P. Gazette, dated 30-9-1950 for any objections under S. 57, Motor Vehicles Act. No objections were, however, filed and, therefore, on 13-12-1950 a permanent permit no. 133 was granted to the applicant which was to be valid upto 13-12-1953. The applicant alleges that thereafter Lala Chatter Sen, the financier, started creating trouble and tried to forcibly stop the running of the stage-carriage which he had sold to the applicant under a receipt on 29-10-1949 and so the applicant applied on 15-1-1951 that there was a dispute about this stage-carriage no. USL 3167 and that he should be allowed to replace it by another stage carriage USL 3810. The Regional Transport Officer allowed the replacement subject to confirmation by the Regional Transport Authority.

(23a) On 30-1-1951, Lala Chatter Sen objected to the replacement by an application made to the Regional Transport Authority alleging that he was the full owner of stage-carriage USL 3167 and of permit no. 133 and that he had filed a civil suit and had applied for an injunction and that, therefore, further action in replacing the vehicle be stayed pending the orders of the civil Court. Lala Chatter Sen had filed the suit on 23-1-1951, for a declaration that he was the owner of permit no. 133 present,and old 43MT, sanctioned with stage-carriage no. USL 3167, with all rights to ply. Lala Chatter Sen applied later for an 'ad-interim' injunction on which notice was issued. This 'ad-interim' injunction was, however, not granted and the High Court upheld the order of the trial Court.

(24) It is then alleged that the applicant filed a reply to the application of Lala Chatter Sen on 18-5-1951 and he asked that as a civil suit has been filed, the decision of the matter by the Regional Transport Authority should remain stayed so that there might not be investigations by two Tribunals at the same time. On 21-7-1951 the Regional Transport Authority, nonetheless, passed the following order:

"Replacement of the vehicle given by Secretary R. T. A. in favour of Babu Ram is not confirmed. There is 'prima facie' evidence to show that Babu Ram sold the vehicle and the permit in favour of Chatter Sen, which he had no right to do without the sanction of the R. T. A. The vehicle and permit are suspended. Issue notice under S. 60 to Babu Ram to show cause why the permit be not cancelled. Transfer application is postponed."

On 3-11-1951, the Regional Transport Authority again considered the matter and passed the following order:

"The original permit was MT No. 43 covering vehicle no. 3167. It is established by deed dated 9-11-49 that Babu Ram sold the vehicle and permit in favour of L. Chatter Sen. Chatter Sen has all along been in possession of that vehicle and has been running it. Babu Ram could not sell the vehicle and the permit without obtaining the permission of the R. T. A. Blanks to fill in number etc. were only left in the deed dated 9-11-49. Babu Ram later wrote out an application addressed to R. T. O. that he has sold the vehicle and permit to Chatter Sen. Babu Ram is not, therefore, entitled to retain the permit. The permit no. 133 is the successor of permit no. MT43. Permit no. 133 is cancelled. The question of transfer of permit does not arise as no permission for transfer was taken."

(25) From this order, an appeal was preferred to the State Transport Tribunal which by its order dated 6-8-1952 held that there was no ground to interfere with the decision of the Regional Transport Authority.

(26) In this last-mentioned order the state Transport Tribunal appeared to consider that the Regional Transport Authority had cancelled the permit no. 133 under S. 60 (d), Motor Vehicles Act, on the ground that the permanent permit was obtained by misrepresentation as the temporary permit had been sold when the permanent permit was applied for. The Tribunal also observed that when the applicant had asked for replacement he was not in possession of the stage-carriage No. 3167 and that the Regional Transport Authority was entitled to cancel the permit also under S. 60 (c) of the said Act.

(27) The order does not appear to determine whether the applicant was in possession of the stage-carriage when he applied for the permanent permit.

(28) Learned counsel for the applicant contends that the permit could not be cancelled either under sub-cl. (c) or (d) of S. 60.

(29) So far as S. 60, sub-cl. (c) is concerned, the submission of learned counsel for the applicant is that the applicant, at no time, ceased to possess the stage-carriage no. 3167 covered by the permit. He urges that the state Transport Authority, in its order dated 6-8-1952, has not stated the ground on which it came to the conclusion that the applicant was not in possession of the stage-carriage no. USL 3167, when he applied for replacement. Attention is drawn by learned counsel to para. 17 of his present affidavit which runs as follows:

"That subsequently L. Chatter Sen, financier, created trouble and tried to forcibly stop the running of the stage-carriage No. USL 3167, so the deponent applied on 15-1-1951 that as there was a dispute about carriage no. USL 3167, he be allowed to replace the vehicle by vehicle No. USL 3810 and the Regional Transport Officer was pleased to allow the replacement subject to confirmation by Regional Transport Authority."

(30) Learned counsel for the applicant urges that this para. has not been controverted by any affidavit filed on behalf of the opposite parties and so it must be taken that possession of the stage-carriage no. USL 3167 was still with him on the date of replacement. He also urges that as sub-s. (c) of S. 60, Motor Vehicles Act, refers to the permit-holder ceasing to possess the vehicle during the currency of the permit, the documents which had passed between him and Chatter Sen all being prior to the grant of the permanent permit these could not establish that the stage-carriage no. USL 3167 had ceased to be in his possession after the permanent permit had come into force, but if at all these documents might be used for establishing that he was not in possession of the stage-coach when he applied for the permanent permit.

(31) Learned counsel then points out that no objection whatsoever was taken, when his application for the grant of a permanent permit was published in the Gazette, by Lala Chatter Sen, within the specified period, and urges that this established that the grant of a permanent permit could not have been opposed on the ground that

the applicant was not possessed of the stage-carriage no. USL 3167 on the date of his application or was not the owner of the temporary permit to ply it. Learned counsel urges that there was no evidence before the Regional Transport Authority apart from the documents to show that Chatter Sen had all along been in possession of the stage-carriage and had been running it since 9-11-1949. He points out that the documents being merely by way of collateral security and not being intended to be acted upon could not, in law, transfer the permit or the stage-carriage back to Chatter Sen, nor did they show that Chatter Sen took possession of the said stage-carriage on or after 29-10-1949, the alleged date of re-transfer.

(32) Learned counsel urges that there is no evidence to show that the applicant had obtained the permit fraudulently or by misrepresenting that he was possessed of stage-carriage USL 3167. He has invited the Court's attention to the application form P. St. S. A. which is to be made under Rule 50 (a) (ii), U. P. Motor Vehicles Rules, 1940, and submits that fraud or misrepresentation could only arise in respect of the particulars to be entered either in Cl. 10 or 14 of the application form. So far as cl. 10 is concerned, it requires particulars of any stage-carriage permit valid in the province held by the applicant on the date of application. It is urged that in view of S. 59, sub-cl. (1), Motor Vehicles Act, 1939, even if it be taken that the applicant had in fact transferred the temporary permit to Lala Chatter Sen on 29-9-1949, in law that transfer was inoperative and, therefore, there could be no fraud or misrepresentation in the applicant stating that he held a temporary permit valid in the province on the date of his application.

(33) It is urged that under Cl. 14 of the said application form, the applicant was only required to state whether he was then in possession of a vehicle available for use under the permit applied for. Learned counsel states that it has not been shown that on that day he was not in possession of the stage carriage no. USL 3167 and that he could not have used the same under the permit applied for. Learned counsel urges that the fact that Lala Chatter Sen did not intimate under S. 31 that the ownership of the stage-carriage no. USL 3167 had been transferred to him by the applicant on 29-10-1949 clearly shows that there was neither transfer of ownership nor of possession under the documents, and he points out that there was no evidence before the transport authorities of the handing back of possession of the stage-carriage under the said documents by the applicant to Lala Chatter Sen.

(34) The submission of learned counsel thus is that in cancelling the permit, the authorities concerned have exceeded or acted illegally in exercising the jurisdiction vested in them under S. 60, sub-cls. (c) and (d), Motor Vehicles Act.

(35) Learned counsel for the State argues that the Regional Transport Authority, in its order dated 3-11-1951, has stated that it was established by the deed, dated 9-11-1949 that Chatter Sen and not the applicant had all along been in possession of the stage carriage no. USL 3167 and had been running it and that, therefore, it cannot be said that that Authority had acted beyond its jurisdiction in cancelling the permit on the ground of misrepresentation. He urges that it is not open to this Court to examine the correctness of the finding that Chatter Sen had all along been in possession of the stage-carriage no. USL 3167 and had been running it and urges that it could not be said that there had been an excessive exercise of jurisdiction under S. 60, Motor Vehicles Act.

(36) Attention has been drawn by the learned counsel for the State to the case of — 'AIR 1952 SC 192' (B). In that case, it was laid down that the grant of a permit is entirely within the discretion of the Transport authorities and naturally depends on several circumstances which have to be taken into account. It was held in that case that the Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation and that no one is entitled to a permit as of right even if he satisfies all the prescribed conditions, that there is a complete and precise scheme for regulating the issue of permits providing what matters are to be taken into consideration as relevant and prescribing appeals and revisions from subordinate bodies to higher authorities and that the remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had. It was further held that such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, 'or there is an error apparent on the 'face of the record', and such act, omission, error, or excess has resulted in manifest injustice. It was held that, however extensive the jurisdiction may be, it seems that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.

(37) In the end, the Supreme Court was of the view that that was not a fit case for interference with the discretion that was exercised by the Transport Authorities paying regard to all the facts and the surrounding circumstances.

(38) In — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi', A. I. R. 1952 S C 319 (D), cited by the State Counsel, it was pointed out that:

> "A writ of 'certiorari' cannot be granted to quash the decision of an inferior Court within its jurisdiction on the ground that the decision is wrong. It must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Once it is held that the Court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a Court has jurisdiction to decide rightly as well as wrongly."

(39) On the other hand, learned counsel for the applicant has referred to the case in — '(1952) 1 All E R 122' (C) Singleton L. J. therein observed:

> "Error on the face of the proceedings has always been recognised as one of the grounds for the issue of an order of 'certiorari'. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings."

His Lordship further observed as under:

> "The decision of the tribunal was a 'speaking order' in the sense in which that term has been used. The Court is entitled to examine it, and if there be error on the face of it, to quash it —not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of His Majesty."

Again Singleton L. J. observed:

"After all, it is the function of the Courts to determine questions of law. Tribunals are sometimes given an unduly difficult task. There must be a feeling of dissatisfaction if it is recognised that a decision of a tribunal is wrong in law and yet there is no power to correct it—in other words if there is no right to obtain the opinion of the Court. I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good."

(40) Denning L. J. observed:

"We have here a simple case of error of law by a tribunal, an error which they frankly acknowledge. It is an error which deprives the applicant of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay him the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such a case there were no means of correcting the error. The authorities to which I have referred amply show that the King's Bench can correct it by certiorari.. .....I am clearly of opinion that an error admitted openly in the face of the Court can be corrected by 'certiorari' as well as an error that appears on the face of the record."

Morris L. J. has observed:

"It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision or irregularity, or absence of, or excess of, jurisdiction where shown."

Morris L. J. further observed:

"It was further said that, though these grounds were formerly wide enough to include cases where decisions were, on the face of them bad in law, there has in recent years been a contraction, with the result that 'certiorari' no longer lies for such reason. It is said that this basis for the exercise of the controlling power has fallen into abeyance. I can find no justification for this contention."

(41) It was suggested that the decision in the case of — 'AIR 1952 SC 192' (B), could not be said to be in accord with the view expressed in — '(1952) 1 All ER 122 (C)' and ruled out the correction of legal errors apparent on the face of the record.

(42) It is not evident that this judgment of the Supreme Court has the effect of laying down that even where there is an error apparent on the face of the record, which goes to the root of jurisdiction, such an error may not be corrected. In this connection, it is necessary to quote the following passage from the judgment of their Lordships of the Supreme Court:

"It is unnecessary for the disposal of this appeal to consider and decide on the exact scope and extent of the jurisdiction of the High Court under Art. 226. Whether the writs it can issue must be analogous to the writs of 'habeas corpus, mandamus, prohibition, quo warranto and certiorari' specified therein and the power is subject to all the limitations, or restrictions imposed on the exercise of this jurisdiction, or where the High Court is at liberty to issue any suitable directions or orders or writs untrammelled by any conditions, whenever the interests of justice so require, is large and somewhat difficult problem which does not arise for solution now."

(43) If the guiding principles in regard to the exercise of jurisdiction under Art. 226 may be taken from the reported English cases, there seems no reason why the latest accepted position in England should not be considered as applicable in India also and there is nothing in the Supreme Court judgment referred to above which suggests that an error on the face of the record, going to the root of jurisdiction may not be corrected. Moreover, the language of Art. 226 has to be kept in view.

(44) Considering the growth of Departmental tribunals in this country, it seems, unless there is anything clearly to the contrary in the Constitution itself or in any case of the Supreme Court, that the writ jurisdiction may, in a fit case, be used for the purpose of not only keeping inferior tribunals within their jurisdiction but seeing that they observe the law.

(45) In the light of these remarks, the contentions of learned counsel may now be examined.

(46) To take up S. 60, sub-s. (c), Motor Vehicles Act, in the first instance, the language of this sub-section clearly indicates that the possession must cease in respect of the vehicle covered by the permit. In other words, it means that possession must have ceased within the duration of the permit.

(47) The case before the Regional Transport Authority seems to have been that there was no possession at all even at the date of the making of the application for a permanent permit for the applicant's possession had come to an end on or about 29-10-1949 when the documents passed. It was not the case that the applicant's possession ceased during the currency of the licence, nor is there any evidence to suggest that the applicant was dispossessed just prior to his applying for replacement. It would appear, therefore, that S. 60, sub-s. (c) would not apply at all.

(48) So far as S. 60, sub-cl. (d) is concerned, in law, there could be no fraud or misrepresentation in stating, that the applicant held a temporary permit valid in the province, under Cl. 10 of the application form, since despite the documents passing, in law there could not have been a valid transfer of permit because of the prohibition under S. 59, sub-cl. (1), Motor Vehicles Act, even assuming that the documents were intended to be acted upon.

(49) So far as possession of the stage-carriage USL 3167 on the date of the application for a permanent permit is concerned, the finding of the Regional Transport Authority that there was no possession at all on the date of application appears to have been arrived at on the basis of the documents executed by the applicant. It is not stated that there was any oral evidence of actual handing over of possession to and of subsequent possession by Chatter Sen. The inference that Chatter Sen had all along been in possession appears to have been drawn from the document purporting to transfer the stage-carriage. The power of attorney which recites that the ownership is with the applicant is difficult to reconcile with the document of transfer to Chatter Sen. Under the circumstances, no inference from the documents regarding possession could be drawn one way or the other. No oral evidence is indicated in the order from which it could be found that the power of attorney had been acted upon. The recitals, by themselves, in the power of attorney do not indicate the actual handing over of possession. The contents of the application made by Chatter Sen on 30-1-1951 to the Regional Transport Authority clearly indicate that Chatter Sen did not have possession of the stage-carriage when he made that application. The nature of this application does not appear to have been kept in view by the Regional Transport Authority in arriving at its decision.

(50) Under the circumstances. it would appear that there is an error on the face of the record caused by a non-reading and misreading of the relevant material and a failure to draw correct legal inferences from the facts which were before the Regional Transport Authority. The State Transport Tribunal appears to accept the reasoning and conclusion of the Regional Transport Authority on the question of possession.

(51) Under the circumstances, it cannot be said that it has been established that on the date, when the application for a permanent permit was made, the possession of the stage-carriage had re-passed from the applicant to Chatter Sen or his son. It has been laid down in — 'AIR 1952 SC 192' (B) that the question which has to be considered in a case like this is not whether legal title to the stage-carriage has passed, but who is in possession of it and that the right to obtain a permit depends upon the possession and not ownership.

(52) For the reasons stated above, it would appear that the petitioner is, in this case, entitled to relief and that a writ in the nature of 'certiorari' should issue quashing the orders of the Regional Transport Authority, dated the 21st July and the 3rd November, 1951 and the order of the State Transport Tribunal, dated 6th of August, 1952.

(53) So far as the second of the petitioner's prayers is concerned, it would appear that the correct order to pass is to direct the State Transport Tribunal to consider the petitioner's application for the replacement of stage-carriage USL 3167 by stage-carriage USL 3810, on the merits.

(54) In my view, this writ application should succeed in the manner indicated above and costs should be awarded to the petitioner and I order accordingly.

(55) BY THE COURT: A writ of certiorari will issue to quash the orders of the Regional Transport Authority dated the 21st July and the 3rd November, 1951, and the order of the State Transport Tribunal dated the 6th August, 1952.

(56) The State Transport Tribunal will proceed to consider the petitioner's application for replacement of vehicle USL 3167 by vehicle USL 3810 on its merits. The petitioner is entitled to his costs which we fix at Rs. 200/-.

A/R.G.D. Writ issued.

AIR 1953 ALLAHABAD 647 (Vol. 40, C. N. 320)

MALIK C. J. AND V. BHARGAVA J.

Vishnu Pratap and others, Appellants v. Sm. Revati Devi and others, Respondents.

Special Appeal No. 26 of 1953, D/- 7-5-1953.

†(a) **Companies Act (1913), Ss. 153(c)(8) and 202 — Order appointing interim receiver — Appeal — (Civil P. C. (1908), S. 104, O. 40, R. 1, O. 43, R. 1) — (Letters Patent (All), Cl. 10).**

An order passed by a single Judge of a High Court appointing an interim receiver under S. 153(c)(8), Companies Act read with O. 40, R. 1, C. P. C. pending the final disposal of an application under S. 153(c) is not open to appeal under S. 202, Companies Act. Since the relief under S. 153(c) is an alternative relief in place of the winding up of the company, it cannot be said that the order is made in the matter of winding up of company so as to come within the purview of S. 202. AIR 1932 Rang. 154 and AIR 1927 Cal 689, Distinguished. (Paras 6, 8)

Though such an order is appealable under S. 104 read with O. 43, R. 1, Civil P. C. the provisions of which are applicable to High Courts it does not mean that they give any right to an appeal from an order by a Judge or Judges of that Court to a larger number of Judges of the same Court independently of the Letters Patent of the Court. Hence such order would not be appealable unless it is a judgment within the meaning of Cl. 10, Letters Patent (All). AIR 1921 PC 80; 9 Cal 482 (PC) and 26 Cal 361, Rel. on. (Paras 9, 11)

Such an order is not a judgment within the meaning of Cl. 10, Letters Patent (All) and as such is not appealable. (Para 22)

Anno: Companies Act, S. 202 N. 1; Civil P. C., S. 104 N. 6: L. P. (Cal), Cl. 15 N. 4.

(b) Letters Patent (All), Cl. 10 — Judgment — Meaning of.

A judgment means an adjudication which conclusively determines the rights of the parties and not a mere interlocutory order during the pendency of a case. Every order passed by a single Judge in the exercise of his civil jurisdiction is not a judgment. What is or what is not a judgment will have to be decided in each case with reference to its effect on the rights of the parties. Even if it disposes of another point in dispute between the parties to a suit which has been raised by a separate application and which may be ancillary to the suit itself, is not necessarily a judgment. Case law discussed. (Paras 20, 22)

Anno: C. P. C., L. P. (Cal), Cl. 15 N. 2.

J. Swarup and R. Chaudhari, for Appellants; G. S. Pathak, R. S. Pathak, S. S. Dhawan, V. D. Bhargava, S. N. Devedi, S. N. Kakkar, H. N. Kapoor, Krishna Shankar, H. N. Seth and Hari Sarup, for Respondents.

CASES CITED:

(A) ('32) AIR 1932 Rang 154: 10 Rang 438
(B) ('27) AIR 1927 Cal 689: 31 Cal WN 894
(C) ('83) 10 Ind App 4: 9 Cal 482 (PC)
(D) ('99) 3 Cal WN 347: 26 Cal 361
(E) ('16) AIR 1916 Cal 361: 43 Cal 857
(F) ('21) AIR 1921 PC 80: 48 Cal 481 (PC)
(G) ('50) AIR 1950 FC 77: 1949 FCR 842 (FC)
(H) ('49) AIR 1949 FC 1: 1947 FCR 180: 49 Cri LJ 625 (FC)
(I) (1890) 59 LJ QB 556: 25 QBD 465
(J) ('39) AIR 1939 FC 43: 40 Cri LJ 468 (FC)
(K) (1884) 53 LJ Ch 662: 12 QBD 342
(L) ('92) 1892 All WN 14: 14 All 226 (FB)
(M) ('72) 8 Beng LR 433: 17 WR 364
(N) ('79) 3 Cal LR 311: 4 Cal 531
(O) ('12) 8 Ind Cas 340: 35 Mad 1 (FB)
(P) ('22) AIR 1922 Lah 380(2): 3 Lah 188
(Q) ('35) AIR 1935 All 620 (2): 57 All 983: 1935 All LJ 681 (FB)
(R) ('25) AIR 1925 PC 155: 23 All LJ 555 (PC)
(S) ('33) AIR 1933 All 262: 1933 All LJ 127 (FB)

(T) ('52) AIR 1952 Nag 357: ILR (1952) Nag 471 (FB)
(U) ('53) AIR 1953 Mad 38: 1952-2 Mad LJ 197
(V) ('50) AIR 1950 All 309: 1950 All LJ 845
(W) ('53) AIR 1953 SC 198: 1953-1 Mad LJ 710 (SC)

MALIK C. J.: This appeal has been filed by some of the opposite parties against whom an order was made by the learned Company Judge under S. 153(C)(8), Companies Act (VII of 1913). A preliminary objection has been raised on behalf of the applicant respondent 1 that no appeal lies.

(2) We have confined the arguments only to the preliminary objection and it is, therefore, not necessary to go into the facts in any detail. Rani Revati Devi filed an application in this Court under S. 153(C), Companies Act in the matter of the Vishnu Pratap Sugar Works Limited, Khadda, District Deoria. She claimed that the company was a private Ltd. Co. with a capital of Rs. 8,50,000/-, divided in 1,700 fully paid up shares of Rs. 500/- each, and most of the shares of the company were held by members of the Padrauna Rai family. She alleged that she was a share-holder and managing director of the company and that opposite parties 2 to 4 supported by opposite parties 6 to 8, and committed various acts of misfeasance, malfeasance and mismanagement and had so conducted the affairs of the company as to promote their personal ends at the cost of the company and its other share-holders. It was further alleged that the opposite parties mentioned above having the majority of votes are in a position to oppress the minority. She claimed that the circumstances set out by her in the petition are such as would justify the winding up of the company under the just and equitable cl. (vi) of S. 162 Companies Act but, instead of asking for that relief, she wanted that the Court should pass orders for the regulation of the conduct of the company's affairs in future and pass such other and further orders detailed in the petition as may be necessary for the proper running of the company in the interest of all concerned.

(3) In the same petition a prayer was made for an interim order under S. 153 (C)(8) which was as follows:

"That pending the hearing and final disposal of this petition the applicant or some other fit and proper person be appointed as receiver to take charge of the properties, assets, books of account, papers and vouchers of the company, with power to carry on the business of the company and with all other powers under O. 40, R. 1, Civil P. C."

The petition was supported by a long affidavit and, on notice being issued to the opposite parties, they appeared and filed objections to which the petitioner filed replies.

(4) Before, however, the application under S. 153(C) could be finally heard and disposed of, a prayer was made that, pending the decision, interim relief may be granted and a receiver be appointed so that the petitioner's interest may not further suffer. On 16-1-1953, the case was put up before the learned Company Judge in order to decide whether the interim relief sought in the petition should be granted. Due to, however, some defect in the affidavits the matter was postponed to 18th February for the consideration of the question whether an interim relief by appointment of a receiver should or should not be granted. Arguments were addressed on the point and the learned Judge on 2-4-1953, passed an order appointing a receiver to take over charge of the company's affairs. It is against that order dated 2-4-1953, that this appeal has been filed.

(5) In answer to the preliminary objection, Mr. Jagdish Swarup has relied on S. 202, Companies Act, on the provisions of O. 43, R. 1, Civil P. C. and Cl. 10 of our Letters Patent read with cls. 7 and 13 U. P. High Courts (Amalgamation) Order, 1948.

(6) As regards S. 202, Companies Act, it provides for appeals from orders made or given in the matter of the winding up of a company by the Court. Section 202 is as follows:

"Appeals from orders—
Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction."

Learned counsel has urged that the order appointing a receiver was an order or decision made or given in the matter of the winding up of a company by the Court. We do not think that this contention has any substance. Before the amendment of the Companies Act, where the Court was of the opinion that the majority was oppressing the minority so that the minority could get no relief from the domestic forum that is the vote of the share-holders, or, for sufficient other cause which need not be enumerated here the Court was of the opinion that it was just and equitable to wind up a company, it could pass an order to that effect but it could not grant relief in any other manner. To meet this hardship, the Act was amended and an alternative remedy was provided by S. 153 (C) which enabled the Court to keep the company alive and yet so regulate its affairs that the interest of the company may not be prejudiced and the interest of the share-holders may be safeguarded. This being, therefore, an alternative relief in place of the relief of winding up it cannot be said that the order or decision was made or given in the matter of winding up of a company.

The petitioner applying u/s. 153 (C) does not ask for the winding up of the company but prays that instead of the company being wound up the other relief under that section may be granted to him. Part V, Companies Act beginning with S. 155 deals with winding up of companies, while S. 153(C) is in part IV which deals with management and administration of a company. It may in this connection be pointed out that by S. 83 of the Amending Act (22 of 1936) sub-s. (7) was added to S. 153 which gave a right of appeal from any order made by the Court exercising original jurisdiction under that section to the authority authorized to hear appeals from the decisions of the Court. Section 153(C) was added by S. 7 of the Amending Act (52 of 1951) and there is no special provision for an appeal in that section. If the case, therefore, does not come under S. 202 for an order made under S. 153(C) the appellants will have to rely on some other provision of law giving them the right to appeal.

(7) Learned counsel for the appellants has relied on —'Lawrence Dawson v. J. Hormasji', AIR 1932 Rang 154 (A) but we do not see how that case is at all helpful. In that case there had been an order of winding up of a company and, in the course of the winding up of the company, a petition was filed by the liquidators under S. 153, Companies Act praying for the sanction of the Court to a scheme for the re-

organisation of the capital of the company. The learned company Judge, however, refused to grant the sanction and rejected the petition. The learned Chief Justice, held that an appeal lay from an order rejecting a scheme both under S. 202, Companies Act, and Cl. 13, Letters Patent of the Rangoon High Court. The order in that case was passed in the course of the winding up proceedings and it might have been treated as an order made or given in the matter of the winding up of the company, though we have grave doubts whether even to that case S. 202 applied. The learned Chief Justice, however, based it in the alternative under S. 202, as well as Cl. 13 of the Letters Patent. Now, that S. 153 has been amended and sub-s. (7) added to it, an appeal would clearly lie under sub-s. (7) of S. 153.

(8) Reliance is also placed on a decision of the Calcutta High Court in — 'Levy Brothers and Knowles, Ltd v. Subodh Kumar', AIR 1927 Cal 689 (B). In that case in the course of the voluntary winding up of a company the liquidators had applied to the Court under S. 215 Companies Act asking that they might be at liberty to admit the claim of the appellants. The learned Company Judge made an order to the effect that the liquidators were not to admit the claim unless the appellants brought a regular suit and obtained a decree. Against that order an appeal was filed. It was held that the order of the Judge in the winding up amounted to a refusal to the creditors of their important right to establish their claim in the winding-up proceedings and it was a "judgment" under Cl. 15 of the Letters Patent from which an appeal, under S. 202, Companies Act, would lie. It would thus appear that the order was made in the matter of the winding-up of a company and it has nothing to do with an order like the one before us appointing an interim receiver pending the final disposal of an application under S. 153(C). We are, therefore, not satisfied that the appellants have any right of appeal under S. 202, Companies Act.

(9) It was next urged that an appeal lies to us under O. 43, R. 1, Civil P. C. It was urged that the order passed by the learned Judge appointing a receiver was an order under O. 40, R. 1, Civil P. C. and an appeal against that order was provided for in O. 43, R. 1, Civil P. C. Learned counsel has referred to Ss. 116 and 117, Civil P. C. and has urged that, save as provided in Part IX or Part X or in the rules, the provisions of the Code of Civil Procedure apply to High Courts in Part A and B States. Reference is also made to O. 49, Rule 3, Civil P. C. and it is urged that Orders 40 and 43 are not excluded therein and they, therefore, apply to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

It is true that Orders 40 & 43 both apply to the High Court but the question here is whether O. 43 makes provision for an appeal from one court to another or it is intended to cover cases of an appeal from one Judge to a bench of the same Court. Section 94, Civil P. C. gives a civil Court, including a High Court, power to pass various orders to prevent the ends of justice being defeated and cl. (d) of this section provides for appointment of a receiver of any property. Part VII, Civil P. C. deals with appeals and S. 96 provides that an appeal against a decree passed by a Court shall lie to a Court authorised to hear appeals from the decisions of such Court. Clearly S. 96 contemplates two separate Courts, one being authorised to hear appeals from a decree passed by the other. While S. 96 deals with original decree, S. 104, Civil P. C. deals with orders, not being decrees, and the orders that are appealable are set out under O. 43, C. P. C. The question of an appeal from one Court to another Court is no doubt governed by the provisions of the Code of Civil Procedure but the provision for appeal from one Judge of a Court to a bench of the same Court is not provided for by the Code and must be governed by the Letters Patent.

(10) Though learned counsel has urged that the order was passed under O. 40, R. 1, C. P. C., the order in fact was passed under S. 153 (C)(8), Companies Act read with O. 40 R. 1, Civil P. C. Section 153 (C)(8) is as follows:

> "It shall be lawful for the Court upon the application of any petitioner or of any respondent to a petition under this section and upon such terms as to the Court appears just and equitable, to make any such interim order as it thinks fit for regulating the conduct of the affairs of the company pending the making of a final order in relation to the application."

It is not necessary for us to consider whether, if sub-s. (8) was not there, the Court could during the pendency of an application under S. 153(C) appoint a receiver or not. The appeal, however, as has been frequently said, is a creature of statute and, unless, there is a provision for an appeal, no appeal would lie. The point that O. 43 relates to appeals from one Court to another and not from a Judge of a Court to a bench of the same Court is covered by authority.

In — 'Hurrish Chunder v. Kali Sunderi Debi', 9 Cal 482 (P. C.) (C) where the question was whether an appeal from a single Judge to a Division Bench of the Calcutta High Court was barred by S. 588 of Act 10 of 1877, their Lordships held that the restriction in S. 588 did not apply to an appeal from one Judge to a bench of the same Court, to which appeals Cl. (15) of the Letters Patent was applicable. Section 104, Civil P. C. (Act 5 of 1908) has now replaced S. 588 of Act 10 of 1877 with this difference that while in S. 588 no appeal could be filed against an order which did not come under that section, S. 104 now provides that an appeal shall lie from the orders enumerated in S. 104 or by any law for the time being in force and from no other orders, but the fact remains that their Lordships of the Judicial Committee held that S. 588, which is now equivalent to S. 104, applied to an appeal from one Court to another and not to a case of an appeal from a Judge of a Court to a bench of the same Court. To the same effect is a Full Bench decision of the Calcutta High Court in — 'Toolsee Money Dassee v. Sudevi Dasee', 26 Cal 361 (D). Mr. Woodroffe in the course of his argument pointed out in that case that

> "a Judge exercising the original civil jurisdiction of the High Court is not subordinate to the High Court; he is 'the High Court'. No appeal lies or can lie, under the Civil Procedure Code, from the decree or order of the High Court in the exercise of its original civil jurisdiction; the appeal is by virtue of Clause 15 of the Letters Patent."

This argument was accepted by the Full Bench which held that such appeals were governed by the Letters Patent and not by S. 588 of the Code.

(10a) In — 'Mathura Sundari v. Haran Chandra', AIR 1916 Cal 361 (E) Sanderson, C. J. and Mookerjee J. were inclined to take a different view and Woodroffe J. expressed no opinion on the point. It was held in that case that the order was a judgment within the meaning of Cl. 15 of the Letters Patent and was, therefore, appealable.

(11) The difficulty, however, about accepting this view is that while, in the case of an order, which is appealable under S. 104 or O. 43, Civil P. C. an appeal would lie to a Court to which it is subordinate, what would happen to cases, if the Code of Civil Procedure, as such is applied where an order similar to an order mentioned in O. 43 is passed by a bench and not by a single Judge. Quite often questions whether a receiver should be appointed, whether an injunction should be issued and similar other matter are referred to and dealt with by Division Benches of the High Court. If S. 104 read with O. 43 makes all these orders appealable then what would be the Court to which appeals would lie from an order passed by a Division Bench and not by a single Judge. We are not satisfied that S. 104 or O. 43 ever intended to deal with appeals from a Judge or Judges of one Court to a larger number of Judges in the same Court. It is no doubt true, as has been held by their Lordships of the Judicial Committee in — 'Mt. Sabitri Thakurain v. Savi', AIR 1921 PC 80 (F) that S. 104 as well as O. 43 apply to High Courts but it does not mean that they give any right to an appeal from an order by a Judge or Judges of that Court to a larger number of Judges of the same Court independently of the Letters Patent of the Court. As we have said if O. 43 or S. 104, Civil P. C. were made applicable per se, without reference to the Letters Patent, then even an order passed by a bench would come under those provisions, but before an appeal can be filed there will have to be a Court constituted for hearing an appeal and the only provision for hearing an appeal, from the judgment of a single Judge, by a bench of two or more Judges of the same Court is contained in the Letters Patent of the Chartered High Courts. An order, to come under the Letters Patent, must be a judgment, and, if an order is not a judgment, then Cl. 10 of the Letters Patent would not apply and there is no provision for constituting a bench of more than one Judge to hear such an appeal. We, therefore, fail to understand how O. 43, R. 1, or S. 104, Civil P. C. without any reference to Cl. 10 of the Letters Patent, can help the appellants.

(12) Coming now to Cl. 10 of the Letters Patent, a great deal of controversy has raged round the word "judgment" and what it means. In the Letters Patent itself we have several clauses in which provisions are made for appeals. Clause 10 deals with an appeal from the judgment of a single Judge. Clause 30 deals with appeals to the Privy Council from any final judgment, decree or order of the High Court. Clause 31 provides for appeals to the Privy Council against certain preliminary or interlocutory judgment, decree, order or sentence of the High Court. Clause 32 provides for an appeal to the Privy Council against any judgment, order or sentence made by the High Court in the exercise of original criminal jurisdiction. It would thus appear that in dealing with appeals to the Privy Council the words used are "Judgment, final or preliminary, or interlocutory, decree, order or sentence", while in dealing with appeals from one judge to a bench of the same Court only the word "judgment" has been used. There being no appeal under the Letters Patent in criminal matters from one Judge to a larger number of Judges the word "sentence" could easily be omitted. There is also no appeal from an order passed by a single Judge in the exercise of revisional jurisdiction. Appeals only lie from judgment in civil matters in the exercise of ordinary or extraordinary original jurisdiction of the Court and, with the leave of the Judge, against a decree or order made by him in the exercise of appellate jurisdiction against a decree or order made by a subordinate Court. In S. 205, Government of India Act providing for appeals to the Federal Court the words used are "judgment, decree or final order".

In —'Mohammad Amin Brothers Ltd. v. Dominion of India', AIR 1950 FC 77 (G), the point arose whether an order under the Letters Patent setting aside an order of a single judge directing the compulsory winding up of a company was a final order against which an appeal lay to the Federal Court and, it having been held that it was not a final order, an argument was raised that it may be a judgment if it was not a final order. Their Lordships held that by reason of the collocation of the words the word "judgment" would not include interlocutory judgment and observed as follows:

> "In English Courts the word 'judgment' is used in the same sense as a 'decree' in the Civil Procedure Code and it means the declaration or final determination of the rights of the parties in the matter brought before the Court"

and referred to a previous decision of the same Court in — 'Kuppuswami Rao v. The King', AIR 1949 FC 1 (H). In that case Kania, C. J. observed:

> "It is next necessary to ascertain the meaning of the words 'judgment' and 'decree'. In England in civil actions a decree is understood to be the same as a judgment. If so, as there may be a preliminary decree, there may be a preliminary judgment."

His Lordship mentioned the case of — 'Onslow v. Inland Revenue Commissioners', (1890) 25 QBD 465 (I) where Lord Esher M. R. said:

> "A 'Judgment' therefore, is a decision obtained in an action, and every other decision is an order."

Kania, C. J., said:

> "These and other English decisions make it clear that in England when the word judgment or decree is used, whether it is preliminary or final, it means the declaration or final determination of the rights of the parties in the matter brought before the Court."

His Lordship pointed out that definitions of the words "judgment" and "decree" in the Code are applicable merely to that Code. Those definitions, therefore, are not helpful.

(13) In — 'Dr. Hori Ram Singh v. Emperor', AIR 1939 FC 43 (J) Sulaiman J. pointed out that:

> "Decree was a term, which, in Equity practice, corresponded to judgment at Common law. Decree is the equivalent to the term judgment in the Queens' Bench Division. A judgment is a decision obtained in an action, and any other decision is an order: per 'Cotton L. J. in Ex Parte Chineres', '(1884) 12 QBD 342 (K)'."

His Lordship went on to say that:

> "The word 'judgment' occurs in Cl. 10 Letters Patent of the Allahabad High Court and Cl. 15, Letters Patent of the Calcutta, Madras and Bombay High Courts, and 'final judgment' in Cls. 30 and 39 respectively. As they had been drafted in England, the first interpretation put upon the word was more or less in the English sense and not that used in the Civil Code."

The earliest decision of this Court referred to us as to what the word 'judgment' means is —'Muhammad Niam-Ul-Lah v. Ihsan Ullah', 14 All 226 (FB) (L). In this case Sir John Edge, C. J., held that

"the word 'Judgment' in Cl. 10 of the Letters Patent means the express decision of a Judge of the Court which leads up to and originates an order or decree."

(14) Many learned Judges have tried to explain what the word 'judgment' used in the relevant clause of the Letters Patent means and a reference to some of them might be helpful. In the — 'Justices of the Peace for the Town of Calcutta v. Oriental Gas Co. Limited', 17 WR 364 (M) the learned C. J. Sir Richard Couch, said:

"We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined."

(15) In — 'Ebrahim v. Fuckrunnissa Begum', 4 Cal 531 (N) Garth, C. J. defined the word 'judgment' as follows:

"I think that word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit."

In —'Tuljaram Row v. Alagappa Chettiar', 35 Mad 1 (FB) (O) Sir Arnold White, C. J., said that the word "Judgment" did not necessarily mean all orders in civil proceedings. But the test according to him was not the form of the adjudication but its effect on the suit or proceeding in which it was made. The learned Chief Justice went on to say that

"an order or an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained) — e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause."

Krishnaswami Ayyar, J. in this case quoted Danial's Chancery Practice, Volume I, where the definition given was as follows:

"A judgment is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final."

The learned Judge was of the opinion that a more accurate definition was to be found in Black on 'judgment' where the author had said:

"We may define a 'Judgment' as the determination or sentence of the law pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist."

(16) In — 'Ruldu Singh v. Sanwal Singh', AIR 1922 Lah 380 (2) (P) Shadi Lal J. expressed the opinion as follows:

"It is, therefore, impossible to lay down any definite rule which would meet the requirements of all the cases, and the only thing which can be said is that in determining whether an order constitutes a judgment or not the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it was made."

(17) In —'Shamzadi Begam v. Alakh Nath', AIR 1935 All 620 (2) (FB) (Q) reference was made to the decision of Sir John Edge in the case of —'Sewak Jaranchod Bhogi Lal v. Dakore Temple Committee', AIR 1925 PC 155 at p. 156 (R) where his Lordship laid down that:

" The term judgment in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

and the decision of the Full Bench of this Court in —'Sital Din v. Anant Ram', AIR 1933 All 262 (S) in which it was held that the word "judgment" in Cl. 10 of the Letters Patent should not be read in a restricted sense and that an order of remand under O. 41, R. 23, which effectually disposes of the appeal before the High Court amounts to a judgment, whether it amounts to a decree or not. The learned Judges further held that the order extending the period of limitation was not a judgment and therefore no appeal lay under Cl. 10 of the Letters Patent.

(18) A comprehensive definition was attempted to be given by Hidayatullah J. in — 'Manohar Damodar v. Baliram Ganpat', AIR 1952 Nag 357 at p. 376 (T).

The learned Judge held:

"A judgment means a decision in an action whether final, preliminary or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned, the controversy which is the subject of the action. It does not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective. The decision need not be immediately executable 'per se' but if left untouched must result inevitably without anything further, save the determination of consequential details, in a decree or decretal orders, that is to say, an executive document directing something to be done or not to be done in relation to the facts of the controversy. The decision may itself order that thing to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole or any part of the controversy."

(19) In —'M. A. Janki v. M. A. Srirangammal', AIR 1953 Mad 38 (U) an order rejecting an application under O. 41, R. 19, Civil P. C. to restore and rehear an appeal dismissed for default of appearance was held to be neither a judgment nor a decree nor a final order. No doubt those observations were made with reference to Art. 133 of the Constitution and it may be said that the word 'judgment' in the Constitution does not necessarily mean the same thing as the word "judgment" in the Letters Patent.

(20) From the case discussed above it would appear that every order passed by a learned single Judge in the exercise of his civil jurisdiction is not a judgment. What is or what is not a judgment will have to be decided in each case with reference to its effect on the rights of the parties. In — 'The Jwala Bank Ltd. v. Shitla Prashad Singh', AIR 1950 All 309 (V) it was held by a bench of this Court that a judgment means an adjudication which conclusively determines the rights of the parties and not a mere interlocutory order during the pendency of a case. Judged from that point of view it cannot be said that the learned Judge has determined any rights between the parties. No doubt it is true that in determining the question whether a receiver should or should not be appointed the learned Judge had to express

an opinion as to the maintainability of the application and whether 'prima facie' the facts justified the passing of an interim order under S. 153(C)(8), Companies Act. By reason of those observations Mr. R. C. Chowdhry urged at one stage that the learned Judge had finally disposed of the application under S. 153 (C) and his order was an order under sub-ss. (4) and (5) of that section and it was an interim order under S. 153 (C)(8). When, however, faced with the entries in the order-sheet the learned counsel had to admit that the application under S. 153 (C) was still pending and the learned Judge had purported to appoint an interim receiver pending final disposal of the application.

(21) It may be that by reason of the appointment of receiver the appellants are caused inconvenience and their rights have been interfered with, but it cannot be said that orders have been passed disposing of the application under S. 153(C), Companies Act.

(22) Shri Jagdish Sarup, learned counsel for the appellants, has urged that the order passed by the learned single Judge should be held to be a judgment as it, at least, finally disposed of the application for an interim order making arrangements for the management of the affairs of the company & any order, which finally disposes of some dispute between the parties must be held to be a judgment. This interpretation, if accepted, would widen the scope of the word 'judgment' in Cl. (13) of the Letters Patent so as to include every order passed on any application raising a dispute during the pendency of a suit or proceeding even though it may not affect the merits of the controversy between the parties in the suit itself nor may it terminate or dispose of the suit or proceedings on any ground. Such a wide interpretation cannot be accepted. Their Lordships of the Supreme Court, in — 'Asrumati Debi v. Rupendra Deb', AIR 1953 SC 198 (W) considered whether an order for transfer of a suit made under Cl. (13) of the Letters Patent of the Calcutta High Court was or was not a judgment within the meaning of Cl. (15) of the Letters Patent and held:

"In the present case, a single Judge of the High Court had decided this question in favour of the plaintiff in the suit; but a decision on any and every point in dispute between the parties to a suit is not necessarily a "judgment". The order in the present case neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground as has been referred to by Couch C. J. in his observations quoted above. An order directing a plaint to be rejected or taken off the file amounts to a final disposal of the suit so far as the Court making the order is concerned. That suit is completely at an end and it is immaterial that another suit could be filed in the same or another Court after removing the defects which led to the order of rejection. On the other hand, an order of transfer under Cl. (13) of the Letters Patent, is, in the first place, not at all an order made by the Court in which the suit is pending. In the second place, the order does not put an end to the suit which remains perfectly alive and that very suit is to be tried by another Court, the proceedings in the latter to be taken only from the stage at which they were left in the Court in which the suit was originally filed."

This decision by their Lordships of the Supreme Court makes it clear that an order, even if it disposes of another point in dispute between the parties to a suit which has been raised by a separate application and which may be ancillary to the suit itself, is not necessarily a judgment. The mere fact that in the case before us, the order passed by the learned Single Judge has disposed of the dispute relating to the interim management of the company cannot, therefore, justify the inference that the order amounts to a judgment.

(23) The preliminary objection, in our view, has substance and the appellants have failed to satisfy us that they have a right of appeal against the interim order.

(24) The appeal fails and is dismissed with costs.

A/K.S. Appeal dismissed.

AIR 1953 ALLAHABAD 652 (Vol. 40, C. N.321)
(LUCKNOW BENCH)

RAGHUBAR DAYAL AND
HARI SHANKAR JJ.

Sheo Shanker and another, Accused-Appellants v. The State.

Criminal Appeal No. 279 of 1951, D/- 23-12-1952.

(a) Criminal P. C. (1898), S. 162 — Use of statement under.

A statement made by a witness to a police investigating officer can be used only in one manner in view of S. 162, Cr. P. C. and that is only to contradict the statement of the witness if he be examined as a prosecution witness. If the same person be not examined as a prosecution witness but examined as a defence witness, then that statement cannot be used. Any other use of the statement is forbidden. (Para 11)

Anno: Cr. P. C., S. 162 N. 10.

(b) Criminal P. C. (1898), S. 162 — Mala fide conduct of investigating officer — Proof of.

The 'mala fide' conduct of the investigating officer can certainly be urged on behalf of the State and the Court can consider it on the basis of circumstances other than the mere discrepant language of the recorded statement of the witness. (Para 12)

Anno: Cr. P. C., S. 162 N. 10.

(c) Criminal P. C. (1898), S. 162 — Mala fide conduct of investigating officer — Proof by statement recorded under S. 162.

The truth of the statements recorded in the police diary is certainly not accepted or presumed, but the correctness of the record is presumed for the purposes of S. 162, Cr. P. C. The Court has therefore, to accept that what is recorded in the case diary was the statement made by that particular witness before the investigating officer and a mere denial of a witness or the extreme improbability of a witness having made such a statement cannot be a factor in determining whether the police Sub-Inspec-

tor was acting bona fide or not at the time when he recorded the statement. (Para 11)
Anno: Cr. P. C., S. 162 N. 10.

(d) Evidence Act (1872), S. 45 — Doctor's evidence — Scorching from gun wounds.

When the victims wear several clothes no scorching of the wounds is possible even if the firing had been from very close range. Taylor on Medical Jurisprudence, relied on. (Para 21)
Anno: Evi. Act. S. 45 N. 5.

(e) Criminal P. C. (1898), S. 367 — Evidence of alibi.

If the alibi evidence be good and no weakness is detected by the Court in it, it should not be given a go-by if the Court comes to know of no weakness in the prosecution evidence. The two cannot be true and the weakness must be found somewhere, however, difficult it might be. If the Court fails to find any weakness in either, the benefit of such a failure must go to the accused and not to the prosecution because a well-established alibi must be sufficient to show that the prosecution witnesses were not speaking the truth or at least to throw doubt upon their truthfulness. AIR 1933 Oudh 369, Ref.

Whenever a defence of alibi is set up and that defence utterly breaks down, it is a strong inference that if the prisoner was not in fact where he says he was, then in all probability he was where the prosecution says he was. But the drawing of certain inferences does not mean that that thing is proved. Moreover, such inference is to be drawn only when the defence of alibi breaks down and not when it is disbelieved. AIR 1934 Cal 719 (SB), Expl.

Held on considerations of facts that the defence of alibi was not proved to be false and did not break down. (Para 22)
Anno: Evi. Act, S. 367 N. 6.

(f) Evidence Act (1872), S. 9 — Failure to identify accused by eye witnesses — Creates doubts about presence of accused. (Para 22)
Anno: Evi. Act, S. 9 N. 4, 5.

S. C. Das, Ram Asre Misra, S. N. Trivedy and B. P. Nigam, for Appellants; P. N. Chaudhari, Additional Govt. Advocate, for the State.

CASES CITED:

(A) ('34) AIR 1934 Cal 719: 35 Cri LJ 1335 (SB)

(B) ('33) AIR 1933 Oudh 369: 34 Cri LJ 1146

RAGHUBAR DAYAL J.: Sheo Shanker alias Tanu and Sheo Shankar alias Bachchu appeal against their conviction and sentence of death under S. 302, I. P. C. for having committed the murder of Girdhari and Ram Singh on the morning of 4-1-1951, near Achalganj railway station.

(2) The prosecution story is that these two accused appellants and one unknown person lay in ambush in the grove of Sheo Ram Brahman about three furlongs by the passage from the railway station and shot at Girdhari and Ram Singh and their companions when they had passed this grove on their way from village Bethar to the railway station. Two shots were fired. It is said that the second shot hit Girdhari on the legs. Girdhari and Ram Singh ran towards the station. Their companions also ran in the same direction but along the sides of the passage. The accused's party pursued them and the men with guns kept on firing. Ram Singh was hit with shots just in front of the quarters of Abdul Ghani, signal inspector. He fell down there. Girdhari kept on running and was hit again after he had run about 328 paces from where Ram Singh had fallen down. Girdhari fell down on being hit at that spot. This place is about 40 paces from the station platform. Tanu accused then shot at Girdhari's chest twice. Bachchu on returning to Ram Singh fired at his chest. The result was that Girdhari and Tanu died immediately.

(3) This incident is said to have taken place at about 8-30 a.m. The departure time of the train leaving for Unnao was 8-47 a. m. Badlu, brother of Girdhari went to police station Achalganj about four to six furlongs away and lodged a report there which purports to be taken down at 9-30 a.m. The main difference between the version given in this report and that narrated in Court is with respect to Bachchu's shooting at Ram Singh after he had fallen down. No such allegation was made in the first information report. We shall deal with its contents later.

(4) Puttu Lal, Sub-Inspector, proceeded at once to the spot, found the dead bodies near the railway station, prepared the inquest reports and sent the bodies for post mortem examination. According to him he reached there at about 11 o'clock. Station officer, Sheo Narain Singh, reached the spot shortly after his arrival. Station officer Sheo Narain Singh found four spent cartridges and one buckshot near the dead body of Ram Singh and five empty cartridges, five buckshot and three wads near the dead body of Girdhari. The five buckshot found near Girdhari's body and the one found near Ram Singh's body appear to be similar to one another and also to one pellet recovered from the body of Girdhari at the post mortem examination. The station officer also found two empty cartridges in the grove of Sheo Ram.

(5) He examined Badlu, Hari Shankar and Lallu prosecution witnesses on the 4th January, Lalli alias Raghunath and Ram Bharosey on the 7th and Raja Ram, Bansidhar and Ram Charan on 9-2-1951. He reported for the recording of the statements of Badlu, Hari Shankar, Lallu and Raja Ram under S. 164, Cr. P. C. on 10-2-1951. Their statements were so recorded on the same day.

(6) Both the accused denied the prosecution allegations in their statements before the Committing Magistrate and did not not say anything further about the incident or about their defence. They simply stated that the prosecution witnesses deposed against them as they were their enemies and were friends of Girdhari. In the Sessions Court Tanu alleged alibi stating that he was proceeding to Unnao that day for the hearing of his case and that learning there at the station about the arrest of his two brothers in connection with these murders, he continued his journey to Lucknow. He also suggested that the deceased had many enemies thereby suggesting that they might have been killed by others. Bachchu also alleged his alibi stating that he had gone to Lucknow that day and had lodged a report there about the loss of his box and that he had lodged a complaint in the complaint book about his being made over a wrong ticket at Kanpur with the

result that he was charged excess fare at Lucknow.

(7) Tanu examined no witness in support of his alibi. Bachchu examined some witnesses. The defence also examined two witnesses to show that the two accused were not the persons who had actually shot at the deceased Girdhari and Ram Singh. These two witnesses are railway employees, Mewa Lal and Makhdoom D. W. 1 and D. W. 2.

(8) There is no doubt that Ram Singh and Girdhari died due to gunshot wounds. It is, however, necessary to note below the injuries observed on their bodies by Dr. Lyall who conducted the post mortem examination.

'In respect of Girdhari'.

1. Entrance gunshot wounds 3/4th inch in diameter with black margins on left axilliary posterior fold.

2. Entrance gunshot wound 1 inch in diameter with black margins on left side chest 4 inches below and 1 inch lateral to left nipple.

3. Four entrance gunshot wounds ½ inch in diameter in right umbilicus region 1 inch lateral to umbilicus.

4. Two entrance gunshot wounds ½ inch in diameter on upper 1/3 and outer aspect right leg.

5. Two entrance gunshot wounds ½ inch in diameter on outer and upper 1/3 of right arm.

6. Four exit gunshot wounds ½ inch in diameter on right side back above the iliac bone.

'In respect of Ram Singh'.

1. Entrance gunshot wound in 3/4th inch in diameter with black margins 1 inch below and ½ inch internal to left nipple.

2. Entrance gunshot wound 1 inch in diameter on uppermost part of right thigh in its medial part.

3. Exit gunshot wound ½ inch in diameter over 6th dorsal vertebra in mid line on back.

(9) Dr. Lyall stated in his deposition that Girdhari's wounds Nos. 1 & 2 & Ram Singh's wound No. 1 were caused with gunshots by placing the gun on the chest or from within a range of one yard.

(10) The prosecution examined, as already, indicated, seven witnesses to prove its case. All of them as noted by the learned Sessions Judge in his judgment belong to the party of Girdhari and Ram Singh between whom and the accused, there had been a lot of litigation. Some of the witnesses namely, Lalli, Raja Ram, Hari Shankar, Lallu and Bansidhar had also personal reasons for being inimical towards the accused. This is not disputed by the learned Government Advocate and it is not necessary to discuss the inimical and partisan character of the prosecution witnesses. It is true that their statements cannot be ignored merely on this basis, but this necessitates a careful scrutiny of their statements. Implicit reliance cannot be placed on them merely on the ground that the first information report appears to have been promptly lodged and because Ram Singh and Girdhari died of gunshot wounds.

(11) One main consideration which was urged for the accused appellants to disbelieve the witnesses was the material discrepancy in the statements of some of the witnesses before the investigating officer and the statements made in Court. With respect to Bachchu's shooting at the victims and particularly Bachchu's shooting at Ram Singh after Ram Singh had fallen, it has already been mentioned that Bachchu's shooting at Ram Singh after he had fallen was not mentioned in the first information report. The only way in which this discrepancy is explained by the prosecution is by a complete denial by witnesses of having made a discrepant statement before the investigating officer and suggesting that the investigating officer had wrongly recorded that part of the statement due to his favouring Bachchu, accused. Several circumstances have been urged in support of this contention which is not usually put forward for the prosecution when witnesses make statements in Court which are found inconsistent with the statements made before the police investigating officer. One of these circumstances is that the statements are so damaging to the prosecution story put in Court that the witnesses could not have been expected to have made such statements before the investigating officer. We are of opinion that this is a very wrong approach to the recorded statements. A statement made by a witness to a police investigating officer can be used only in one manner in view of S. 162, Cr. P. C. and that is that it can be used to contradict the statement of the witness if he be examined as a prosecution witness. If the same person be not examined as a prosecution witness but examined as a defence witness, then that statement cannot be used. Any other use of the statement is forbidden.

This is not disputed by the learned Government Advocate. His contention is that the recorded statement is not really a statement of the witnesses and therefore is not a statement contemplated by S. 162, Cr. P. C. We are of opinion that the statement recorded in the police diary cannot be assailed for the purposes of the case under investigation as otherwise the whole use of S. 162, Cr. P. C. will vanish. The contradiction will come into existence only when a witness makes a different statement in Court and it is not expected that he would ordinarily admit having made a contrary statement before the police. He must deny having made a contrary statement. The prosecution can always say that in view of the witness's statement, the police Sub-Inspector did not write the statement correctly & may then make allegations which may necessitate rather a detailed inquiry about the bona fides of the investigating officer. This could not have been contemplated. The only way to prove that a witness made a certain statement before the police is to confront the witness with that statement and in case he denies it, to get it proved from the investigating officer who made a note of that statement. The truth of the statements recorded in the police diary is certainly not accepted or presumed but the correctness of the record is presumed for the purposes of S. 162, Cr. P. C. We are, therefore, of opinion that for this particular case we have to accept that what is recorded in the case diary was the statement made by that particular witness before the investigating officer and that a mere denial of a witness or the extreme improbability of a witness having made such a statement cannot be a factor in determining whether the police Sub-Inspector was acting bona fide or not at the time when he recorded the statement.

(12) The 'mala fide' conduct of the investigating officer could certainly be urged on behalf of the State & the Court can consider it on the basis of circumstances other than the mere discrepant language of the recorded statement of the witness. Such other circumstances urged in the present case are that the Sub-Inspector did not arrest the two accused till they themselves had surrendered in Court, that he did not take any steps to treat them as absconders, that he did not come to know about the hearing of their case at Unnao that day and that he made a statement that he had asked the second officer to search

the houses of the two accused, a fact which did not appear to be correct in view of the second officer not deposing about it. So far as the last point is concerned, we find mention about it in the case diary. Of course, we do not find any search list there. It is, however, to be expected that a wrong note would not be made there and if a wrong note had been made, the superior officers would have made a check about it. The Sub-Inspector not taking action against the accused as absconders, does not necessarily mean that he was favouring them. He might have been trying to get at them or just securing information about their movements. It may have been also possible though he does not say so that he was hesitant about making arrests just on the basis of statements of witnesses he knew to be of the party of the complainant and especially if he had got scent of the accused suggesting alibi. We, therefore, do not find these circumstances to be such as to lead to the conclusion that the Sub-Inspector was favouring the accused.

(13-14) In addition to these circumstances, there is the statement of Ram Bharosey, brother of Girdhari that he had seen the relations of Bachchu approaching the station officer and that he had complained about his conduct to his superior officers. Carbon copies of the complaints sent have been filed. They do not mention any complaint with respect to the Sub-Inspector being approached on behalf of Bachchu though they contain other allegations. Ram Bharosey's statement according to the statement of the station officer was recorded on the 7th January. Ram Bharosey would like to make us believe that it was taken down on the 9th January. We see no reason to disbelieve the station officer especially when we find that in the case diary of the 7th January the statement of some other witnesses had also been recorded.

(15) (Their Lordships then considered the statement and other circumstances and proceeded as follows:) We are, therefore, in agreement with the learned Sessions Judge that it has not been established that Sheo Narain Singh, station officer had been favourable towards Bachchu and therefore, had not been conducting the investigation properly.

(16-18) (Their Lordships then discussed other prosecution evidence and the circumstances connected with the first information report and concluded as follows:—) It is in view of these circumstances that we are inclined to think that the first information report is not a report which was lodged so promptly as it alleges to be and that, therefore, the prosecution story cannot be given sufficient corroboration from the contents of the first information report.

(19) The observations of the doctor in our mind do not fully support the prosecution story. Anyway, they show that the prosecution witnesses either failed to observe all what happened or have not deposed to all that they had seen.

(20) (After discussing the prosecution evidence regarding pursuit and gun wounds, the judgment proceeds as follows:—) The nature of the wounds said to have been inflicted on account of the gun being placed on the chest and fired does not fit in with the allegation. It is true that the doctor was not questioned about it. In fact the doctor made the statement that these wounds were due to the gun being fired by being placed on the chest or from within a range of one yard. We are of opinion that in this the doctor was wrong and probably got misguided on account of the black margins of the wounds. The black margins of a wound are never due to the firing of the gun from very close range but are due to something different. Taylor says at page 430 of his Principles and Practice of Medical Jurisprudence, Volume I, 10th Edition:—

> "The edges of the wound commonly show a narrow ring of discoloration due to the removal of a layer of epithelium by the passage of the bullet. The surrounding skin may be scorched or not, and there may be a zone of blackening or peppering with grains of powder, according to the distance from which the weapon was fired."

And again at page 431:—

> "All entrance wounds, if examined, will be found to have a zone of denuded epithelium immediately surrounding the orifice. This is caused by the spin of the bullet and the invagination of the skin by the bullet and tends to dry and become discoloured shortly after death. It should not be confused with the marks due to powder for it gives no indication of range."

And again at page 441:—

> "The bruised and dark appearance which a gunshot wound sometimes presents, even when the weapon is discharged at a distance from the body has led to the supposition that this effect was due to a burn and that the bullet burnt the parts which it touched, but this idea is not correct. The projectile never becomes sufficiently heated to acquire the power of burning."

(21) Of course no scorching of the wounds could have been possible in this case when the victims had several clothes on, even if the firing had been from very close range. And that again shows that the doctor's opinion was due to the existence of black margins and not due to any scorching of the surrounding skin. Again Taylor says at page 430:—

> "We must distinguish between near wounds and far wounds. Usually when a weapon is discharged in contact with or within an inch or so of the body the gases which pass out with the bullet enter the tissues and thereafter expand causing tearing of the skin or clothes very often in the form of a cross or a split. Most of the powder is found inside the tissues, but there may be traces of blackening, burning and tattooing around the entrance hole .....
> if the weapon is discharged at a shot distance from the skin the effect of the gases is lost and the entrance wound looks like a hole which might be caused by pressing a lead pencil into the tissues; it is rounded with inverted edges and surrounded by a zone of singeing, blackening from the smoke and tattooing from the impaction of small particles of powder in the skin."

The clothes did not show such tearing or splitting. It is, therefore, clear from the condition of the clothes which the victims were wearing, that the gun does not appear to have been fired by its being placed on the chest or very close to the chest after the victims had fallen down. The position of the two first wounds on Girdhari is also not very consistent with the position of the gun. It is not expected that he would be lying on the left side when the gun would be so fired.

(22) Lastly, it was argued for the State that the alibi evidence of Bachchu was not to be believed and if alibi is not believed the prosecution case should be taken to be proved. In support of this contention we were referred to two cases reported in —'Sarat Chandar v. Emperor', AIR 1934 Cal 719 (A) and in — 'Suraj Bakhsh Singh v. Emperor', AIR 1933 Oudh 369 (B). With all respect we are not prepared to agree with the observation made in those cases. In 'AIR 1933 Oudh 369 (B)', Smith J. observed:

"The reason for not believing the alibis of these three men is that there is convincing evidence that they took part in the crime; it need hardly be said where there is satisfactory evidence that a man committed a crime at a certain place and at a certain time a Court will never find any difficulty in rejecting an alibi he may seek to establish, even if that alibi is supported by what on the surface would appear to be satisfactory evidence."

We do not take this to mean that if the alibi evidence be good and no weakness is detected by the Court in it, it must be given a go-by if the Court comes to know of no weakness in the prosecution evidence. The two cannot be true and the weakness must be found somewhere, however, difficult it might be. If the Court fails to find any weakness in either, we are of the view that the benefit of such a failure must go to the accused and not to the prosecution because a well-established alibi must be sufficient to show that the prosecution witnesses were not speaking the truth or at least to throw doubt upon their truthfuiness. What was observed in A. I. R. 1934 Cal 719 (A) is that whenever a defence of alibi is set up and that defence utterly breaks down it is a strong inference that if the prisoner was not in fact where he says he was, then in all probability he was where the prosecution say he was. The drawing of certain inferences does not mean that that thing is proved and here again such inference is to be drawn, according to the Calcutta case,when the defence alibi breaks down and not when it is disbelieved. The utmost that can be said about the alibi set up by Bachchu is that it has not been established to the satisfaction of the Court. The alibi of Bachchu consists in producing the order sheets of the criminal case which was for hearing on the 4th January in the Court of Bench Magistrate at Unnao. The order sheet shows his presence and purports to be signed by him. It shows the absence of Tanu. We find no difficulty in believing the genuineness of the order sheet and see no good reason why the reader of the Court should fabricate the order sheet with respect to one of the persons concerned in this case and not with respect to the other, namely, Tanu. Of course the reader has not been examined to depose that it was Bachchu accused who was present and we do not find it impossible that after commission of the offence, Bachchu could have reached Unnao and be present in Court. As already indicated, a railway train was to leave for Unnao at 8.47 A. M. It was really to catch this train that Girdhari and Ram Singh were proceeding to the station, as Ram Singh was the complainant in that case. Bachchu, if he was one of the assailants, could have caught that train and reached Unnao at about 9 A. M. and thus be present in Court.

(23) The other evidence about alibi was Bachchu's lodging complaints with the police and in the complaint book at Lucknow railway station at 7.30 A. M. and 8.10 A. M. on 4-1-1951. Ram Bharosey constable G. R. P. Lucknow Station deposes about a certain written report being handed over there by some one alleging himself to be Bachchu. His statement is interesting. In examination-in-chief he stated that the person who had come to deliver the written note was not Bachchu accused but was some one who limped, had one eye and was thin. We do not find from the record whether this description fits in with the accused Bachchu but we presume that it does not. In cross-examination he stated that the man who had lodged a report had scribed it in his presence. It could have thus been very easily established whether the writer of the report (Ext. 10) was Bachchu accused or not. The accused tried to have the writing sent up to an expert for opinion and later on gave up the request. No adverse inference can be drawn against him on this score. The prosecution had come to know of this report much earlier. In fact Ram Bharosey was examined by the Investigating Officer on the 14th March during the investigation. It was for the prosecution, therefore, to get it clearly established that the writer of the report was not Bachchu accused. Anyway, Bachchu has examined his father to prove his identity of the writings and also his signatures on the complaint about the excess realised from him. In view of all this evidence it may be said that the alibi is not so good that it should be believed, but it is difficult to say that it is false and the alibi set up breaks down.

(23a) Apart from the above considerations there are the statements of the two railway employees Mewa Lal and Makhdum, D.Ws. 1 and 2. They were sent up to identify the accused in jail and failed to identify them. Makhdum stated there before the Magistrate that none of the persons who had fired was among the persons put up in the parade. Both of them now say in Court that Tanu and Bachchu accused were not those persons. The learned Sessions Judge does not rely on their testimony & observed that witnesses like these could not have observed things to such an extent as to come forward to say who exactly the assassins were. We fail to find any logic behind this observation. If these people were on the engine and were watching the incident they were in the best position to notice the assailants. They had a front view of them. Ram Singh fell down at 40 paces from the engine. They were in a position to see them. It was their inability to identify the accused in the identification parade that they were not produced as good identifying witnesses by the prosecution itself. It is different whether their inability to recognise the two accused can be said to be due to the fact that the two accused were not the persons who had fired at Ram Singh and Girdhari or that one may not be inclined to accept their positive statements that the two accused were not the two persons who had fired. It is not necessary to believe them in full on this point. Suffice it to say that for our purposes they failed to identify the two accused persons who are said to have fired at Girdhari and Ram Singh. Their failure to identify has been rightly urged for the appellants to create doubt about the accused being the actual persons who had fired at Girdhari and Ram singh.

(24) In view of the above, we are of opinion that this is not a case in which the statements of the prosecution witnesses who belonged to the party of the deceased and who have reason to bear ill-will against the accused should be implicitly relied upon & it be held that the prosecution succeeded in establishing beyond reasonable doubt that the two appellants committed the murder of Girdhari and Ram Singh on the 4th January, as alleged. They are, therefore, given the benefit of doubt. In view of the above, we reject the reference of the confirmation of the death sentence, allow the appeal, set aside the conviction and sentences passed on the two appellants and acquit them of the offence under Section 302, I. P. C. We direct that they be released from custody forthwith, if not required to be detained under any other process of law.

B/D.R.R. Appeal allowed.

A. I. R. 1953 ALL 657 (Vol. 40, C. N. 322)

SAPRU AND CHATURVEDI JJ.

Panchaiti Akhara, Appellant v. Babu Nem Chandra and others, Respondents.

Second Appeal No. 1962 of 1943 and Civil Revn. No. 444 of 1944, D/- 17-3-1953.

Debt Laws — U. P. Encumbered Estates Act, (25 of 1934), Ss. 9(5), 11(2) — Liability of sons after partition.

The Special Judge under S. 11(2) is required to determine only with respect to the property of the landlord, or any part thereof, whether it is liable to attachment, sale or mortgage in satisfaction of his debts. Sub-section (5) of S. 9 would be applicable to the case where the sons are also liable for the payment of the debt in spite of the partition. In such a case, the Special Judge is required to determine the amount of the joint debt which is due by the applicants and that due by those who have not applied. Case law discussed. (Paras 13, 15)

C. S. Saran, for Appellant; R. C. Ghatak, for Respondents.

CASES CITED:
(A) ('48) AIR 1948 All 448: 1948 All L J 535
(B) ('46) AIR 1946 All 109: ILR (1945) All 856
(C) ('52) AIR 1952 All 977: 1952 All L J 623 (FB)
(D) ('49) F. A. No. 278 of 1944, D/- 22-11-1949 (All)

CHATURVEDI J.: The present appeal by a creditor, Sri Panchaiti Akhara, Kydganj, Allahabad arises out of proceedings under the Encumbered Estates Act. In order to appreciate the points that arise in this appeal, it would be necessary to give a few facts.

(2) On 13-4-1930, Mutsaddi Lal, father of the respondents Nos. 1 and 2, and himself arrayed as respondent No. 11 in the appeal, executed a deed of simple mortgage in favour of the appellant. The mortgage deed was for a sum of Rs. 20,000/-, and by means of the deed, property in village Arai and a plot of land situate on the Zero Road, Allahabad, were mortgaged. In the year 1932, the two sons of Mutsaddi Lal brought a suit for partition of their shares against their father and arrayed the appellant also as a defendant in the suit. On 23-1-1933, the appellant filed a written statement resisting the suit for partition, and claiming that the mortgage executed by Mutsaddi Lal in favour of the appellant was binding on the sons also as it was executed in discharge of antecedent debts and was a valid and binding transaction. On 7-9-1933, the suit was compromised between the father and the sons and the village Arai was allotted to the share of the sons and the plot of land on the Zero Road was allotted to the wife of Mutsaddi Lal. The appellant was exempted from the suit and it was dismissed against the appellant with costs.

This preliminary decree for partition was made final on 26-10-1933. The U. P. Encumbered Estates Act came into force with effect from 1-4-1935, and on 9-10-1935, an application was filed by Mutsaddi Lal alone, under S. 4, Encumbered Estates Act, which was in due course transmitted to the Special Judge, Allahabad. On 19-11-1935, Mutsaddi Lal filed his written statement under S. 8 of the Act and alleged that as a result of the partition he was allotted a share in certain other properties, which were not mortgaged to the appellant, and he showed those properties only as the properties belonging to him. The appellant filed his written statement on 12-3-1936, and the allegations made by him were that the alleged partition effected by means of the compromise decree was a fraudulent and collusive transaction and it was not binding upon the appellant. It was further pleaded that the property which was mortgaged to the appellant was Mutsaddi Lal's self-acquired property and, as Mutsaddi Lal belonged to the Jain Community, he was absolute owner of the property. As regards the mortgage, it was alleged that the mortgage was executed for legal necessity and for the payment of antecedent debts and it was a valid and binding transaction.

(3) After the written statements had been filed, the entire properties, including the properties which had been allotted to the shares of the sons of Mutsaddi Lal and his wife, were all notified in the Government Gazette under S. 11 of the Act. After this publication in the gazette and within the time allowed by law, objections were filed under S. 11 by the sons, and also by the wife of Mutsaddi Lal claiming that they were the owners of the properties allotted to them by the compromise partition decree of 7-9-1933; and that the properties were not liable to attachment, sale or mortgage in satisfaction of the debts of Mutsaddi Lal. It was also pleaded that the said partition was valid and that the mortgage executed in favour of the appellant had not been executed for any valid necessity. The appellant contested the claim of the sons and of the wife and the learned Special Judge dismissed the objections. He held that the mortgage deed executed by Mutsaddi Lal in favour of the appellant was executed for payment of the antecedent debts of Mutsaddi Lal which had actually been satisfied out of the consideration received under the mortgage. The deed was held to be binding on the sons as under the Hindu law the pre-partition debts of the father continued to be binding on the sons even after the partition. He held that the property in village Arai and the plot of land on the Zero Road were liable to pay the debt under the mortgage in favour of the appellant.

(4) The two sons of Mutsaddi Lal then went up in appeal from this order. The wife of Mutsaddi Lal had died during the pendency of the case in the Court of the Special Judge and it was alleged that the plot of land on the Zero Road was inherited by Mutsaddi Lal. The appeal came up for hearing before the learned District Judge on 19-5-1943. The learned District Judge held that it was true that the pre-partition debts were not affected by any partition between the members of the joint family and the mortgaged property continued to remain liable for the payment of the mortgage debt, but the property after partition could not be described as being liable to attachment, sale or mortgage in the satisfaction of the debts of the applicant and, the property being no longer in the hands of Mutsaddi Lal, the appellant creditor could proceed against that property only in the manner provided by the Encumbered Estates Act. The learned Judge pointed out that the provisions of S. 9, sub-sections (4) and (5), had to be followed. He was of the opinion that the decision of the point where the mortgage deed was executed for legal necessity or for the payment of antecedent debts did not arise for decision at that stage. That question was to be considered only while passing the decrees under S. 14. He consequently allowed the appeal and declared that the properties in dispute were not liable to attachment, sale or mortgage in satisfaction of the debts of Mutsaddi Lal. The creditor Sri Panchaiti Akhara has now come up in second appeal to this Court.

(5) The learned counsel appearing for the appellant has raised two points in the appeal. His first contention is that the appellant had asserted in his written statement that the partition was a

fraudulent and collusive one and, as such, it was not binding on the appellant; but this question had not been determined by any of the courts below. His next contention is that under S. 11, U. P. Encumbered Estates Act the court had only to see whether the appellant's debt was recoverable from the property, and it made no difference whether the property at the time stood in the hands of the sons or the wife or any third person. For this contention the learned counsel relies mainly on the wordings of S. 11, sub-section (2) of the Act.

(6) The first point raised by the learned counsel need not detain us because it appears that the appellant had not pursued his allegation that the partition effected by the compromise decree was a fraudulent and collusive transaction. There is no mention of this point in the judgment of the first court; and no evidence appears to have been tendered either, to prove that the father continued in possession of the property even after the partition, and the partition was not acted upon. Before the lower appellate court, it appears that the point was argued and the finding of the learned Judge on the point is that there was not sufficient material on the record to justify the conclusion that the partition decree was a fraudulent one. This finding is a finding of fact and, in our opinion, it is further justified on the evidence on the record. It is true that the appellant was first made a party to the partition suit and was subsequently exempted. But this does not mean that the remaining parties to the suit did not intend to act upon it, or that it was not a final and binding partition between them. It may be that in that suit they decided not to have the question of the legal necessity of the mortgage determined and, therefore, exempted the appellant from the suit. But there is nothing to show that they did not mean to effect a partition of the properties and treat themselves henceforth as the separate and exclusive owners of the properties allotted to them in the partition. We, therefore, find no force in this contention.

(7) Great stress was laid by the learned counsel on the other point raised by him, namely, that, irrespective of the present ownership of the property, what the court should have seen was whether it was liable for the payment of the debt of the appellant. He urged that the decision of the learned Special Judge was correct on the point. His submission was that there were three types of cases which might arise before a Special Judge One was where the debt had been contracted by the father but the sons were under a pious obligation to discharge the debt. The second was where the debt had been contracted by the Karta as manager of a joint Hindu family and the question was whether the other members of the family were also liable for the payment of the debt, and the third was the case where there were ordinary joint debtors with no question of coparcenary between them. According to the learned counsel, in the first case, the learned Special Judge should decide, under S. 11, whether the property notified in the gazette was liable for the payment of the debts of the landlord. He says that in a case like this neither the property is to be divided nor the debts are to be apportioned between the father and the son; and the entire property, in spite of the partition, must be treated to be the property which is liable for the payment of the pre-partition debts of the father which the sons are bound to pay under the Hindu law. For this contention the learned counsel relied on the wordings of sub-section (2) of S. 11, and contended that the section nowhere provides that the Special Judge should determine which property belongs to the landlord and which belongs to the others; all that the Special Judge is required to see is which property is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant.

In support of his contention the learned counsel relied on a case reported in — 'Hari Shanker v. Gulab Shanker', AIR 1948 All 448 (A). In this case an objection by the son was filed after the Special Judge had decided the case and had sent the papers to the Sub-Divisional Officer under S. 19 of the Act. The son claimed a one-fifth share in the property, and the Special Judge dismissed the claim on the ground that it was not mentioned in the objection when the son was born and why the application was not made earlier. The learned Judges of this Court agreed with the learned Special Judge that the claim was correctly dismissed on the grounds mentioned by the learned Special Judge. But the learned Judges added a further ground and they remarked:

> "The Special Judge is not called upon to determine the share of the claimant in the property and that of the landlord applicant. What the Special Judge has to decide is whether any part of the property is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. These words were used to cover cases under the Hindu law where on account of the indebtedness of the father, the son's share could also be sold."

This was not a case where any partition had been alleged between the father and the son, nor was it known whether the son had even been born on the date that the notification was published in the gazette under S. 11 of the Act. The position, therefore, was quite different from the position in the present case. In the present case, there has been a partition effected by means of a decree of court, there is no longer any joint family consisting of the father and the sons, and the property is at present owned by the sons, who have not joined in the application and are actually separate from their father.

(7a) While considering this point it would be necessary to refer to a number of provisions of the Encumbered Estates Act. Under S. 8(1)(b) and (c) the landlord applicant is required to give the nature and extent of the "landlord's" proprietary rights in land and also of his other property which is liable to attachment and sale under S. 60, Civil P. C. This section does not require the landlord to give a list of all the properties which are liable for the payment of the debts contracted by him, even though they did not on the date of the written statement belong to him. What these clauses require is that he is to specify the nature and extent of his proprietary rights in land, and also of his other properties which are liable to attachment and sale under S. 60, Civil P. C.

(8) Section 9 requires the Special Judge to publish a notice in the gazette calling upon all persons having claims in respect of private debts against the 'person or the property' of the landlord to file written statements of their claims.

(9) Section 10 requires every claimant referred to in S. 9 to state, so far as they are known to or can be ascertained by him, the nature and extent of the 'landlord's' proprietary rights in land and the nature and extent, if any, of the 'landlord's' property other than proprietary rights in land.

(10) Under section 11(1) the Special Judge is required to publish a notice specifying the property mentioned by the applicant under S. 8 or by any claimant under S. 10. We have already seen that these properties which are to be mentioned under S. 8 or under S. 10 are the landlords' proprietary rights in land and his other properties excluding

those which are exempt from attachment, sale or mortgage under S. 60, Civil P. C. Under sub-s. (2) of S. 11 a claim may be preferred respecting the property mentioned in the notice and the Special Judge is required to determine whether the property specified in the claim is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. In our opinion, the words "liable to attachment, sale or mortgage" refer to a similar expression used in S. 8(1)(c). The Special Judge is required to determine only that property of the landlord which is liable to attachment, sale or mortgage in satisfaction of his debts. Obviously sub-section (2) refers only to those properties which have been spoken of in sub-s. (1) as having been notified under S. 8 or S. 10, and we have already seen that the written statements filed under S. 8 or under S. 10(1) are to be confined to the properties belonging to the landlord. A property which does not belong to the landlord is not to be mentioned under S. 8 or S. 10(1) and, therefore, does not come under S. 11(1) at all. Whatever doubts there might have been because of the wordings of sub-s. (2) of S. 11 are removed by a reference to the above sections and also to the subsequent provisions of the Act which deal with the liquidation of the debts of the landlords.

(11) Under S. 24(1) the Collector is directed first to realise the value of such of the 'debtor's property' other than proprietary rights in land, as shall have been reported by the Special Judge under the provisions of sub-section (2) of S. 19 to be liable to attachment or sale. Under this section the Collector is authorised to deal with such of the debtor's property as has been reported by the Special Judge to be liable to attachment and sale. In other words, the property which the Collector is entitled to deal with under S. 24 has to be the debtor's property and it should further be such as is liable to attachment or sale, that is, the property should not be exempt from attachment or sale under the Civil Procedure Code or some other provision of law. But it has to be the debtor's property all the same. In Chapter V of the Act the "landlord" has been spoken of as the "debtor" and not as the landlord. But, in our opinion, the word "debtor" has been used in the same sense as the "landlord" in the previous Chapters of this Act. Section 26 of the Act similarly speaks of the debtor's property.

(12) We may further point out that under S. 11, sub-section (2), the Special Judge is only required to adjudicate concerning the property which is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. In these proceedings the Special Judge is interested only in the debts of the applicant, and a provision has separately been made for the apportionment of joint debts.

(13) In view of what we have said above, we are of the opinion that the Special Judge under S. 11 (2) is required to determine only with respect to the property of the landlord, or any part thereof, whether it is liable to attachment, sale or mortgage in satisfaction of his debts. In case the property at the time belongs to somebody else, the Special Judge should declare the property as belonging to the claimant and the question whether that property is also liable to attachment or sale does not fall for consideration under S. 11 at all. That question has to be determined by the Special Judge under sub-ss. (4) and (5) of S. 9 of the Act.

(14) The view expressed by us above is supported by a decision of this Court reported in — 'Pirya Shankar v. Radhey Shiam', AIR 1946 All 109 (B). In this case the father had contracted a debt before partition and a decree had been passed against him alone after partition. In execution of that decree the decree-holder sought to put to sale the share of separated son in the property which was previously joint family property of the father and the son. The learned Judges held that the creditor could not execute the decree against the son which had been passed against the father alone after the partition. In case he wanted to recover the money from the property allotted to the son, he ought to bring a separate suit against the son; and in case the suit was decreed, he could then and then alone execute the decree against the son. This case is an authority for the proposition that the property of the sons cannot be proceeded against simply because the debt contracted by the father was of a period prior to the partition. A decree has to be obtained before the sons' property can be proceeded against.

(15) Sub-section (5) of S. 9 covers a case of joint debtors; and would, therefore, be applicable to the case where the sons are also liable for the payment of the debt in spite of the partition. They cease, after partition, to be members of a joint Hindu family and become joint debtors with the father. In such a case, the Special Judge is required to determine the amount of the joint debt which is due by the applicants and that due by those who have not applied. The provision of the Encumbered Estates Act, therefore, which applies to the present case is S. 9(5).

(16) We might also refer to a Full Bench case of this Court reported in — 'Bala Din v. Mst. Ram Piaray', AIR 1952 All 977 (C). The facts of this case were different, but the Full Bench by a majority decision held that there was no power conferred by the provisions of the Encumbered Estates Act on a Special Judge to include the property of a third person in the list of the property of the landlord debtor.

(17) An unreported case decided by a Division Bench of this Court on 22-11-1949, — 'F. A. No. 278 of 1944, Manmohan Das v. Sat Narain Prasad', (D) appears to be on all fours with the present case. In that case the debts were contracted by one Sat Narain Prasad when he was the manager and Karta of the joint family which consisted of his five sons and one nephew. Subsequently it was alleged that these other members were dissatisfied with the Karta's management and the matter was referred to arbitration. The arbitrator gave an award dividing the properties between the different members of the family and the award was subsequently made a rule of court. Sat Narain Prasad subsequently applied under S. 4 of the Encumbered Estates Act and a creditor had all these properties notified under S. 10 of the Act. One objection was filed by the sons, another by the nephew, and a third by the widow of a deceased brother of Sat Narain Prasad. This award was taken to be a valid and binding award, but the contention of the creditor was that, as his debt was a pre-partition debt, therefore, all the properties which had been subsequently partitioned should be shown under S. 11 as liable to be mortgaged or sold in satisfaction of his debts. The Division Bench of this Court repelled the creditor's contention and observed that the other properties did not belong to Sat Narain Prasad and were, therefore, rightly not shown by him in his written statement.

The learned Judges then observed as follows:

"It may be that Sat Narain Prasad having incurred debts in his capacity as manager of the joint Hindu family at a time when the family was joint, the creditors are entitled to enforce their decrees and realise debts from the entire joint family property. We are not concerned

with that matter in the present proceedings. That may have to be investigated in proceedings which Lala Manmohan Das or any other creditor may take under S. 9 of the Encumbered Estates Act. For proceedings under S. 11 of the Act, it must be held that Sat Narain Prasad is the owner only of such properties as were allotted to him under the award and we, therefore, hold that the Special Judge was right in allowing the objections of the various objectors and in rejecting the contention of Lala Manmohan Das (creditor)."

(18) The learned District Judge has taken the same view as in the case cited above and, in our opinion, he has arrived at a correct conclusion.

(19) The objections filed by the sons have to be allowed, and the property which has been allotted to them on partition has to be taken out of the proceedings, under the Encumbered Estates Act, in so far as the attachment, sale or mortgage of the properties under the Encumbered Estates Act is concerned. These properties should not be notified to the Collector as the properties of the landlord under S. 19 (2) of the Act because the objections under S. 11 by the sons having succeeded, the properties have gone out of the liquidation proceedings which can be taken by the Collector under the Encumbered Estates Act. The objections filed by the sons under S. 11 are allowed, and the Special Judge will now proceed to pass decrees under S. 14 of the Act. While doing so, he will also consider what is the amount which the landlord applicant, Mutsaddi Lal, is liable to pay under the mortgage. We might mention here that the mortgage is dated 13-4-1930, and the application under S. 4 was filed by Mutsaddi Lal within six years of this date, namely, on 9-10-1935. The personal liability of Mutsaddi Lal, therefore, had not become barred by time and Mutsaddi Lal was liable for the payment of a part of this debt. The Special Judge will determine what amount Mutsaddi Lal was liable to pay on the date of the application, and also the amount payable by the sons. He will make the sons also parties to the proceedings, in case they have not already been made parties. The Special Judge shall then proceed under the provisions of sub-s. (5) of S. 9 of the Act to determine the respective liabilities of the sons and the landlord applicant, Mutsaddi Lal, treating them as joint debtors.

(20) With these observations we affirm the decree of the lower appellate court and dismiss the appeal with costs.

B/D.H.Z. Appeal dismissed.

A. I. R. 1953 ALL 660 (Vol. 40, C. N. 323)

RAGHUBAR DAYAL AND MUKERJI JJ.

Hari Prasad and others, Appellants v. The State.

Appeal No. 802 of 1950, D/- 26-3-1953.

(a) Penal Code (1860), Ss. 30 and 477 — Account books — (Evidence Act (1872), S. 34).

Account books — No entries signed by constituents acknowledging liability — Account books are not "valuable security" — They are relevant documents within meaning of S. 34, Evidence Act. (Para 6)

Anno: Penal Code, S. 30 N. 1; S. 477 N. 1; Evi. Act, S. 34 N. 4.

(b) Penal Code (1860), S. 477A — Persons maintaining 'kaccha' drafts of accounts.

Only person employed as clerk, officer or servant, either on salary or honorary, is liable — There must be relationship of master and servant — Account drafts maintained by person managing the firm — No liability on basis of drafts until signed by third named person — Person maintaining drafts does not come under S. 477A — Merely performing the work of a clerk, does not make him liable under S. 477A. AIR 1932 Cal 464; AIR 1925 Sind 328, Distinguished. (Para 7)

Anno: Penal Code, S. 477A N. 1.

(c) Criminal P. C. (1898), S. 297 — Charge to Jury — Evidence.

The Sessions Judge is expected to place the entire evidence before the jury in a form that could be easily intelligible to and understood by the jurors. He is expected to help the jury in not only refreshing its memory in regard to the evidence tendered but in appreciating that evidence and coming to a proper conclusion with respect to its credibility, and this he can do only when he fairly puts before the jury all the relevant criticism and its effect.

(The charge held singularly lacked in such summing up the case). (Para 13)

Anno: Cr. P. C., S. 297 N. 6.

(d) Evidence Act (1872), S. 33 — Witness not found.

Service of summons on witness — Witness not found at address — His evidence cannot be brought on record under S. 33, without first making a diligent search for him. (Para 14)

Anno: Evi. Act, S. 33 N. 5.

(e) Evidence Act (1872), S. 33 — Temporary inability.

Temporary inability of witness is no ground to bring his previous statement on record under S. 33 — Conditions of S. 33 must be strictly established. (Paras 15, 16)

Anno: Evi. Act, S. 33 N. 6.

R. S. Pathak, and G. S. Pathak, for (Nos. 1 and 2); Man Singh, for (No. 3) for Appellants; D. P. Uniyal, for the State; P. C. Chaturvedi, for Complainant.

CASES CITED:
(A) ('32) AIR 1932 Cal 464: 33 Cri LJ 597
(B) ('25) AIR 1925 Sind 328: 26 Cri LJ 1101

RAGHUBAR DAYAL J.: Hari Prasad, Ram Saran and Harianand appeal against their conviction under Ss. 406, 477 and 477A, Penal Code, by the Additional Sessions Judge Banaras. The trial was with the help of a jury.

(2) The prosecution case, in brief, is that these appellants and one Moti Lal, the complainant, entered into a partnership on 15-7-1948. The partnership firm was to be known as "Moghalsarai Cloth Trading Company". Moti Lal was to contribute Rs. 24,000/- towards the capital and each of the three appellants was to contribute Rs. 8,000/-. Each of the appellants was to share in the profit and loss equally, and the share of Moti Lal in the profit and loss of the business was to be 7/16. The three appellants were to manage the business of the firm. The account-books were to be kept by them or any of them. It was further provided in the deed of partnership that an account would be taken of all the capital assets and liabilities and of the profits and losses of the partnership annually, that the appellants would explain the accounts to Moti Lal and that then it would be signed by all the partners. It further provided that such accounts when signed would be binding

on each of the appellants. Moti Lal was not to take active part in the management of the firm.

(3) It was in October, 1948, that he suspected that there was something wrong with the management. He asked Nem Chand, his brother-in-law and who happened to be the person to whom any disputes in connection with the partnership were to be referred for decision under para. 17 of the agreement, to check up the accounts. Nem Chand demanded the account-books from Ram Saran Ram, one of the appellants who used to write up the accounts, and got the pakka-rokar, pakka-khata and some invoices after a few demands. He did not get kachha-rokar and nam-jakars which are alleged to have been maintained in this firm, though their maintenance is denied by the accused appellants. He suspected the correctness of various entries in the books of account and informed Moti Lal about it. A few days later he learnt about the accused's removing the stock of the firm; he went to the firm and found a truck laden with goods standing in front of the shop. To him, this confirmed the information; he complained to a police constable and later to the Sub-Inspector of police about the accused's removing the property of the firm but, when required by the Sub-Inspector to lodge a report in writing, did not make any report in writing.

(4) Some time later, the complaint which has given rise to this case was filed by Moti Lal on 29-11-1948. The complainant just mentioned that he suspected that the accused persons were misappropriating, that they had knowingly made or caused to be made wrong entries in the bahi-khata with a view to derive undue benefit, and that on inquiry it was found that the accused persons had already taken away the entire stock of the shop from before and had misappropriated it. The complaint did not specify any particular entries with respect to cash which were considered to be wrong and with respect to amounts misappropriated, or the quantity and nature of stock which had been misappropriated. No effort was made later on to specify precisely these two items.

(5) All the accused denied the prosecution allegations. They contended that the partnership firm could not really get into working order in view of Moti Lal's having not contributed the entire amount of Rs. 24,000/-. They denied having made the alleged false entries on the 12th July, 6th August and 12th August, 1948. Harianand explained the alleged removal of goods from the shop in a truck; according to him the goods belonged to traders of Chakia, that those traders were on the truck and that these facts had been conveyed to the police when it made inquiries on the complaint of Nem Chand. It is alleged that the police was satisfied of what was represented to it. Harianand further explains the non-existence of any of the goods in the shop on 12-12-1948, by saying that no goods could be kept in the shop without a license. Cloth was not controlled in 1948 up to the 30th of October when it again became a controlled article. This partnership firm failed to secure a license for selling cloth wholesale; it appears that this explanation is correct.

(6) The conviction of the appellants for offences under Ss. 477 and 477A. I. P. C. is challenged on the ground that on the facts of this case no offence under those sections could be made out. The offence under S. 477 against the accused appellants was on the allegation that they had secreted the account-books. namely kachhi-rokar and nam-jakar and, therefore, secreted valuable securities. It is contended for the appellants that account-books do not come within the definition of the expression "valuable security" under S. 30, I. P. C. and that, therefore, no offence under S. 477, I. P. C. could be made out on the mere basis that the appellants secreted away certain account-books.

We agree with this contention. The words "valuable security" as defined in S. 30 mean, a document which is or purports to be a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledges that he lies under legal liability or has not a certain legal right. Account-books, as such, do not create any right, and any entry in the account-books cannot be the basis of charging an accused with the liability of what is noted against him. Entries in the account-books can be merely evidence of certain alleged facts and, as such, are relevant evidence in view of S. 34, Evidence Act. Certain entries which might be signed by a constituent may form the basis of a charge against him in view of his acknowledging his liability and the correctness of the contents noted in that entry. It is not alleged that any entry in these account-books was of such a type and consequently the secreting of an account-book with respect to that particular entry would not amount to the secreting of a valuable security. We, therefore, hold that the account-books are not "valuable security" and that therefore no offence under S. 477, I. P. C. is made out against the accused appellants, even if they had secreted the kachhi-rokar and the nam-jakar bahis of this firm.

(7) Section 477A, I. P. C. makes a clerk, officer or servant or one employed or acting in the capacity of any of these liable to certain punishments in case any of those persons do any of the things mentioned in the section in connection with any book, paper writing, valuable security or account which belongs to or is in the possession of that person's employer or has been received by him for or on behalf of his employer. The contention for the appellants is that Ram Saran Ram was neither a clerk, nor an officer nor a servant of the firm and, therefore, he could not be guilty of any offence under S. 477-A, I. P. C., even if he had falsified certain entries in the account-books. The prosecution does not allege that Ram Saran Ram was appointed by the firm as a clerk, officer or servant. What is alleged is that he performed the work which was to be done by a clerk and that consequently he acted in the capacity of a clerk when he made entries in the account-books and that, therefore, he would be guilty of the offence under S. 477-A if the other ingredients of the offence under that section were made out.

Reliance was placed on the cases of — 'Monindra Mohan v. Srish Chandra', AIR 1932 Cal 464 (A) and — 'Mahomed v. Mahomed Idris', A. I. R. 1925 Sind 328 (B). We do not agree with this contention. It appears to us that only such a person would be guilty under S. 477A who is employed by the firm in any of these capacities, namely, as a clerk or officer or servant. Employment connotes a sort of different relationship between the person employed and the employer; the two are different. There has to be some basis of service; it may be honorary or it may be on remuneration. Ram Saran Ram was not so appointed by the persons who were in charge of the management of the firm. Paragraph 8 of the agreement of partnership simply mentioned that the three appellants would manage the business of the firm, and paragraph 9 simply provides that all necessary and proper books of account would be kept properly posted by the persons or any of them named in paragraph 8 above. This, to our mind, does not indicate that the three appellants or any of them had been appointed a clerk, or servant of the Company. In our judgment, paragraph 9 simply meant that the accounts of the Company would be maintained by these persons jointly or

singly as the case may be, and that Moti Lal would have nothing to do with the maintenance of accounts; in fact Moti Lal was not to take any active part in the management of the firm.

Normally, it is the duty of the owners or the proprietors of a firm to do everything connected with the firm. They may for the sake of convenience pass on this duty of theirs to an employee, or they may arrange among themselves that certain duties would be done by some of them and other duties would be performed by others. The provisions of paragraphs 8 and 9 of this agreement appear to us to be a sort of mutual arrangement among the persons, as such, with respect to the maintenance of accounts. The terms of para. 10 of this agreement are that any sort of account maintained by these persons would have no binding effect on any of them until those accounts had been explained to and signed by Moti Lal. If Moti Lal does not sign these accounts these accounts, it could be said, would not be binding on any of the appellants. The accounts which they were expected to maintain may, therefore, be termed to be just draft notes of what took place with regard to the business of the firm. We do not, therefore, read the provisions of para. 9 to mean that the appellants or any of them had been employed as a clerk or servant or officer. It follows, therefore, that no one could be guilty of an offence under S. 477A, I. P. C. on account of one of the main ingredients necessary for an offence under that section not existing.

(8) In — 'AIR 1932 Cal 464 (A)', cited above, the accused was charged with having misappropriated a sum of Rs. 800/-, a part of the sum of Rs. 1200/- said to have been contributed as a contribution to the share of the complainant in a partnership firm. The Magistrate discharged the accused holding that a charge under S. 477A might have been framed against the accused if he had been a clerk or a servant, but having regard to the relationship of partners which existed between the parties no such charge could subsist in the case. This view was held to be erroneous and it was observed that the mere fact that a partnership existed, is no answer in a properly proved case to a charge of falsification of accounts by one partner who is in charge of the books. The matter is not dealt with at any length, and we do not say that one who is a partner in a firm can never be guilty of an offence under S. 477A, I. P. C. If a person who is a partner has also taken upon himself the status of a clerk or servant or officer of the Company, he could then be guilty of an offence under S. 477A, I. P. C. if the other ingredients of the offence are made out against him. This case, therefore, does not in any way go against the view expressed by us.

(9) In — 'AIR 1925 Sind 328 (B)', the partner concerned had been appointed a manager with a salary of Rs. 30/- a month and it was held that where a partner of a firm was appointed to manage its business and to write its accounts and he falsified its accounts, he was liable under S. 477A, I. P. C. This case also, therefore does not hold that in the absence of a partner's appointment as a manager, he would be guilty under S. 477A, I. P. C. if he does any of the acts mentioned therein.

(10) We, therefore, hold that Ram Saran Ram appellant who wrote the account-books cannot be guilty under S. 477A, I. P. C., even if certain entries were false.

(11) When Ram Saran Ram cannot be guilty under S. 477A, I. P. C., the other two appellants cannot be guilty of abetting the offence under S. 477A, I. P. C. by Ram Saran Ram. Moreover, there is no evidence on the record that these two appellants, namely, Hari Prasad and Harianand had in any way abetted Ram Saran Ram in making false entries in the account-books. The learned Sessions Judge ignored this aspect of the matter and did not draw any attention of the jury to the absence of evidence with respect to these persons abetting the making of false entries by Ram Saran Ram.

(12) There remains then the third offence under S. 406, I. P. C. of which these appellants have been convicted. We have already indicated that the complaint did not specify precisely the amount misappropriated or the stock which had been misappropriated. We have also indicated the basis for the charge of misappropriation. The only basis for the charge under S. 406 seems to be the suspicion that certain entries in account-books were wrong and that no stock was found on a certain date when the police searched the premises of the firm under the orders of the Court in order to take charge of the stock present there. The absence of stock on that date is sufficiently explained by Harianand in his statement.

The allegation about the misappropriation of cash has been sought to be established with respect to five items, two of which were with respect to the payments to the firm of Badri Das Gopalka and of three items of money said to have been paid to the firm Raghunath Prasad Deokinandan. (His Lordship considered the evidence and proceeded:)

(13) The charge to the jury delivered by the learned Sessions Judge was bad in law; the learned Sessions Judge did not lay the entire evidence with the possible criticism against it before the jury. He did not mention what Lochan Ram had stated in cross-examination. In the charge the learned Sessions Judge just mentioned briefly the statements-in-chief of the various witnesses and then left it to the jury to come to a conclusion whether to believe those statements or not; this is a very unsatisfactory way of summing up the case for the jury. The Sessions Judge is expected to place the entire evidence before the jury in a form that could be easily intelligible to and understood by the jurors. He is expected to help the jury in not only refreshing its memory in regard to the evidence tendered but in appreciating that evidence and coming to a proper conclusion with respect to its credibility, and this he can do only when he fairly puts before the jury all the relevant criticism and its effect. The present charge to the jury is singularly lacking in such summing up of the case. We are therefore of opinion that the charge of the learned Sessions Judge to the jury with respect to the offence under S. 406, I. P. C. is bad both on account of misdirection and non-direction, and that the conviction of the appellants of the offence under S. 406, I. P. C., should be set aside. What we have said above about the nature of the allegations and the evidence in support of those allegations does not justify an order of retrial of the accused for an offence under S. 406, I. P. C. In fact it appears to us, as contended for the appellants, that this was a case eminently fit for a civil court and was not a case for a criminal court.

(14) We may further refer to another illegality committed by the learned Sessions Judge in the trial of this case and it relates to his admitting the evidence of Jheemal Singh and Abdul Majid Sub-Inspector on record under S. 33, Evidence Act without any proof, what to say of strict proof, of any of the conditions precedent for taking the evidence on record under S. 33, Evidence Act. It appears that Jheemal Singh used to reside at Moghal-Sarai, though a resident of some village, and that the constable who went to serve the summons on him could not find him at his house, he having gone to his village residence. This in-

ability to find Jheemal Singh cannot be said to lead to the conclusion that Jheemal Singh could not be found with a little more diligence, or with an adjournment for a short period of the sessions case it could not have been possible to secure the presence of Jheemal Singh.

(15) Sub-Inspector Abdul Majid happened to be suffering with a boil in the leg and was therefore unable to attend the court; this is in the report of the constable who served the summons on him & it is also in the endorsement made on that summons by the Sub-Inspector himself. No evidence was recorded about the ailment of the Sub-Inspector Abdul Majid or about the period for which he could not attend the court in any circumstances. It might have been that he could have come to Court on a conveyance. Anyway, a short adjournment of the sessions case would have again, enabled the court to secure his presence.

(16) Nothing has been said by the learned Sessions Judge in allowing the application of the District Government Counsel for taking the statements of these two witnesses on record as to why he considered it justified to allow the application. His order is just of one word "Allowed"; this is very unsatisfactory. Sessions Judges should realise the importance of not only following strictly the provisions of law, especially when it has been held by the highest court that evidence of witnesses not appearing in court should not be taken on record under S. 33, Evidence Act without strict proof of the conditions justifying its being taken so on record and also when it is usually very necessary that a witness should be examined in the court so that parties be in a position to examine and cross-examine him fully according to the needs of the case. What we wish to stress is that it is not a mere matter of formality that a statement previously recorded of a witness who is not present should be taken on the record of a sessions case in view of S. 33, Evidence Act as a matter of course.

(17) In view of the above, we allow the appeal, set aside the order of the court below, discharge the appellants of the offences of which they were convicted and acquit them. The accused are on bail; they need not surrender. The fines, if paid, may be refunded.

B/R.G.D. Appeal allowed.

A. I. R. 1953 ALL 663 (Vol. 40, C. N. 324)

MALIK C. J. AND GURTU J.

Baijnath Das, Objector Appellant v. Mahant Ramdeo Das Chela Mahant Kashi Das deceased, Respondent.

First Appeal No. 155 of 1950, D/- 24-3-1953.

Succession Act (1925), Ss. 299, 192 and 209 — Order made by virtue of powers under Act.

It is only order made by District Judge by virtue of powers conferred upon him by Act, that is appealable — Order must adjudicate rights of parties and give direction to be carried out by parties — On application under S. 192, District Judge fixing final date for hearing — It is not an order under S. 192 and as such appealable — Even if order is considered to be one under S. 192, appellant must show that S. 209 does not apply—Order under summary proceedings under Part VII in which S. 192 occurs is not appealable. AIR 1932 All 379; AIR 1942 Bom 276, Rel. on. (Para 3)

Anno: Succ. Act, S. 299 N. 1, 3; S. 192 N. 1; S. 209 N. 1.

Ambika Prasad, for Appellant; Krishna Shankar, for Respondent.

CASES CITED:
(A) ('32) AIR 1932 All 379: 139 Ind Cas 156
(B) ('42) AIR 1942 Bom 276: ILR (1942) Bom 712

MALIK C. J.: One Kashi Das died. Ramdeo Das, claiming to be the Chela of Kashi Das, made an application under S. 192 of the Succession Act in the Court of the District Judge of Banaras and alleged that the opposite-party Baijnath Das was threatening to take wrongful possession of the property which consisted of two houses. The applicant further alleged that the deceased had left a will in his favour. The applicant also alleged that the deceased Mahant Kashi Das had executed a will on 13-2-1908, in favour of his Chela Ram Saran Das who, in his turn, had executed another will dated 9-2-1926, in favour of Kashi Das. It was further alleged that Kashi Das also had executed a will in favour of the applicant, Ramdeo Das, before his death.

Before taking proceedings under S. 192 the learned District Judge issued notice to Baijnath Das. Baijnath Das filed various objections and claimed that the application under S. 192 of the Succession Act did not lie. The learned District Judge after having disposed of the preliminary points fixed 19-4-1950, for final orders. The operative portion of the order passed by him is as follows:

> "The preliminary requisites having been satisfied by the production of evidence entitled the applicant to claim a preliminary order in his favour. With that end in view, I fix 19-4-1950 for the opposite party to appear and show cause."

The appellant has filed this appeal against that order and on behalf of the respondent a preliminary objection has been raised that no appeal lies.

(2) Learned counsel for the appellant has, however, relied on S. 299 of Indian Succession Act and has urged that every order passed by a District Judge is appealable. Section 299 is as follows:

> "Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals."

The question, therefore, is whether the order passed by the District Judge is an order passed by him by virtue of the powers conferred upon him by the Succession Act. The question has arisen in several cases and it has been held that it is not every order passed by a District Judge that is appealable. It is only an order passed by a Judge in the exercise of the powers conferred upon him by the Act that is appealable under this section.

In — 'Bhupendra Narain Singh v. Ashtabhuja Ratan Kuer', AIR 1932 All 379 (A) it was held that an order passed under S. 271 by a District Judge that he would entertain an application on behalf of a person, who had no fixed abode at the time of his death within his jurisdiction, was not an appealable order. Section 271 of the Succession Act gives the District Judge a discretion to refuse to entertain an application for Probate or Letters of Administration when the deceased had no fixed abode at the time of his death within his territorial jurisdiction. The learned Judge having decided to entertain the application, an appeal was filed in this Court. The learned Judges in the above case

accepted the preliminary objection raised on behalf of the respondent that no appeal lay and observed that—

"In order to have a right of appeal there must be an order made by the District Judge by virtue of any of the powers conferred upon him by part 9 of the Act. 'Order' generally implies an adjudication of the rights of the parties and a direction to be carried out by them."

The same view was taken by the Bombay High Court in — 'Fakirji Navroji v. Meherban Faredoon', AIR 1942 Bom 276 (B). The learned Judges followed the decision of this Court in — 'Bhupendra Narain Singh v. Ashtabhuja Ratan Kuer', (A) but on the ground that the exercise of a discretion by a District Judge under S. 271 of the Succession Act to entertain and to proceed with an application for Probate or Letters of Administration was not an 'Order'. It is not necessary for us to examine in this case the authorities at any length, as we are in full agreement with the view expressed by a Bench of this Court in — 'Bhupendra Narain Singh's case' (A).

(3) Section 299 does not say that every order made by a District Judge is appealable. It limits it to orders made by a District Judge by virtue of the powers conferred upon him by the Succession Act and as has already been said in — 'Bhupendra Narain Singh's case' (A), the order must be an adjudication of the rights of the parties and a direction to be carried out by them by virtue of any of the powers conferred upon him by the Succession Act. In the case before us all that the learned District Judge did was to fix a final date for hearing. It cannot be said that he exercised his jurisdiction under S. 192 and passed any order thereunder. Even if he did pass an order under S. 192, the appellant would have had to satisfy us that S. 209 does not apply to it. Section 209 provides that:

"The decision of a District Judge in a summary proceeding under this part (Part VII) shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review."

Learned counsel has urged that S. 209 prevents an appeal against an order settling the question, who shall remain in actual possession of the property. If, however, the order is under Part VII, in which Part S. 192 also occurs, then the decision of a District Judge in a summary proceeding under that Part has no other legal effect than that of settling the actual possession. An order in a summary proceeding under that part is, therefore, not appealable.

(4) In any view of the matter we think that the preliminary objection must prevail.

(5) The appeal, therefore, fails and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 ALL 664 (Vol. 40, C. N. 325)

MOOTHAM AND GURTU JJ.

Shiv Dayal, Applicant v. State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ No. 423 of 1952, D/- 30-4-53.

(a) Constitution of India, Art. 226 — Affidavits — (High Court Rules (All.), Ch 22).

Affidavits filed along with a petition filed under Art. 226 should be prepared in accordance with the rules to be found in Chap. 22 of the Rules of the High Court and must be restricted to matters of fact. They must not be used as vehicles for the expression of matters of argument or opinion. (Para 4)

(b) Words and Phrases—"Officiating."

The word "officiating" is frequently used in more than one sense. "To officiate" means to act, or to discharge an office, but it is sometimes used with the meaning of to act 'for', or to discharge an office 'on behalf of' some other person: as, for example, in the expression Officiating Chief Justice. (Para 6)

(c) Municipalities — U. P. Municipalities Act (2 of 1916) (as amended by Act 15 of 1951), S. 87A (2) — District Magistrate.

Where on the transfer of the District Magistrate another officer is, both in fact and in law a District Magistrate the provisions of sub-s. (2) of S. 87A of the Act are complied with. He does not cease to be a District Magistrate only because he is designated as an officiating District Magistrate. (Para 6)

(d) Municipalities — U. P. Municipalities Act (2 of 1916) (as amended by Act 15 of 1951), S. 87A — District Magistrate — (Criminal P. C. (1898), S. 10).

An officer who succeeds temporarily to the chief executive administration of a district, and who is able to exercise all the powers and perform all the duties conferred and imposed by the Code of Criminal Procedure on a District Magistrate, is a District Magistrate for the purposes of S. 87A. (Para 7)

Anno: Criminal P. C., S. 10 N. 3.

(e) Municipalities — U. P. Municipalities Act (2 of 1916) (as amended by Act 15 of 1951), Ss. 87A (14), 46 (1) and 56 — Assumption of office by Chairman.

The date upon which a chairman assumes office is to be decided on fact. It is not dependent upon the issue of a notification by the Government for there is no provision in the Act which lays down that a notification is required. Sections 46 (1) and 56 are of no help in this respect. (Para 8)

Shanker Sahai Verma, for Applicant.

MOOTHAM J.: This is a petition under Art. 226 of the Constitution.

(2) On 2-6-1951 the petitioner, who was a member of the Municipal Board of Lalitpur, was elected chairman of the Board in the casual vacancy caused by the removal of the former chairman, Sri B. N. Kiledar. On 14-7-1951, the election of the petitioner was notified in the official Gazette. On 5-6-1952, written notice of an intention to make a motion of non-confidence in the petitioner as chairman of the Board was presented to Sri C. M. L. Bhatnagar who on that date was officiating as District Magistrate and Collector, and on 8th July the non-confidence resolution was passed by the Board. By a notification published in the Official Gazette on 6-9-1952, the petitioner was removed from office. The petitioner now comes to this Court and seeks relief on the ground that his removal from office was in contravention of the provisions of the U. P. Municipalities Act, 1916, as amended by the U. P. Municipalities (Supplementary and Validation Act, 1951) here-

inafter referred to as 'the Act'—and is consequently of no legal effect.

(3) The argument on his behalf is a twofold one. It is said, first that the notice of intention to make a motion of non-confidence was not delivered to the "District Magistrate" within the meaning of S. 87A (2) of the Act and, secondly, that a period of twelve months did not elapse between the receipt of the motion of non-confidence and the petitioner's assumption of office as chairman as is required by S. 87A (14) of the Act.

(4) Before proceeding to consider these two arguments I think it necessary to observe that the petition and affidavits which have been filed in this case on behalf of the petitioner have not been prepared in accordance with the rules to be found in Chap. 22 of the Rules of this Court. It is desirable to repeat again that affidavits must be restricted to matters of fact, and that they must not be used as vehicles for the expression of matters of argument or opinion.

(5) In the early part of May, 1952, Sri Ahmad Hasan was the District Magistrate of Jhansi, and Sri C. M. L. Bhatnagar was the Additional District Magistrate. Sri Ahmad Hasan was then transferred, and on the afternoon of 26th May he, pursuant to the orders of Government handed over charge of the office of District Magistrate and Collector to Sri C. M. L. Bhatnagar, who officiated as District Magistrate and Collector until 18th June, when he in his turn made over charge of these offices to Sri S. R. D. Saxena.

(6) The petitioner contends that Sri C. M. L. Bhatnagar was not a 'District Magistrate' within the meaning of S. 87A(2) of the Act. His argument, as I understand it, is that the expression 'District Magistrate' cannot include an officer who is designated as an officiating District Magistrate. I do not think this argument can be sustained. The word "officiating" is frequently used in more than one sense. "To officiate" means to act, or to discharge an office, but it is sometimes used with the meaning of to act 'for', or to discharge an office 'on behalf of', some other person: as, for example, in the expression Officiating Chief Justice. That, however, it is I think clear, is not the meaning which can be attributed to the appointment of Sri C. M. L. Bhatnagar; for this officer was not, between 27th May and 19th June, acting for or on behalf of the District Magistrate; the District Magistrate had been transferred, and both in fact and in law Sri C. M. L. Bhatnagar was for this period the District Magistrate. The provisions of sub-s. (2) of S. 87A of the Act were therefore, in my opinion, complied with.

(7) It was argued that Sri C. M. L. Bhatnagar was an officer who had temporarily succeeded to a vacancy in the office of District Magistrate within the meaning of S. 11, Criminal P. C. Upon the facts of the case I do not think that this is so: but I should hesitate long before holding that an officer who succeeds temporarily to the chief executive administration of a district, and who is able to exercise all the powers and perform all the duties conferred and imposed by the Code of Criminal Procedure on a District Magistrate, is not a District Magistrate for the purposes of S. 87A of the Act.

(8) The second argument advanced on behalf of the petitioner is that although he was elected chairman on 2-6-1951, and although he, in fact, assumed office as such on 3rd June, he did not in the eye of the law become the chairman until the following 14th July when his election as chairman was notified in the official Gazette, and that in consequence there has been a contravention of sub-s. (14) of S. 87A which provides that

> "No notice of a motion of non-confidence under this section shall be received within twelve months of the assumption of office by a Chairman."

In my judgment this argument has no foundation. The question is whether the date upon which a chairman assumes office is one of fact, or whether it is dependent upon the issue of some notification by the Government. It is conceded that there is no provision in the Act which lays down that a notification is required. The notification which was in fact issued (No. 3371/XXIII-179 (49-50), dated 14-7-1951) merely states that the Lalitpur Municipal Board has elected the petitioner to be chairman to fill the vacancy caused by the removal of Sri B. N. Kiledar. It makes no reference to the petitioner's assumption of office. Mr. S. S. Verma has drawn our attention to Ss. 56 and 46(1) of the Act. The former provides that every election and nomination of a member or chairman of a board, and every vacancy in the office of member or Chairman, shall be notified in the official Gazette; and it was pursuant to that section that the notification of 14th July was issued. Section 46(1) provides that

> "The term of office of a chairman shall begin from the date on which he is elected or nominated or from the date upon which the vacancy occurs which he is elected or nominated or to fill if the vacancy occurs subsequent to the election or nomination."

(9) I am unable to see how this section assists the petitioner, for the date to be determined is not that upon which his term commenced but upon which he assumed office. In the absence of any provision in the Act as to the manner in which this date is to be determined, I have no doubt it must be determined on the facts. In this case it is now common ground that the petitioner took over charge and acted as chairman on 3-6-1951, the day following his election and I am clearly of the opinion that it was on that date that he assumed office within the meaning of S. 87A, sub-s. (14) of the Act.

(10) For these reasons this petition in my opinion must fail, and I would dismiss it with costs.

(11) There remains one further matter to which reference must be made. On 18-10-1952, the State Government published in the official Gazette a notification that Sri C. M. L. Bhatnagar had been appointed an officiating Magistrate and Collector, Jhansi, from May 27 to June 18, 1952. Mr. S. N. Misra, who also appeared for the petitioner stated that this notification had been published by the Government maliciously, and for the express purpose of defeating this petition. The statement was presumably made on the instructions of the petitioner, but Mr. Misra was unable to point to any evidence whatever in support of this very serious allegation other than the fact that the notification was published in the Gazette about five weeks after the petition had been filed in this Court. In my opinion this is an allegation which counsel should not have made.

(12) GURTU J.: It is not necessary for me to deal at length with the questions which arise in this petition as my brother has already considered them in detail. I, however, desire to add a few remarks.

(13) The principal contention is that the written notice of intention to make a motion of non-confidence was not delivered to "the District Magistrate" when it was handed over on 5-6-1952 to Sri C. M. L. Bhatnagar. In my view, the notice was delivered to the 'District Magistrate'. It appears from the charge certificate which has been filed that Sri Ahmad Hasan who held the office of the District Magistrate and Collector, Jhansi transferred the same on the afternoon of 26-5-1952 to Sri C. M. L. Bhatnagar. This transfer of office was effected pursuant to a Government order of appointment and a subsequent wireless message asking that the transfer should be quickly effected. After Sri C. M. L. Bhatnagar had held the office of District Magistrate from 27th May to 18th June, 1952, a notification appeared in the official Gazette of 13-10-1952. No doubt the official notification states that Sri Bhatnagar had been appointed an officiating Magistrate and Collector, but I have no doubt in my mind that this was an appointment under S. 10, Criminal P. C. The fact that the word "officiating" was used does not take the appointment out of S. 10.

(14) To my mind, the scheme of both Ss. 10 and 11, Criminal P. C. is absolutely clear. So far as I can see, S. 11 only comes into play when a person succeeds to the chief administrative office of the District without being "appointed" a District Magistrate. Occasions arise when the State Government cannot at once appoint or does not see the necessity to appoint any one for a short term in the office of the District Magistrate which falls vacant. In such a case, some Magistrate of the District generally holds charge of the current duties but without his being specially appointed under S. 10. When he does so, S. 11 empowers him to perform certain duties. When, however, a person is appointed District Magistrate, whether he be appointed for a short or a long period and whether he be called a District Magistrate or officiating District Magistrate, the appointment is, nonetheless, under S. 10. The term 'officiating Magistrate' does not find a place in S. 10 or anywhere else, so far as I have been able to see, in the Criminal Procedure Code. The term has probably been introduced in Government Notifications to cover the case of Magistrates not yet confirmed in the cadre of District Magistrates, but who officiate for short periods as such so that they may become entitled to draw the pay which District Magistrates are entitled to. In my view, in this case, Sri Bhatnagar was a 'District Magistrate' within the meaning of the Criminal Procedure Code and thus also within the meaning of the U.P. Municipalities Act.

(15) The Municipalities Act, of course, does not define the term "District Magistrate." If the definition contained in the Criminal Procedure Code be not accepted, then clearly the meaning which must be given to the words "District Magistrate" under the Municipalities Act is the meaning which popularly attaches to those words. In popular parlance, a District Magistrate is undoubtedly understood to mean the chief executive administrator of the district for the time being. There can be no doubt that Sri Bhatnagar occupied that capacity on the relevant date.

(16) The next argument is that there was no assumption of office by the petitioner within the meaning of cl. (14) of S. 87A until the date when his election was notified in the U.P. Gazette.

(17) When a person offers himself for election, he obviously does so with the intention of entering upon his duties immediately, if elected. Unless there is anything to the contrary in the statute applicable, a person so elected is entitled to enter upon his office immediately he is elected. It may be that he himself postpones entering upon his office in which case naturally it is the date on which he started to perform his duties that is the date on which he can be said to have assumed office. Quite obviously, the word 'assumption' has been used in S. 87A, cl. (14) to enable the person elected to enjoy immunity for a period of twelve months from the date he started functioning as President. In this case, the evidence was clear that the petitioner entered upon the performance of his duties and assumed his office on 3rd June. The notice was served in the subsequent year on 5-6-1952 and thus more than twelve months had expired since assumption of the office.

(18) In my view, there is no force in the contention of the petitioner that the requirements of S. 87A, as they stand at present in the Municipalities Act after the amendments effected by item 26 of the Schedule to the Uttar Pradesh Municipalities (Supplementary and Validation) Act, 1951, have not been fulfilled.

(19) My brother has made certain observations in regard to the oral allegations made by the petitioner, through Mr. Misra, that the Notification dated 13-10-1952 and published in the official Gazette of 18-10-1952 was a mala fide Notification. There is absolutely no evidence in support of this allegation. Allegations of this nature should not lightly be made in Courts.

(20) I concur in the order of my brother.

A/V.S.B. Petition dismissed.

A. I. R. 1953 ALL 666 (Vol. 40, C. N. 326)

AGARWALA J.

Dwarka Gorh and others, Applicants v. Sita Ram Singh and others, Opposite Parties.

Criminal Misc. Writ No. 81 of 1953, D/- 10-4-1953.

U. P. Panchayat Raj Act (26 of 1947), S. 85 — Revision by Sub-Divisional Magistrate — Limitation.

Though no period of limitation is fixed for filing revision application before the Sub-Divisional Magistrates, a period of two months is a reasonable time for filing such applications. If they are filed beyond that time, it is open to the Sub-Divisional Magistrate to reject them unless the delay is sufficiently explained by the applicants. (Para 1)

Satyendra Nath Varma, for Applicants; Mansingh, for the State.

ORDER: The decision of the Panchayati Adalat was made on 5-7-1952 and the revision before the Sub-Divisional Magistrate was not filed till 20-11-1952, that is after a lapse of three months and about 5 days. The learned

Sub-Divisional Magistrate was therefore justified in dismissing the application on the ground that it was belated application. He has mentioned that it was filed beyond two months. It does not appear that any period of limitation is fixed for filing revision applications before the Sub-Divisional Magistrates, but at the same time a period of two months is a reasonable time for filing such applications. If they are filed beyond that time it is open to the Sub-Divisional Magistrate to reject them unless the delay is sufficiently explained by the applicants.

(2) There is no force in this application. It is rejected.

B/D.R.R. Application rejected.

A. I. R. 1953 ALL 667 (Vol. 40, C. N. 327)

AGARWALA AND MUKERJI JJ.

Mohammad Shafi, Complainant-Applicant v. State and others, Opposite Parties.

Criminal Revn. No. 781 of 1951, D/ 3-2-1953.

(a) Criminal P. C. (1898), S. 540 — Right of party to claim action under section.

Section 540 does not confer a right in any party to examine, re-examine or cross-examine any witness. He has also no right to claim action under the section. It is entirely discretionary in the Court in the interest of justice to take or not to take action under the section. (Para 3)

Anno: Cr. P. C., S. 540 N. 4 Pt. 1.

(b) Criminal P. C. (1898), S. 540 — Witness recalled under S. 540 at his own instance — Witness cannot claim to cross-examine himself under provisions of Evidence Act — (Evidence Act (1872), S. 137). (Para 3)

Anno: Criminal P. C., S. 540 N. 2; Evidence Act, Ss. 137 and 138 N. 4.

S. Hasin Ahmad, for Applicant; Mohd. Baqar Usmani, for Opposite Parties.

MUKERJI J.: This is an application by Mohammad Shafi who was a complainant in a criminal case. This case, which was filed by him before a Magistrate, was under Ss. 379/147/504/506, I. P. C. against the opposite parties. During the course of the trial, the complainant examined himself and after his examination was over — both examination and cross-examination — it appeared that some documents which were relevant to this case had not been produced by him, nor had they been proved. Consequently an application was moved on his behalf on 2-12-1950, seeking permission to put in the documents and to prove those documents by oral evidence. In this application it was stated that the complainant should be called u/s. 540, Criminal P. C. for the aforesaid purpose. Objection was made on behalf of the accused to this request by the complainant. The learned Magistrate disposed of the application and the objection on 28-12-1950 in the following words:

> "I have heard the objection by the counsel for the accused that the witness cannot be examined afresh. But since he is not going to introduce any new matter and since the documents which he wants to file and prove may be of value to the just decision of the case, I call the complainant to come and prove the documents under S. 540, Cr. P. C."

From the aforesaid order of the learned Magistrate it would appear that the learned Magistrate permitted the recall of the complainant for the limited purpose of putting in and proving certain documents which, in the view of the Magistrate, were to be of assistance in the just decision of the case. After the complainant had been permitted to prove the documents which he had filed at his recall under S. 540, Cr. P. C., request was made on his behalf by his counsel to ask him further questions in order to connect these documents, so to speak, with the relevant facts of the case. The learned Magistrate appears to have prohibited this.

Feeling aggrieved by the decision of the Magistrate not to permit the complainant to be examined at length on the documents which he had produced, the complainant went up in revision to the learned Sessions Judge, which was rejected by the learned Sessions Judge mainly on the ground that the complainant had yet opportunity to bring forward evidence which could connect these documents with the relevant facts of the case, since the complainant's evidence had not been closed. A revision was then made to this Court by the complainant which was, in its first instance, heard by a learned single Judge who thought it fit to refer this question and this case to a Bench for decision.

(2) The question which calls for determination is whether the complainant had a right to examine himself at length in relation to the documents which he had been permitted to produce and prove under the powers conferred by S. 540, Cr. P. C. We have already quoted at length the order which the learned Magistrate made on the application of the complainant and from it, it would appear, that the learned Magistrate permitted the complainant to re-examine himself only to the extent to which it was necessary to prove the documents which he was permitted to file at that stage.

(3) Section 540 Criminal P. C. gives the Court a discretion to summon any person as a witness who has been not summoned by any party or to examine a witness who is in attendance, or to recall a witness who has already been examined. This section does not confer a right in any party to examine, re-examine or cross-examine any witness. It is also clear from the words of this section that no party has a right to claim action under S. 540, Cr. P. C. It is entirely discretionary in the Court in the interests of justice to take action or not to take action under this section. The right to cross-examine a witness who is called by a Court — a witness who is not one who has been summoned by any party — arises not under the provisions of S. 540, Cr. P. C., but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, therefore Courts have given the right of cross-examination to both the parties in respect of such a witness. A witness who is recalled under S. 540 at his own instance, cannot claim to cross-examine himself under the provisions of the Evidence Act, for S. 137 states what is meant by examination-in-chief and what is meant by cross-examination and re-examination. The section is in these words:

> "The examination of a witness by the party who calls him shall be called his examination-in-chief.
>
> The examination of a witness by the adverse party shall be called his cross-examination.
>
> The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination."

In our judgment, therefore, there was in this case no right in the applicant to either examine himself at any length or to cross-examine himself. The terms on which he was permitted to be re-examined were laid down clearly by the learned Magistrate in his order of 28-12-1950. In our view the learned Magistrate was perfectly within his rights to do so and in laying down those terms, the learned Magistrate had in no manner prejudiced any party to the case.

(4) In our judgment, therefore, there are no merits in this application which we accordingly dismiss.

B/V.R.B. Application dismissed.

A. I. R. 1953 ALL 668 (Vol. 40, C. N. 328)

DESAI AND BEG JJ.

Bashir, Appellant v. State.

Criminal Appeal No. 480 of 1951, D/- 19-3-53.

(a) Penal Code (1860), S. 300 Excepn. 4 — Scope and applicability.

Exception 4 will not come into play every time that a quarrel takes place suddenly; for its applicability, a number of facts are required in addition to the suddenness of fight, there must be heat of passion, sudden fight and absence of undue advantage or of acting in a cruel or unusual manner. (Para 6)

Anno: Penal Code, S. 300 N. 26.

(b) Penal Code (1860), Ss. 34, 302 and 304 — Applicability.

The deceased enquired about his missing crop from the accused and his three sons. The accused unreasonably thinking that he was being suspected of theft abused the deceased in return and shouted that the deceased should be beaten. The accused and his sons at once attacked the deceased with lathis and gave several blows on the head resulting in fracture of the skull and ultimately in death. The accused took undue advantage of the fact that the deceased was not armed with lathi and the beating continued even after he had fallen down. Who inflicted the injuries on the head was not however known.

Held that whoever inflicted the injuries which caused fracture of the skull must be held guilty of the offence of murder because he must have intended the natural consequences of the act. A fracture of skull in the ordinary course of nature would result in death. A person is also presumed to know that a fracture of skull is likely to result in death. The case was not covered by exception 4 to S. 300 and therefore the offence was not reduced to one under S. 304. (Para 6)

Held further that each of the assailants must be held guilty of murder by virtue of S. 34 even though their common intention was only to beat the deceased and cause simple or grievous injuries to him. (Paras 9 and 25)

Anno: Penal Code, S. 34 N. 8; S. 300 N. 33.

(c) Penal Code (1860), S. 34 — 'Criminal act', meaning of explained.

The 'criminal act' mentioned in the section is the physical act that has been done. It must be distinguished from the effect or result or consequence of it. AIR 1948 All 229 and AIR 1951 All 21 (FB), Ref. (Para 8)

The 'criminal act' must include at least two acts; it must be a series of acts. If only one act has been done, S. 34 cannot apply. For its applicability, it is essential that the criminal act is done by several persons. All the persons who are sought to be made liable by virtue of S. 34 must have done some act which is included in the 'criminal act'. One who has not taken any part in doing the criminal act cannot be made liable under the section. (Paras 9, 11)

Anno: Penal Code, S. 34 N. 1.

(d) Penal Code (1860), S. 34 — 'Common intention', meaning of explained — A I R 1953 All 203, dissented from.

Section 34 does not require any particular kind of common intention. The common intention may be to do a certain act regardless of the end and the means, it may be to achieve a certain end regardless of the means or it may be to do an act with certain means regardless of the end. (Para 12)

Common intention can certainly be formed by conduct; neither a written nor an oral agreement is required to constitute common intention. In most cases of common intention, there is no agreement either in writing or oral. As common intention can be formed only a moment before the doing of the criminal act, the suddenness of a quarrel or fight does not by itself negative the existence of common intention. Just as the fight is sudden, the common intention also might have been formed suddenly. (Para 13)

"Common intention" should not be confused with the intention that is an ingredient of any of the offences defined in the Penal Code. (Difference between the two pointed out). AIR 1953 All 203, dissented from. (Para 14)

Anno: Penal Code, S. 34 N. 1.

(e) Penal Code (1860), S. 34 — Proof of common intention.

When the common intention is formed by conduct, obviously it can be proved only from the conduct of all the persons; no direct evidence is possible even in theory. In most cases the common intention — its formation and nature — is to be inferred from circumstances.

The presumption of the common intention must be subject to the same restrictions as other presumptions; it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. (Para 16)

The common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the criminal act done is not to be assumed to be in furtherance of the common intention it follows that the common intention is not to be inferred exclusively from the criminal act done. The criminal act done will certainly be one of the factors to be taken into consideration but should not be taken to be the sole factor. Besides proving that a certain criminal act was done, the prosecution has to prove the existence of

common intention and that the criminal act was done in furtherance of it; these two are independent facts and one is not to be assumed or inferred exclusively from the other. (Para 16)

(f) Penal Code (1860), S. 34 — In furtherance of common intention, meaning of.

The criminal act for which all the conspirators are sought to be made liable under S. 34 must be connected with the common intention; it must have been done while, or for the purpose of, executing or carrying out the common intention. If it is extraneous to the common intention or is done in opposition to it, or is not required to be done at all for carrying out the common intention, it cannot be said to be in furtherance of it. (Para 17)

Whether an act is in furtherance of the common intention or not, depends upon the common intention and the nature of the act. It is an incident of fact and not of law. (Para 17)

(g) Penal Code (1860), S. 34 — Scope and applicability.

The use of the words "in furtherance" suggests that S. 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise, the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention. (Para 18)
Anno: Penal Code, S. 34 N. 1.

(h) Penal Code (1860), S. 34 — Object and scope.

The sole object of S. 34 is to lay down what act will be deemed to be done by the conspirators. The section is not a punitive section and does not enact a rule of evidence. It enacts a common law principle of substantive law. (Para 20)
Anno: Penal Code, S. 34 N. 1.

(i) Penal Code (1860), S. 34 — Scope and applicability.

Section 34 makes it quite clear that the liability of all the conspirators is for the 'criminal act actually done and not for the common intention, e. g. the act jointly intended by them. What the common intention was, is, therefore, not to be considered at all in deciding for what the conspirators are liable. The section does not punish the conspirators for the act jointly intended by them; it punishes them for the act actually done. (Para 22)
Anno: Penal Code, S. 34 N. 1.

M. A. Kazmi, for Appellant; J. R. Bhatt, for the State.

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(A) ('48) AIR 1948 All 229: 1947 All LJ 417: 49 Cri LJ 271
(B) ('51) AIR 1951 All 21: 1950 All LJ 884: 52 Cri LJ 131 (FB)
(C) ('25) AIR 1925 PC 1: 52 Cal 197: 26 Cri LJ 431 (PC)
(D) ('45) AIR 1945 PC 118: 1945 All LJ 344: 46 Cri LJ 689 (PC)
(E) ('44) AIR 1944 Cal 339: ILR (1944)-2 Cal 405: 45 Cri LJ 771
(F) ('53) AIR 1953 All 203: 1952 All LJ 546: 1953 Cri LJ 565
(G) (1942) 315 US 60: 86 Law Ed 680
(H) 14 CLR 387
(I) (1940) 28 Cr. App. Rep. 1
(J) ('46) AIR 1946 PC 45: 47 Cri LJ 344 (PC)
(K) ('46) AIR 1946 All 153: 1945 All LJ 531: 47 Cri LJ 532
(L) ('47) AIR 1947 All 408: 1947 All LJ 208: 48 Cri LJ 858
(M) (1931) 22 Cr. App. R. 148: 144 LT 526
(N) 55 CLR 253
(O) (1874) 12 Cox CC 624
(P) (1893) 148 US 197: 37 Law Ed 419
(Q) (1852) 5 Cox CC 231
(R) (1838) 168 ER 1136: 2 Lewin CC 225
(S) (1892) 142 US 450: 35 Law Ed 1077
(T) ('52) AIR 1952 Pat 135: 30 Pat 1264

DESAI J.: This is an appeal by Bashir who has been convicted under Ss. 302, 323 and 447 read with S. 34, Penal Code; under S. 302, Penal Code he has been sentenced to transportation for life.

(2) The case against the appellant was very simple. Sardar Khan, Uzair Khan and Wazir Khan were brothers. P. W. Angan is Sardar Khan's son, Majid Khan deceased was the son of Uzair Khan and Bashir appellant is the son of Wazir Khan. Along with the appellant his three sons Ibrahim, Nisar and Hamid were also said to have taken part in the crime but they absconded immediately after the commission of the crime and were not arrested and put on trial. Angan and Majid had a joint field in the neighbourhood of the fields of Bashir. On 31-3-1950 Angan and Majid reaped the crops of the field and stored them in the field. Bashir and his sons were at that time reaping crops of their field. When next morning Angan and Majid went to their field they found that some of their crops were missing. So they questioned the appellant and his sons who were in their field about the missing crops. This offended the appellant and his sons who abused Majid and Angan and rushed at them with lathis and beat them. Angan getting two blows with a lathi stood apart while Majid was struck and knocked down with lathis by the appellant and his sons. The witnesses turned up and the appellant and his sons left off the beating. Majid and Angan were then taken to the police station where within two hours of the occurrence the first information report was lodged by Angan. Majid was taken to the hospital where he died at 11 A.M.

(3) The appellant denied having taken part in the beating and pleaded that he was at home. His defence is that a fight took place between Angan and Majid on one side and his sons on the other.

(4) Walli Khan, Shafi Ahmad, Murli, Badlu, Jangali and Angan examined by the prosecution, supported the prosecution case. They all stated that they had seen Majid being beaten by the appellant and his sons. Walli Khan has a field near the field of Majid and Shafi Ahmad and Badlu were working in the field as his labourers. Murli was passing by the field of Majid and Jangali was grazing his cattle in the neighbourhood, when the occurrence took place. The statement of Angan is fully corroborated by the first information report made by him at the police station without any delay and also by the injuries found on his person on medical examination. The names of Walli Khan, Shafi Ahmad, Badlu and Murli are mentioned in the report and there is no reason to doubt their presence at the time of the occurrence. All these witnesses are independent,

having no reason to favour Angan and Majid or to give false evidence against the appellant and his sons. There are no serious contradictions in the statements made by the witnesses and there is no ground for discarding the evidence of any of them. It is clear from their evidence that Majid and Angan were beaten by the appellant and his sons.

(5) The appellant examined a doctor to prove that his right fore-arm was fractured. His plea was that he was not in a position to wield a lathi. But the evidence of the doctor does not bear out his plea. His right fore-arm was certainly fractured but it is stated by the doctor that it has movement though not free movement, that the appellant can hold a lathi with his left hand also with the help of the right hand and that he can use a lathi as a weapon with both hands though not with full force. All the prosecution witnesses to whom the question was put stated that the appellant used a lathi with both hands. So there is no justification for saying that the appellant could not have wielded a lathi on account of this defect in the right fore-arm. The appellant also examined Shanker Lal and Triloki who supported his version by saying that the fight took place with the appellant's sons and that the appellant was not present at the time. There are contradictions in the statements of the two witnesses. Shanker Lal said that he had learnt from the appellant later that the fight arose on account of Majid's cutting a portion of the appellant's Rabi crop. The appellant himself did not say anything about it in his statement in Court. Neither of the witnesses was produced by the appellant before the investigating officer. Triloki could not explain why the fight started at all. He stated that the appellant's sons did not receive any injuries but could not explain why they were not injured. We are not impressed with the evidence of the defence witnesses and hold that they have failed to rebut the evidence of the prosecution witnesses. We are satisfied that the appellant and his sons all jointly beat Angan and Majid.

(6) Majid died on account of shock and haemorrhage resulting from the injury to the head. He had received nine injuries, out of which six were contused wounds inflicted on the head and one was a bruise also on the head. The skull bones were fractured on account of the injuries on the head. Whoever inflicted the injuries which caused fracture of the skull must be held guilty of the offence of murder because he must have intended the natural consequences of the act. A fracture of skull in the ordinary course of nature would result in death. A person is also presumed to know that a fracture of skull is likely to result in death. Therefore, whoever hit Majid on the head and fractured his skull bones was guilty under S. 302, Penal Code. Mr. Kazmi urged that he would be guilty under S. 304, Penal Code and not 302 because his case was covered by exception 4 to S. 300, Penal Code. He pointed out that the quarrel was a sudden one and that the assailant who fractured Majid's skull bones had no previous intention to do so. Exception 4 will not come into play every time that a quarrel takes place suddenly; for its applicability a number of facts are required. In addition to the suddenness of fight, there must be heat of passion, sudden fight and absence of undue advantage or of acting in a cruel or unusual manner.

Here the quarrel might have been sudden but neither was there a sudden fight in the heat of passion nor did the accused act without taking undue advantage. No provocation was given by Majid; he had only enquired about his missing crops. He did not abuse the accused, but instead it was the accused who abused him in reply to his enquiry. Bashir (unreasonably) thought that he and his sons were suspected of the theft and shouted that Majid should be beaten. At once they attacked him with lathis. It is impossible to say that the assailant, who fractured his skull bones, acted in a sudden fight in the heat of passion upon a sudden quarrel. Moreover, he took undue advantage of the fact that Majid was not armed with a lathi. Several blows were given on the head with lathis and the beating continued even after he had fallen down. We, therefore, hold that the offence committed by the assailant who broke the skull bones of Majid is not reduced to that of culpable homicide not amounting to murder.

(7) The question whether the other assailants would also be guilty under Section 302, Penal Code will depend upon whether Section 34 applies. It was argued before us that the appellant and his sons had no common intention or had no common intention of causing anything more than simple or grievous injuries, and that if their common intention was only to cause simple or grievous injuries, none of them could be punished under S. 302 even after applying S. 34. The reasoning was this: As it is not known which appellant fractured the skull bones, none can be held guilty under S. 302 without the aid of S. 34 and as the common intention was only to cause simple or grievous injuries, even after applying S. 34, the accused could not be convicted of any offence graver than that of S. 325. The matter was argued at considerable length before us and several authorities were cited. We have come to the conclusion, and done so without any hesitation, that all these contentions are without substance and that all the assailants are guilty under S. 302 read with S. 34.

(8) Section 34 has proved to be one of the most difficult sections in the Penal Code. Though its language is plain and the words used are of everyday use, the section is interpreted by different Judges in different manners. We think that all the trouble and confusion are caused by ignoring the words used in the section or by interpolating new words. The section is:

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The "criminal act" mentioned in the section is the physical act that has been done. It must be distinguished from the effect or result or consequence of it. In many cases the distinction between the physical act done and its effect has been lost sight of. If A and B strike X, the criminal act done within the meaning of the section is the physical act of striking, and not the pain, or the fracture of a bone, or the death that may result from the striking. If they strike with lathis on his head and fracture his skull bones or put his brain out of action by producing concussion, the criminal act is the striking with lathis on the head and not the fracture or the concussion. If they stab him and pierce his heart and he dies in consequence, the criminal act is not the killing but the stabbing into the heart with a knife. In — 'Nazir v. Emperor', AIR 1948 All 229 (A), Dayal J., with whom Sankar Saran J. agreed, said at Page 237 that "S. 34 refers to a physical act only". At page 234, he said that criminal act is not equivalent to an offence which is composed of a physical act, its effect and the intention or knowledge. In — 'State v. Saidu Khan', AIR 1951 All 21 (FB) (B), decided by a Full Bench,

Wanchoo J. said that "criminal act" mentioned in the section is different from "offence".

(9) The "criminal act" must include at least two acts; it must be a series of acts. If only one act has been done, S. 34 cannot apply. For its applicability, it is essential that the criminal act is done by several persons. Obviously, one act cannot be done by several persons. If several persons do an act, they must do several acts even though they may be of the same nature and effect. If only one blow with a lathi is given by A, B, who is present there at the time, may be guilty as an abettor but would not be guilty under S. 34 unless his presence at the spot is itself deemed to be an act. In certain cases, it may be deemed to be an act but not in all.

(10) The "criminal act" is the whole series of acts. It is, what Lord Sumner called, "unity of criminal behaviour" in — 'Barendra Kumar v. Emperor', AIR 1925 PC 1 (C). If A and B go to the place of X with an intention to beat him and A gives him three blows with a lathi and B two blows with a spear, the criminal act comprises of their going to the place of X and the infliction of five blows with the weapons. If S. 34 applies, A will be punished as if he alone had done the whole act and similarly B will be punished as if he alone had done the whole act. If A and B are sitting at a place, X happens to pass by, a quarrel takes place between them and A gives one blow to X, the mere presence of B may not be an act and "criminal act" would consist only of the infliction of a blow and B would not be rendered punishable by virtue of S. 34. Even omission to prevent an offence being committed may be an act; vide — 'AIR 1925 PC 1 (C).

(11) The next requirement of S. 34 is that the "criminal act" must be done by several persons. If it is done by one person, even if it consists of a series of acts, S. 34 will not apply. All the persons who are sought to be made liable by virtue of S. 34 must have done some act which is included in the "criminal act". One who has not taken any part in doing the criminal act cannot be made liable under the section.

(12) Another requirement is that all the persons who are sought to be made liable must have formed a "common intention". It should be understood clearly that all that is required is the formation of a common intention; no particular kind of common intention is required. The common intention may be to do a certain act regardless of the end and the means, it may be to achieve a certain end regardless of the means or it may be to do an act with certain means regardless of the end. If A and B jointly decide to strike X generally without deciding upon the weapons and without intending a particular result or effect, if they jointly decide to strike him with a certain weapon only but without intending a particular result, if they jointly decide to strike him in order to bring about his death and if they jointly decide to strike him in order only to maim him without fixing the weapons, these are all common intentions within the meaning of S. 34. A and B may in some cases jointly decide to achieve a certain end, but it would be quite wrong to look for the end sought in every common intention. There may be common intention in which only the doing of a certain physical act is fixed and the end or the means are not decided upon.

(13) What is meant by "common intention" is the "community of purpose" or "common design" or common intent". Section 34 lays down a principle of Common Law and it has been pointed out by Lord Sumner in the case of — 'AIR 1925 PC 1 (C)' (ubi supra), at page 8 that the Indian Penal Code must not be assumed to have sought to introduce differences from the prior law and it must not be supposed that, because it ceases to use the terms "principal in the first degree" and "principal in the second degree" it does not intend to provide for the ideas which those terms, however imperfectly expressed. Therefore it will not be wrong to interpret the words "common intention" to mean "community of purpose", "common design" or "common enterprise" which are the words used in the English Common Law. In — 'Mahboob Shah v. Emperor', AIR 1945 PC 118 (D), "common intention" was held to imply a "pre-arranged plan". This does not mean either that there should be confabulation, discussion and agreement in writing or by word, nor that the plan should be arranged for a considerable time before the doing of the criminal act. The Judicial Committee in the 'case of Mahboob Shah (D)', did not lay down that a certain interval should elapse between the formation of a pre-arranged plan and the doing of the criminal act and did not negative the formation of a pre-arranged plan just a moment before the doing of the criminal act. There is no reason why A and B should not proceed to carry out their common intention as soon as they form it. In — 'AIR 1951 All 21 (B), Sankar Saran, J. said on page 37:

> "A pre-arranged plan does not mean that there should be a conference where resolutions are moved and a decision arrived at to commit a particular crime.....the plan might have been arranged just half a minute before the actual beating started."

Common intention can certainly be formed by conduct; neither a written nor an oral agreement is required to constitute common intention. In most cases of common intention, there is no agreement either in writing or oral. As common intention can be formed only a moment before the doing of the criminal act, the suddenness of a quarrel or fight does not by itself negative the existence of common intention. Just as the fight is sudden, the common intention also might have been formed suddenly.

(14) "Common intention" should not be confused with the intention that is an ingredient of many of the offences defined in the Penal Code. The intention, that is an ingredient of many of the offences, is the intention formed by a person himself committing the offence; it is a personal matter. It is the intention immediately behind the act done by the doer. On the other hand, "common intention" is the common design or common intent of two or more persons acting together. It is more akin to motive or object. It is remoter than the intention with which each act included in the criminal act is done; it is what the persons jointly decide to achieve. It is the reason or object for doing all the acts forming the criminal act. In some cases, the intention which is an ingredient of an offence, may be identical with the common intention of the conspirators but it would still be separate from, or in addition to the common intention and not merge in it. If the common intention is to do a simple act, which can be done with only one intention, the intention with which that act is done by the doer will be identical with the common intention. But when the common intention is to do an act which can be done with different intentions, the intention of the doer may be different from the common intention. Even when it is identical, it is distinct from the common intention, being the intention of the doer. Wali Ullah J. pointed out in the case of — 'AIR 1951 All 21 (B), that the phrase "com-

mon intention" is used "in a much wider sense and is not confined to what is described as volitional intention" (page 32). In the same case, Sankar Saran J. quoted with approval an observation of Khundkar J. in — 'Ibra Aklnda v. Emperor', AIR 1944 Cal 339 (E), to the effect that

> " "common intention" cannot be given a constant connotation, that there are cases in which it is identical with 'mens rea' required for the offence actually committed and that there are others in which its horizon is wider."

We respectfully differ from the contrary view advanced in — 'Behari v. State', AIR 1953 All 203 (F), by Agarwalla J. with whom Dayal J. agreed.

In that case, A, B and C forming a common intention hit X with lathis and a blow given by one of them proved fatal and X died. Our learned brother held that the accused who himself dealt the fatal blow was guilty of murder and that the others also became guilty of murder because there was "nothing to show that the intention of the person who actually caused the fatal blow on the head was different from the intention of the others". "The intention of the others" could be nothing but the common intention, as they had not dealt the fatal blow it could not possibly be the intention with which it was dealt. Apparently our learned brother held the others guilty because he found that the common intention was the same as the intention which is an ingredient of the offence of S. 300. No authorities have been cited by our learned brother and the view taken by him, we say so with respect is not one we can accept and is opposed to authorities.

(15) When several acts are done by two or more persons, in order to make each of them responsible for all the acts, the only thing necessary is that they should have done the acts "in furtherance" of their common intention. It is not always essential to ascertain the common intention, if it can be shown that they did the acts in furtherance of their common intention, whatever it was, each would be responsible for all the acts. In some cases it may be necessary to ascertain the common intention because without ascertaining it it cannot be said whether the criminal act done was done in furtherance of it or not. In some cases, there may be clear evidence about the common intention. But in every case, the only object of ascertaining the common intention is to find out if the criminal act was done in furtherance of it. If the answer is in the affirmative, the purpose of the ascertainment is exhausted and the liability of the several persons will depend upon the criminal act done by them and not upon the common intention. The existence of the common intention will only make all of them liable, but for what they should be held liable or to what extent they should be liable, will depend upon the criminal act done. The common intention will bring into existence their liability, but its nature or extent will depend not exclusively upon it but upon it and the criminal act. Therefore it is quite wrong to stake everything upon whether the common intention is to do the criminal act actually done or not. The words, "in furtherance of the common intention" are not enacted for nothing. They are not to be treated as non-existent or mere surplusage. If the common intention contemplated by the section were the intention to do the criminal act actually done, then that by itself would mean that the criminal act done was done in furtherance of the common intention and the words "in furtherance of the common intention" would be without any content. These words were added by the legislature in 1870 and must have been added for a purpose. That purpose could be none other than to make persons, acting in concert, liable for an act, which is not exactly the act jointly intended by them, but has been done in furtherance of their common intention. The words would not have been required at all if the common intention implied an intention to do the very criminal act done.

(16) When the common intention is formed by conduct, obviously it can be proved only from the conduct of all the persons, no direct evidence is possible even in theory. Direct evidence to prove the formation and nature of the common intention is possible in theory only when it is formed in writing or by word of mouth, but in practice it is difficult to be had. Conspiracies are not hatched within the sight or hearing of others. That in most cases the common intention — its formation and nature — is to be inferred from circumstances is clear from — 'Barendra Kumar v. Emperor (C)', and — 'Glasser v. U. S. A.', (1942) 86 Law Ed 680 (G). In the latter case, Murphy J. said at p. 704 that

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances."

In the — 'King and the Attorney General of the Common Wealth v. Associated Northern Collieries', 14 CLR 387 (H), Issacs J. said on page 400:

> "Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of preconcert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge."

The presumption of the common intention must be subject to the same restrictions as other presumptions, it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the inference of common intention "should never be reached unless it is a necessary inference deducible from the circumstances of the case", (per Sir Madhavan Nair in — 'AIR 1945 PC 118 at p. 121 (D)'. When the nature of the common intention is to be inferred, it must be inferred with the least amount of flight of fancy. For instance, in the absence of any evidence, the Court should not infer that the common intention of A and B was to kill X or that it was not to kill X, but only to cause simple or grievous hurt. It does not matter whether the inference is to be drawn in favour of the prosecution or in favour of the defence, in either case there must be evidence to support it. As we said earlier, it is not essential in every case to find out the exact nature of the common intention. If the common intention was formed by conduct or is to be inferred from conduct, the Court can infer only a general outline of the common intention and cannot infer its details. Another warning that is necessary to be given is that, the common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the

criminal act done is not to be assumed to be in furtherance of the common intention it follows that the common intention is not to be inferred exclusively from the criminal act done. The criminal act done will certainly be one of the factors to be taken into consideration but should not be taken to be the sole factor. Besides proving that a certain criminal act was done, the prosecution has to prove the existence of common intention and that the criminal act was done in furtherance of it, these two are independent facts and one is not to be assumed or inferred exclusively from the other.

In — 'R. v. Appleby', (1940) 28 Cr App Rep 1 (I), the facts were that Appleby and Ostler were surprised by police officers while committing housebreaking, that they tried to escape but were overtaken and that a shot fired by Ostler killed a police officer. The Court of Criminal Appeal held that Appleby and Ostler were both guilty of murder. It was contended in appeal that the trial Court did not point out to the jury that there was some evidence that the common design was not to use violence but to use some degree of force which would not amount to violence. The argument was repelled because there was no such evidence. In the case of — 'AIR 1951 All 21 (B)', Sankar Saran J. said at page 38:

> "When people stand near their victim and simultaneously attack him with lathis, the presumption is that it would not be a case of "same intention" but one of 'common intention'."

In the case of — 'Mamand v. Emperor', AIR 1946 PC 45 (J) the existence of common intention was presumed by the Judicial Committee from the facts that one of the persons had strong grounds for entertaining feelings of enmity against the deceased, that the other conspirators were related to, or connected with him, that all lived together and that they all ran away together after the assault. Their Lordships did not ascertain what was the exact common intention formed by the three accused but concluded that the murder was committed in furtherance of it.

The decision in — 'Mahboob Shah v. Emperor', (D) has not always been correctly understood and much confusion and great miscarriage of justice have resulted. The decision must be read in the light of its facts. The essential facts in the case were these. A and H collected reeds from land belonging to G. A quarrel took place between A and G and A struck G who shouted for help. Hearing his shouts W and M came up from behind bushes with guns. When A and H tried to run away they were intercepted by M and W and W fired at A and killed him at once and M fired at H and wounded him. The High Court itself found that there was no common intention to attack A and H formed by G, M and W and that a common intention came into existence only when M & W fired at A and H. Their Lordships of the Judicial Committee disagreed. There were no circumstances on the basis of which they would say that W and M had a common intention to commit the criminal act. There was no evidence that W ever entered into a premeditated plan or concert to bring about the murder of A in carrying out their intention of rescuing G. It was in this connection that their Lordships laid down that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances. It is to be noted that M fired only one shot and W also fired only one shot, and that one fired at one person and the other at another person. Though they came together from behind the bushes, it did not necessarily follow that they came in concert. Their conduct might be consistent with concerted action but was also consistent with their having acted independently of each other. Each could have very well acted regardless of what the other was doing and there was nothing to suggest that they were animated by a common purpose or intention. Had M and W fired several shots it could have been said that they acted in concert, but when they fired one shot each it could not necessarily be said that they acted in concert.

In — 'Bishuwanath v. Emperor', AIR 1946 All 153 (K) the facts were as follows. B and his companions were erecting huts when the four accused went there armed with lathis and stopped B. B asserted his right over the land which annoyed one of the accused who asked his companions to beat him. Thereupon all the four accused jointly attacked B with lathis & B fell down & died on account of injuries. Because there was no evidence of concert or pre-arranged plan, Mulla, J. held that S. 34 did not apply. We think that the circumstances of the case established the existence of common intention on the part of the four accused to beat B. This decision was considered by a Bench of this Court in — 'Dipa v. Emperor', AIR 1947 All 408 (L). There the facts were similar but the trial Court itself held that S. 34 did not apply. The judgment in — 'Dipa's case (L)' proceeded on the footing that S. 34 did not apply. It is not an authority laying down when S. 34 applies and when it does not apply; it only deals with a case which is not governed by S. 34. This was made clear in the case of — 'AIR 1951 All 21 (B)' at page 43 by Wanchoo, J. who was a member of the Court deciding — 'Dipa's case (L)'. The decision in the case of — 'Bishuwa Nath (K)' was criticized by Sankar Saran J. in the case of — 'AIR 1951 All 21 (B)' at pages 37 and 38.

(17) The last contention for the applicability of S. 34 is that the criminal act done must have been done in furtherance of the common intention. Russell on Crime, 10th edn. p. 557, adopts this definition of "furtherance", e.g., "the action of helping forward" and writes that "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." The criminal act for which all the conspirators are sought to be made liable must be connected with the common intention; it must have been done while, or for the purpose of, executing or carrying out the common intention. If it is extraneous to the common intention or is done in opposition to it, or is not required to be done at all for carrying out the common intention, it cannot be said to be in furtherance of it. If A and B jointly decide to strike X, then all the striking done by them, whatever be the result, is done in furtherance of it, provided there is nothing unusual or nothing that was not contemplated or anticipated in the striking or the means used for the purpose.

In — AIR 1948 All 229 (A)', Raghubar Dayal, J. said at page 234, that

> "only such acts are not to be deemed in furtherance of the common intention as could not have taken place ordinarily in the carrying out of the common intention."

Kenny in his Outlines of Criminal Law, 15th edn. writes on page 162 that

> "the act done must relate to the common design and not totally or substantially vary from it."

A slight variation will not prevent the act from being in furtherance of the common intention; what is required to prevent that is altogether departing from the agreement or direction. The distinction between varying to some extent and altogether departing was pointed out in the case of — 'Appleby (I)'. In — 'R. v. Betts and Ridley',

(1931) 144 L T 526 (M) Avory, J. said, quoting from Foster's Crown Cases that

"if the principle in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases, the person soliciting to the offence will.....be.....if present, a principal."

Whether an act is in furtherance of the common intention or not depends upon the common intention and the nature of the act. It is an incident of fact and not of law.

In — 'Brennan v. The King', 55 C L R 253 (N) A and B broke into a shop, stole jewellery and while doing so killed the watchman while C remained outside on watch and it was laid down that it did not follow as a matter of law that if C aided and abetted the shop-breaking he was criminally responsible for the murder, that it was a question of fact whether this followed from the facts and that it was clear from the evidence that C aided and abetted A and B in a criminal enterprise which he knew included the use of some force upon the watchman to prevent his giving the alarm or obstructing the commission of the theft and that consequently he could be guilty of man slaughter.

In — 'AIR 1953 All 203 (F)', there is an observation to the effect that "each one's act must be presumed to have been done in furtherance of the common intention" (p. 207). If our learned brother really meant that whatever is the act done by the conspirators, it must be presumed to have been done in furtherance of their common intention, we respectfully dissent. Had it been a matter of presumption, the words "in furtherance of the common intention" would not have been added by the legislature. If A and B jointly agree to strike X with lathis, then the striking with lathis only can be in furtherance of their common intention and if A shoots X and kills him his act being in opposition to the common intention, cannot be said to be in furtherance of it and B will not be responsible for it. But of course there must be evidence to show that the common intention was to strike with lathis only. If at the time of their joint decision to strike X, A openly carried a pistol and B a lathi, the use of both the weapons must be deemed to have been contemplated and A's shooting with the pistol would be an act in furtherance of the common intention. If, however, A had concealed the pistol and B did not know that he was armed with it and he suddenly took it out and shot X, it is obvious that the common intention did not contemplate the use of the pistol. When B did not know of its existence, he could not have intended its use and if he could not have intended the use there could have been no common intention to use it. The act of shooting with the pistol would not be said to be in furtherance of the common intention. When there is an agreement between A and B to assualt C with fists and A, of his own impulse, kills C with a weapon suddendly caught up, B would not be responsible for the death because the killing was not an act in pursuance of the common design; see — 'R. v. Caton', (1874) 12 Cox C C 624 (O). Similar law was laid down by Wanchoo, J. in — 'AIR 1951 All 21 (B)' at pp. 40-41. If the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged; see — 'Pettibone v. United States', (1893) 37 Law Ed 419 (P).

(18) The use of the words "in furtherance" suggests that S. 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise, the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention. Going to the spot in a motor car is an act in furtherance of the common intention to commit a crime there; but if while going there the driver runs over and kills a pedestrian, the collision is merely incidental and the running over of the pedestrian is not in furtherance of the common intention. If, however, a conspirator who wishes to commit a crime involving violence against X is impeded by Y and throws Y aside in order to get at X, the attack upon Y is made in furtherance of the common intention; see Russell on Crime, pages 557 and 558.

(19) If the conditions mentioned in S. 34 are fulfilled, then each of the persons or conspirators is responsible for the whole criminal act done by all of them. If A and B do a criminal act in furtherance of their common intention, each of them is guilty of that offence of which he would have been guilty if he alone had done the whole criminal act. The law makes no distinction between them or between the parts played by them in doing the criminal act; each is guilty of the same offence. If S. 34 applies, it is impossible to convict the conspirators of different offences.

(20) Now is the time to consider the result or effect of the criminal act done by the conspirators because now the Court has to decide what offence each of the conspirators has committed. The nature of the offence committed by an accused depends upon the act done by the accused and the effect produced by it and the sole object of S. 34 is to lay down what act will be deemed to be done by the conspirators. The section is not a punitive section and does not enact a rule of evidence. It enacts a common law principle of substantive law. If A and B act in concert and do a criminal act, it makes A liable for all the acts done by him and by B. It makes him liable not out of necessity (because it cannot be determined which act was done by A and which act by B) but because the law considers him as the doer of the whole act. Even if it is ascertained which act was done by him and which act by B, the law makes each of them responsible for the whole act. The law considers them as one unit and the criminal act, as done by that unit, and makes the unit punishable regardless of the question which member of it did which act. Just as when a man assaults another, his guilt does not depend upon whether he assaults him with the right hand or with the left hand; so also when a unit consisting of a number of persons A, B etc. commits an offence in furtherance of its intention, it does not matter whether A commits the offence or B commits it and the unit, that is all the persons, are held guilty of it. It may be said that S. 34 dispenses with the necessity of ascertaining what are the respective acts done by the various conspirators.

(21) All that remains to do is to find out the offence constituted by the whole criminal act (done by all the conspirators); each conspirator is to be convicted of it. If the nature of the offence depends on a particuar intention or knowledge, the intention or knowledge of the actual doer of the criminal act is to be taken into account. What intention or knowledge will decide the nature of the offence committed by him and the others will be convicted of the same offence because, as pointed out above, they cannot be convicted of a different offence. The intention of the actual doer must be distinguished from the common intention,

as already pointed out. It is an ingredient of the offence said to be constituted by the criminal act. It is a personal matter. When an offence requires a particular intention that intention must be harboured by the person doing the physical act. That the intention must be of the person doing the act is laid down in the definitions of the offences themselves. When A is made responsible for an act done by B, the nature of the offence must necessarily depend upon the intention of B, when A himself has not done an act there cannot arise any question of his intention for that act. Though the intention of the actual doer is to be distinguished from the common intention, the intention must not be foreign to or inconsistent with the common intention. It must be consistent with the carrying out of the common intention, otherwise the criminal act done will not be in furtherance of the common intention. If A and B strike X with lathis and one blow causes death, and the others only pain, the offence constituted by the infliction of the fatal blow depends on the intention or knowledge of the actual assailant who dealt it and the offence constituted by the infliction of the other blows is simply that of S. 323, Penal Code. If the person who inflicted the fatal blow had the intention mentioned in S. 300, Penal Code, the offence committed by the infliction of that blow is punishable under S. 302, Penal Code and both A and B will be guilty of it (and also of S. 323, even if they cannot be sentenced for it in addition). It is not at all necessary to find out who inflicted the fatal blow; all that is necessary to find out is with what intention or knowledge it was inflicted, whomsover inflicted it.

(22) Section 34 makes it quite clear that the liability of all the conspirators is for the criminal act actually done and not for the common intention, e.g., the act jointly intended by them. Nothing can be clearer than this and one has only to read S. 34 to know it. What the common intention was, is therefore not to be considered at all in deciding for what the conspirators are liable. The section does not punish the conspirators for the act jointly intended by them; it punishes them for the act actually done. Even if A and B formed a common intention to cause simple or grievous hurt and the simple or grievous hurt caused by them resulted in death, they will be liable for causing the death. A person who causes grievous hurt can be punished under S. 302 or 304, Penal Code if the hurt brings about death. It is often forgotten that one who fractures skull bones can be punished under S. 302 or 304, Penal Code if death results from the fracture. When A, intending to kill B, hits him on the head and he dies, he only breaks the skull bones; the nature does the rest and extinguishes the life. So even when he intends to kill he only fractures the skull. It is, therefore, quite illogical to argue that the conspirators should be convicted under S. 325, Penal Code only because the common intention was to cause grievous hurt, even though the grievious hurt results in death. In the case of — AIR 1953 All 203 (F)' it was said at page 207:

> "In the absence of any definite evidence that the intention of giving the beating was confined to causing simple hurt or grievous hurt or an injury likely to cause death, the presumption of intention drawn from the nature of the injury actually caused remains unshaken."

The learned Judge has not explained why, even if the common intention was to cause grievous hurt, when it resulted in death, the offence of murder was not committed by the conspirators. With great respect we would point out that the intention that is an ingredient of the offence of S. 300, Penal Code has been confused with common intention. The learned Judge on page 207 writes that if the common intention was to cause simple hurt or grievous hurt, the mere fact that actually an injury that is sufficient in the ordinary course of nature to cause death has been caused would be immaterial and the conspirators who did not cause the fatal injury would be guilty not of murder but of causing simple or grievous hurt as the case may be. The reason for this is said to be that the fatal injury would be deemed to have been caused accidentally or in excess of the common intention. Of course, if an act is done accidentally S. 34 may not apply because it may not be held to be in furtherance of the common intention. If the common intention is exceeded, it only means that the act done was not in furtherance of it. Therefore the real point is not that the conspirators are punished for the act jointly intended by them, but that they are punished for the criminal act actually done, provided it is in furtherance of their common intention. If there is a common intention to cause grievous hurt and grievous hurt is caused, the result or effect of the grievous hurt is quite immaterial. If it results in death, it does not mean that the grievous hurt was not caused in furtherance of the common intention. When the nature of the offence is to be ascertained, the act done and the effect produced both must be taken into account; so if grievous hurt is caused and that brings about death, the conspirators may be guilty of murder or culpable homicide if the necessary intention or knowledge existed.

(23) In the case of — 'Nazir (A)' the common intention of the conspirators was to abduct and to give a beating with a 'tabal' and a lathi and they were convicted under S. 302 for killing a man. In — 'Pettibone v. United States', (P), Brewer, J. in his dissenting judgment, said, on page 425:

> "Parties combine to break into a house and commit burglary; while engaged in the commission of that offence, resistance being made, one of the party kills the owner of the house, can there be a doubt that they are all guilty of murder, although murder was not the purpose of the combination, and was not in the thought of any but the single wrongdoer? In other words they who did not intend murder, who did not know that murder was, in fact, being committed, are ruled to be chargeable with the intent to commit murder, and to be guilty of that offence because they were engaged at the time in an unlawful undertaking, and the murder was committed in carrying that undertaking into execution."

When Betts and Ridley agreed to way-lay and rob A after pushing him down and went to the place where he was to be found and Ridley remained in the car while Betts alighted, waylaid A and struck him a violent blow on the head, as a result of which he was rendered unconscious and died soon after, it was held that both Betts and Ridley were guilty of murder; see — 'R. v. Betts and Ridley', (M). If A and B agree to assault C with their fists and C is killed by a chance blow of the fist from either of them, both are guilty of culpable homicide, vide — 'R v. Caton', (O).

A similar case is — 'R v. Harrington', (Q) 6 Mews, Digest, Col. 328 (Sic) (1852-5 Cox C C 231 cited in 4 Mew's Digest Col. 1122), which lays down that if two or more persons go out together with a purpose to commit a breach of the peace and in the course of the accomplishment of that common design, one of them kills a man the other also is guilty of man slaughter. In — 'R. v. Macklin', (1838) 2 Lewin C. C. 225 (R), Baron Alderson said in his charge to the jury:

> "It is a principle of law that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent

by each of them is, in law, done by all....The jury must determine whether all these persons had the common intent of attacking the constables — if so, each of them is responsible for all the acts of the others done for that purpose; and if all the acts done by each, if done by one man, would, together show such violence and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all."

In — 'Loyd v. U. S.', (1892) 35 Law Ed 1077 (S) it was held that if a number of persons agree to commit, and enter upon the commission of a crime which will probably endanger human life such as robbery, all of them are responsible for the death of a person that ensues as a consequence. In — 'State v. Hira Dubey', AIR 1952 Pat 135 (T), two persons armed with lathis pursued a victim and gave him several blows one of which proved fatal and both were convicted of murder.

(24) Section 34 has to be interpreted in conformity with the English law; see — 'AIR 1925 PC 1 (C)' at p. 4. The interpretation that we have placed upon the various expressions used in the section is in conformity with the English law. According to Russell on Crime, 10th edn., page 1855, the true rule of law is that

"where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such a common unlawful object, all are guilty."

The rule laid down by Kenny in his "Outlines of Criminal Law", 15th edn. page 161, is :

"if several persons act together in pursuance of a common intent, every act done in furtherance of it by any one of them is in law done by all."

Hence if persons have agreed to waylay a man and rob him and if they come together for the purpose armed with deadly weapons and one of them happens to kill him, every member of the gang is held guilty of murder".

(25) Applying the law as expounded above to the facts of the instant case, we find that S. 34 applies and that the appellant and his sons all committed the offence of S. 302, Penal Code. They formed the common intention of assaulting Majid with lathis. The appellant gave the order and he and his sons at once, in concert, attacked him with lathis. Each of the assailants shared the intention to beat with the others. Not only each had the intention to beat Majid, but each also acted in concert with the same purpose in view. It does not matter in the least if they formed the common intention immediately before beating Majid. All the blows inflicted by all were inflicted in furtherance of the common intention. The result of all the acts done by all was the commission of the offence of murder; all of them are, therefore, responsible for the murder. The appellant was, therefore, rightly convicted under S. 302, Penal Code. His conviction under Ss. 323 and 447, Penal Code was also correct.

(26) We maintain the appellant's conviction and sentence and dismiss his appeal.

(27) Leave for appeal to the Supreme Court is refused.

A/K.S. Appeal dismissed.

A. I. R. 1953 ALL. 676 (Vol. 40, C. N. 329)

MALIK C. J. AND V. BHARGAVA J.

Commr. of Income-Tax, U. P. and V. P., Lucknow, Applicant v. Shamsherjang Bahadur, Respondent.

I. T. Misc. Case No. 58 of 1948, D/- 8-5-1953.

† **Income-Tax Act (1922), Ss. 2 (1) (b) and 4 (3) (viii) — Grazing dues.**

Fees collected from owners of cattle for allowing them to graze on forest lands covered by jungle and grass of spontaneous growth are exempt as agricultural income within the meaning of S. 2: Case law discussed. AIR 1952 All 845, Distinguished. (Paras 1 and 14)

Anno: Income-Tax Act, S. 2 N. 3; S. 4 N. 28.

S. C. Das, for Applicant; Kalbe Abbas, for Respondent.

CASES CITED:

(A) ('49) AIR 1949 PC 13: 1948-16 ITR 330 (PC)
(B) ('45) AIR 1945 Oudh 44: 1945-13 ITR 98
(C) ('35) AIR 1935 PC 172: 1935-3 ITR 305: 62 Ind App 215 (PC)
(D) ('47) AIR 1947 Mad 157: 1946-14 ITR 92
(E) ('47) 1947-15 ITR 98 (All)
(F) ('24) AIR 1924 Cal 668: 1 ITC 284
(G) ('52) AIR 1952 Nag 205: 1949-17 ITR 454
(H) ('52) AIR 1952 All 845: 1952-22 ITR 1

MALIK C. J.: The assessee was the proprietor of a big estate known as Saharanpur Estate. He was assessed to Income tax on all kinds of Income and as regards several items there was a dispute whether the income derived from those sources was agricultural income which was exempt from Income tax. We are concerned in this case only with a sum of Rs. 12046/-, which the Appellate Assistant Commissioner of Income-tax held was not Agricultural Income and was thus liable to be included in the total income of the assessee for purposes of payment of Income tax. The Tribunal, however, in a short order dated 31-8-1946, held that it was Agricultural Income and was exempt from Income tax. The Commissioner filed an application under S. 66(1), Income-tax Act which was granted and the following question of law was formulated for decision by this Court:

"Whether in the circumstances of the case, the sum of Rs. 12,046/- being fees collected from owners of cattle for allowing them to graze on forest lands covered by jungle and grass (admittedly of spontaneous growth) is exempt as agricultural income within the meaning of S. 2, Income-tax Act?"

(2) The statement of the Case is rather brief and the only facts that appear therefrom are mentioned in the question itself. The appellate order of the Tribunal, dealing with this point, is quoted in full in the Statement of the case and that too does not give the facts in details.

(3) All that we can gather from the appellate order and the statement of the case is that the assessee owns a big estate, part of which is forest land, that in the forest land there is grass of spontaneous growth, that owners of cattle are allowed to graze on payment of a fee and that this fee which is known as grazing dues comes to Rs. 12,046/-. On these facts we are asked to decide the question, whether these grazing dues are agricultural income or not.

(4) Section 2, sub-section (1), Income-tax Act, defines 'agricultural income' as follows:

"(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in the taxable territories or subject to a local rate assessed and collected by officers of Government as such;

(b) any income derived from such land by

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily

employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii);

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-cls. (ii) and (iii) of cl. (b) is carried on:

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling house, or as a store-house, or other out-building;"

Section 4, sub-section (3), clause (viii) exempts agricultural income from being included in the total income of an assessee for purposes of assessment of Income-tax. The result of this exemption of all agricultural income from being included in the total income for purposes of Income-tax has been that there has arisen frequent controversy whether a particular income was agricultural income or not.

(5) As regards the income from forest trees of spontaneous growth, without the intervention of human agency, the law has now been settled by a decision of the Judicial Committee in — 'Mustafa Ali Khan v. Commr. of Income-tax, U. P. Ajmer and Ajmer Merwara', AIR 1949 PC 13 (A). The question formulated for the decision of the Oudh Chief Court from whose judgment the appeal went to the Privy Council, was as follows:

"Whether income from the sale of forest trees growing on land naturally and without the intervention of human agency, even if the land is assessed to land-revenue, is agricultural income within the meaning of section 2 (1)(a) of the Income-tax Act, and as such exempt from income-tax under section 4(3)(viii) of the Act?" (See —'Mustafa Ali Khan v. Commr. of Income-tax, U. P. and C. P.', AIR 1945 Oudh 44 (B)).

The Oudh Chief Court having decided against the assessee, the matter was taken up to the Judicial Committee which held that the income was not agricultural income. In the course of the judgment, their Lordships made the following observations, dealing with the question as to the meaning to be ascribed to the word 'agriculture':

"(1) that in their opinion no assistance is to be got from the meaning ascribed to the word 'agriculture' in other statutes and

(2) that, though it must always be difficult to draw the line, yet, unless there is some measure of cultivation of the land, some expenditure of skill and labour upon it, it cannot be said to be used for agricultural purposes within the meaning of the Income-tax Act."

The income in that case was derived from the sale of trees described as 'forest trees growing on land naturally' and the case had throughout proceeded upon the footing that there was nothing to show that the assessee was carrying on any regular operation in forestry or arboriculture. The jungle from which trees had been cut and sold was of spontaneous growth. Their Lordships held that it was not agricultural income. The second point decided in that case was that

"exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient."

And again

" 'the result in their Lordships' opinion is to exclude 'agricultural income' from the scope of the Act howsoever or by whomsoever it may be received."

These observations had been made by the Board in —'Commr. of Income-tax, B. & O. v. Kameshwar Singh', AIR 1935 PC 172 (C). The portions quoted above were quoted by their Lordships from that judgment and their Lordships went on to observe:

"Enough has been said to show that the distinction sought to be made between rent received by a mortgagee 'in lieu of interest' and rent received by him but applicable by him, 'inter alia' in satisfaction of interest cannot be maintained."

(7) The question whether income from trees of spontaneous growth is or is not 'agricultural income' has, therefore, been set at rest by the decision of the Judicial Committee in 'Mustafa Ali Khan's case (A)' and in several other cases which their Lordships quoted with approval; for example, — 'Gangadhara Rama Rao v. Commr. of Income-tax, Madras', AIR 1947 Mad 157 (D) — 'Benoy Ratan v. Commr. of Income-tax, U. P. C. P. and Berar', (1947) 15 ITR 98 (All) (E). In Benoy Ratan Banerji's case (E)' this Court observed:

"We are entirely satisfied that, being trees of spontaneous growth, to the production of which the assessee has made no contribution by way of cultivation, no question can arise either of the land on which they grew being 'used for agricultural purposes' or of the trees themselves and the income they produced being the result of 'agriculture'."

(8) Learned Counsel for the Department has strongly relied on these decisions and has urged that income from grass which spontaneously grew in a forest must be deemed to be of the same nature and there was no real difference between trees of spontaneous growth and grass of spontaneous growth. There is, however, to our minds, a vital difference on which their Lordships of the Judicial Committee were not called upon to pronounce an opinion. Trees, unless they are cultivated, if we may use that phrase, or grown, would not be normally deemed to be a part of agricultural operations of an agriculturist. The sale of timber which entitles the purchaser to cut the trees and remove the wood and sell it is not a part of agricultural operations.

It is possible to conceive of a case where, instead of growing crops, a person undertakes to spend money and labour in growing trees on a plot of land assessed to land-revenue or local rates. This might be an agricultural operation. We, however, do not express any opinion on the point, as the point does not arise in this case & is not a question on which we are called upon to give an answer, but there can be no doubt that trees growing spontaneously on forest land cannot be deemed to be a part of agricultural operations.

(9) Rearing of cattle, however, is intimately connected with agriculture and can be deemed to be a part thereof. If land is, therefore, used for pasturage, it cannot be said that it is so divorced from agricultural operations that the income derived therefrom cannot be said to be agricultural income. No doubt the assessee deriving income has not spent either labour or money to grow the grass, but labour and money are certainly spent by the agriculturists whose cattle

graze on the land and as the income is derived from them for the right to graze their cattle on the land, according to the observations of their Lordships in 'Maharajah of Darbhanga's case (C)' which was followed in 'Mustafa Ali Khan's case (A)'.

"The exemption is conferred, and conferred indelibly on a particular kind of income and does not depend on the character of the receipient."

(10) The question whether income from pasturage is agricultural income came up for decision before the Calcutta High Court in — 'Emperor v. Probhat Chandra AIR 1924 Cal 668 (F). No doubt the point was conceded yet both the learned Judges, Rankin J., and Page, J., expressed their opinion. Rankin J., said

"The question as regards income from pasturage is not now in dispute, and I agree with the Commissioner and the learned Vakil who appears for the crown in thinking it to be reasonably plain that income from pasturage is 'derived from land which is used for agricultural purposes' .....In the circumstances that such income is derived from fees realised from graziers who graze their cattle in the forest areas and waste lands there is nothing to render inapplicable the definition of 'agricultural income' contained in clause (a)."

Page, J., said:

"The Commissioner has held that income derived from pasturage is not assessable to income-tax on the ground that it is 'agricultural income' within sections 2 and 4 of the Income-tax Act. The Crown does not now dispute the correctness of the Commissioner's decision on this point with which I agree."

(11) The same view was taken by a Full Bench of the Nagpur High Court in — 'Mahendralal v. Commr. of Income-tax, C. P. and Berar Nagpur', AIR 1952 Nag 205 (G) and we are in full agreement with the judgment of the Acting Chief Justice, that if the cattle that graze on the land are cattle commonly used for agricultural purposes, the land is being used for agricultural purposes. Dealing with this question the learned Judge said:

"The cattle eat it, and it is not so much the product of the soil which is the agricultural purpose but the rearing and management of the livestock. I conceive that land which is occupied for a dairy farm in a rulal area would be such land even though nothing is grown on it and only buildings are there. So also would be land leased out to a person who conducts agricultural operations on a large scale, for the housing and tethering of his agricultural livestock.

A distinction has to be drawn between the land and the purpose for which the land is used. The land need not be agricultural land in the sense that it must grow a crop. It can be any land which is used for an agricultural purpose, and the income can be any rent or revenue derived from such land. When the agricultural purpose is the growing of a crop then there must be some element of skill and labour expended upon it, but when the purpose is the management of livestock we are not concerned with the product of the soil. The human agency element must still be there. There must be skill and labour in the management of the stock but not upon the land. The land in such a case is incidental to the main purpose."

If we may say so with respect, we are in full agreement with the observation quoted above.

(12) Reliance has been placed on behalf of the Commissioner of Income-tax on a decision by this Bench in — 'Pratap Singh v. Commr. of Income-tax, U. P. C. P., and Berar and Lucknow', AIR 1952 All 845 (H). In that case the question was not about income from pasturage. The income in that case, as in 'Mustafa Ali Khan's case, (A)' was from trees in a forest of spontaneous growth. It was, however, urged that 'Mustafa Ali Khan's case (A)' did not apply as in that case human skill and labour were being used in watering, pruning and protecting the trees and it was said that that amounted to agricultural operations. We pointed out that there was nothing to show that the assessee had been watering, pruning and protecting the trees. All that appeared that the assessee had done was that some weeding operations had been carried on and we held that mere weeding, care and preservation of the trees of spontaneous growth was not agricultural operation. We followed, as we were bound to follow and quoted the decision of their Lordships in 'Mustafa Ali Khan's case (A)' that

"for income to be agricultural income, the essential element that must exist is that there should be 'some measure of cultivation of the land ' or 'some expenditure of skill and labour upon it'."

These observations must, however, be confined to the facts of that case. Income derived from trees would not normally be agricultural income and to bring it in the category of agricultural income it may be necessary for the assessee to establish that such use was being made of the land and human skill, labour and money were being spent on it so that the income may be deemed to be agricultural income, when normally it would not be so.

(13) In the case before us, the pasturage or land used for grazing of cattle normally used for agricultural purposes, is an agricultural activity and it is not necessary to spend money, human skill and labour to make it agricultural. We may point out that we do not propose to express any opinion on the question whether income from every kind of trees not of spontaneous growth but on the growth of which labour and money have been spent is 'agricultural income', as the point does not arise in this case.

(14) The result, therefore, is that our answer to the question is in the affirmative.

(15) The assessee is entitled to his costs which we assess at Rs. 400/-.

A/V.R.B. Answer accordingly.

A. I. R. 1953 ALL. 678 (Vol. 40, C. N. 330)

V. BHARGAVA AND CHATURVEDI JJ.

A. C. Gilbert and others, Applicants v. Registrar, High Court of Judicature, Allahabad and others, Opposite Parties.

Civil Misc. Writ No. 105 of 1953, D/- 6-5-53.

(a) **Constitution of India, Art. 226 — Issue of writ of mandamus.**

A writ of mandamus only issues to a public authority or a holder of a public office not to act contrary to any provision of a statute in the capacity of such holder of public office. No such writ can issue against a person, whether an individual or a juristic person, who purports to exercise a right by virtue of a claimed title to a certain property. **(Para 4)**

Moreover, essentially the purpose for which a 'mandamus' exists is to ensure that justice is done in all cases where there is a specific legal right, and no specific legal remedy exists. For the enforcement of such rights, it is issued as a rule only in those cases where there is no legal remedy of an equally convenient, beneficial and effectual nature. Hence, no application for the issue of a writ of mandamus is maintainable if adequate relief is obtainable by the applicant by any other process of law. AIR 1951 All 1 (FB); AIR 1951 All 746 (FB), Foll. (Para 5)

(b) Constitution of India, Art. 226 — Issue of writ of prohibition.

A writ of prohibition only issues against a judicial or quasi-judicial tribunal in order to restrain it from exercising jurisdiction not vested in it. (Para 4)

(c) Constitution of India, Art. 226 — Dispute about title — Writ of mandamus — Practice.

Where a dispute exists about the title to a property which requires investigation of facts and recording of evidence, that can only be done appropriately by the Civil Court in a regular suit. The High Court will in such a case refuse to issue any writ of mandamus. For, it ordinarily decides applications for issue of writs under Art. 226 of the Constitution on the basis of affidavits only and, in such cases, the applications have to be decided only on admitted facts. (Para 7)

S. N. Misra, for Applicants; A. K. Kirty and Junior Standing Counsel, for Opposite Parties.

CASES CITED:

(A) ('51) AIR 1951 All 1: 1950 All LJ 767 (FB)
(B) ('51) AIR 1951 All 746: 1951 All LJ 576 (FB)

V. BHARGAVA, J.: This is an application in which the prayer is for issue of writs in the nature of prohibition and mandamus against the opposite parties, the Registrar, High Court of Judicature, Allahabad, the State of Uttar Pradesh and three individuals, viz. Rev. R. W. Matheson, Dr. A. Ralla Ram and Rev. Kennath Masih. The applicants are Christians residing at Allahabad & claiming to be the members of the congregation entitled to worship in St. Andrew's Church, Allahabad. It is alleged that opposite parties nos. 1 and 2 are interfering with the right of the applicants to hold their meetings for prayers in the Church at the instigation of and with the connivance of opposite parties nos. 3, 4 and 5. The applicants claimed that this act of the opposite parties interferes with the fundamental right of the applicants to maintain their religious institution, St. Andrew's Church, Allahabad, for religious purposes. In support of these allegations affidavits were filed on behalf of the applicants and, on service of notice, Rev. R. W. Matheson, opposite party no. 3, filed two counter-affidavits. A rejoinder affidavit has been filed on behalf of the applicants and certain documents have been appended to this rejoinder affidavit.

(2) The facts, as they appear from these various affidavits, are that this church came into existence some time about the middle of the 19th century. According to the applicants, the church was a United Presbyterian Church which was consecrated and started with funds contributed by members of the Presbyterian Congregation and by private persons who, before the construction of the church, used to worship in Katra and Jumna Mission Churches. The church was constructed under the supervision of Rev. James Williamson who was a Minister of the Church of Scotland. According to the opposite parties, the church was constructed by Rev. James Williamson not on behalf of the Presbyterian Congregation of Allahabad but on behalf of the Government though public subscriptions were also raised. After the construction of the church, according to the opposite parties, its management was handed over by the Government to the Church of Scotland which also constructed certain ancillary buildings. The church, all the time, continued to belong to the Government whereas the ancillary buildings belonged to the Church of Scotland. The case of the applicants is that they have all through been saying their prayers in this church without any appreciable break until 11-1-1953; whereas the opposite parties alleged that the use of this church for purposes of prayers was given up about 30 years ago and since then the church has been lying deserted. Their case is that it was only in 1947 that these applicants wanted to get possession of this church to start prayers therein. This was resisted by the authorities of the church of Scotland in India but the applicants did manage to use the church. The opposite parties have denied that the church was consecrated.

(3) Rev. R. W. Matheson, opposite party no. 3, in his affidavit, has stated that there is no law in the Church of Scotland by which an ecclesiastical building cannot be used for secular purposes and that the authorities of the Church of Scotland had renounced their rights in this church in favour of the High Court. The remaining property, which is ancillary to St. Andrew's Church, has been claimed as the property of the Church of Scotland and it has been contended that, in order to acquire it, the Government have to pay proper and adequate compensation to the authorities of the Church of Scotland. It appears that possession over this property is already with the Government and the possession came with the consent of the authorities of the Church of Scotland. From all these facts, it would appear that the real dispute between the parties is as to the rights which the applicants and the authorities of the Church of Scotland had in this church. According to the applicants, the church was consecrated and they had a right to use it in perpetuity for their religious purposes. According to the authorities of the Church of Scotland, the church itself was the property of the Government and the Church of Scotland had merely the right to use it for religious purposes according to the usage of their Church which permitted subsequent use of the properties for secular purposes also. Opposite parties nos. 1 and 2 have purported to exercise rights in the church and the ancillary properties by virtue of the transfer in their favour by the authorities of the Church of Scotland, renouncing their rights in the church. It is only in the case of properties ancillary to the church that a claim has been put forward on behalf of the authorities of the Church of Scotland that they are entitled to proper and adequate compensation.

(4) There has not been any acquisition of the property by the State of Uttar Pradesh or

the Registrar of the High Court by virtue of the Official capacity as the State of Uttar Pradesh or the Registrar of the High Court. The use of the church by the Government by virtue of their purported right of ownership is admitted by the authorities of the Church of Scotland through Rev. James Williamson. It would thus appear that the writ, in this case, is sought against action which is being taken by opposite parties nos. 1 and 2 not by virtue of their public capacity or office as the State of Uttar Pradesh or the Registrar of the High Court but in their capacity of claimants as owners of this property who are entitled to use this property after the renouncement of the rights of the Church of Scotland who was using it until recently. The applicants in their affidavits, have nowhere clearly stated that the act of interfering with the exercise of their rights in the church committed by opposite-parties nos. 1 and 2 was committed by virtue of their public capacity or office. A writ of mandamus only issues to a public authority or a holder of a public office not to act contrary to any provision of a statute in the capacity of such holder of public office. No such writ can issue against a person, whether an individual or a juristic person, who purports to exercise a right by virtue of a claimed title to a certain property. For such acts, there never has been the practice of issuing any kind of writ. In the application, the applicants have mentioned writs of the nature of prohibition and of the nature of mandamus. On the face of it, there can be no question of issuing a writ of prohibition as a writ of prohibition only issues against a judicial or quasi-judicial tribunal in order to restrain it from exercising jurisdiction not vested in it. On the facts given in the various affidavits in this case, there is not even a suggestion that the Registrar of the High Court or the State of Uttar Pradesh is acting in the capacity of a judicial or quasi-judicial tribunal. If any writ at all could issue, it could only be a writ of mandamus and, as we have already said, a writ of mandamus only issues as a direction to a public authority or to a holder of a public office to restrain that public authority or the holder of that office from acting contrary to any provision of a statute in that capacity. In this case, there being no allegation that any act is being committed by any of the opposite parties in the capacity of a public authority or the holder of a public office, no writ of mandamus can at all issue and the application must fail on this preliminary ground.

(5) Besides, there is a second reason why this application cannot be entertained. Even if a writ of mandamus could issue, this does not appear to us to be an appropriate case where this Court should exercise its discretionary powers of issuing a writ of mandamus. In —'Indian Sugar Mills Association v. Secretary to Government, Uttar Pradesh, Labour Department, Lucknow', AIR 1951 All 1 (FB) (A), a Full Bench of this Court laid down :

> "The powers under this Article should be sparingly used and only in those clear cases where the rights of a person have been seriously infringed and he has no other adequate and specific remedy available to him."

These remarks were made by the Full Bench when dealing with an application for issue of the writ of mandamus. The principles, which should govern issue of a writ of mandamus, were further explained by another Full Bench of this Court in —'the Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (FB) (B). In that case, the Full Bench held :

> "The terms of Article 226 of the Constitution are very wide. They enable this Court to issue, in suitable cases, writs, directions or orders including the writs of habeas corpus, certiorari, prohibition, mandamus and quo warranto for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. It strikes us that the fact that the Constituent Assembly has vested this Court with much vast powers imposes a heavy responsibility upon it to use them with circumspection. We must not be understood to suggest that, in a suitable case, this Court will be hesitant in issuing the appropriate writ, order or direction nor must we be understood to lay down that there is any universal or general principle which governs the grant or refusal of the writs, orders or directions referred to above."

Explaining the writ of mandamus, the Full Bench remarked :

> "Shortly put, it is a writ which compels a person to perform a duty the law has imposed upon him and it can be used to order things to be done as well as not to be done. The issue of this writ is entirely discretionary with the Court, and this being so, it is, in our opinion, open to a Court to refuse it in cases where, for example, a Court of equity would, in the exercise of a sound discretion, refuse to lend its protection. Essentially, the purpose for which a 'mandamus' exists is to ensure that justice is done in all cases where there is a specific legal right, and no specific legal remedy exists. For the enforcement of such rights, it is issued as a rule only in those cases where there is no legal remedy of an equally convenient beneficial and effectual nature."

Subsequent to these decisions of this Court, the Court has framed a rule for its guidance in deciding applications for issue of writs under Art. 226 of the Constitution. This rule numbered as Rule 6 of Chapter 22 of the Rules of the Court lays down that

> "no application under this chapter shall be maintainable if adequate relief is obtainable by the applicant by any other process of law."

(6) Applying these principles to the present case, it is clear that this application for issue of a writ should not be allowed. Obviously, the applicants had the alternative remedy of instituting a regular suit in a civil court where they could obtain a declaration of their rights in this church and could ask for an injunction against opposite parties to refrain from interfering with those rights of theirs. Learned counsel for the applicants has not been able to explain to us how this remedy by a suit would not have granted to the applicants adequate relief or how that remedy would not have been equally convenient, beneficial and effectual. Learned counsel's contention was that, if a civil suit had to be filed, the suit would have taken a long time for decision that the applicants were holding services in this church upto the 11th of January, 1953,

and they were stopped from holding further services when they went there on the 18th of January, 1953 and that the applicants could not have got effectual and speedy relief if they had been compelled to resort to a regular suit in a civil court. We have not been able to appreciate the force of this argument. The suit could have been instituted as early as this application was presented in this Court for issue of the writ. In case there was interference with any rights of the applicants against which an immediate remedy was required, the applicants could have got appropriate relief by moving the Court for an injunction, restraining the defendants in the suit from committing or continuing that interference. Whether the applicants would have been able to satisfy the Court that the issue of an interim injunction was justified is an entirely different matter. In fact, there was a prayer for an interim order in this application for issue of writs and that prayer was refused by this Court. In any case, the relief, which the applicants could get by presenting this application to this Court, could have been sought by them in the civil court also and it could have proved equally efficacious and speedy. Consequently, it is clear that this is a case where this Court should not exercise its discretionary power to issue a writ of mandamus.

(7) There is, in fact, an additional reason which makes it undesirable to deal with this matter by exercising the power of issuing a writ under Art. 226 of the Constitution. As the facts set forth above show, there is considerable dispute between the parties as to their title and rights in the property. The applicants claim that the church belongs to the Presbyterian Congregation of Allahabad whereas the opposite parties claim that the church belongs to the Government and that the Church of Scotland had only certain rights in the church. Again, so far as ancillary buildings are concerned, the applicants claim that the congregation is the owner of those buildings also whereas opposite party no. 3 has alleged that the owner of these ancillary buildings is the Church of Scotland. This is a dispute about title which requires investigation of facts and recording of evidence. This can only be done appropriately by the Civil court in a regular suit. This Court ordinarily decides applications for issue of writs under Article 226 of the Constitution on the basis of affidavits only and, in such cases, the applications have to be decided only on admitted facts. On admitted facts, this application would fail. It would not be at all appropriate for this Court to investigate complicated questions of fact by recording evidence when dealing with an application for issue of writs under Article 226 of the Constitution. It would, therefore, appear that the remedy, which has been sought by the applicants, instead of being more convenient and effectual, is really less appropriate than the remedy by way of regular suit.

(8) Considering the circumstances of this case, this application cannot be allowed and is dismissed with costs.

A/V.S.B. Application dismissed.

A. I. R. 1953 ALL. 681 (Vol. 40, C. N. 331)

MOOTHAM AND GURTU JJ.

Matwal Chand, Applicant v. District Magistrate, Budaun and others, Opposite Parties.

Civil Misc. Writ No. 54 of 1953, D/- 5-5-1953.

(a) Constitution of India (1950), Art. 226 — Mandamus.

Sanction to build granted by Executive Officer, subsequently revoked by Municipal Committee — Municipality urging that revocation was justified because the officer had sanctioned plan without applying his mind to the matter, that the plan was not in accordance with bye-laws and that the petitioner had obtained sanction by fraud and misrepresentation — Held, High Court would not examine these matters in the proceeding for mandamus under Art. 226. (Paras 6, 7)

Anno: Civil P. C., App. III; Constn. of India, Art. 226 N. 11.

(b) Municipalities — U. P. Municipalities Act (2 of 1916), S. 180 — "May" — (Constitution of India (1950), Art. 226).

Word "may" in section has reference to sanction and does not control the opening words and hence the words "subject to" cannot be construed as "notwithstanding" — Municipality cannot dispense with bye-laws framed and sanction plans not in accordance with these bye-laws — Sanction so accorded is invalid and when the municipality revokes such sanction a petition for a writ of mandamus to restrain municipality from interfering with the construction cannot succeed: Case law discussed. (Paras 6, 7)

Anno: Civil P. C., App. III, Constn. of India, Art. 226 N. 11.

(c) Constitution of India (1950), Art. 13 — Legislative act of local bodies — High Court would if possible support it and would be slow to declare it invalid. (Para 8)

S. B. Jauhari and Ram Lal Anand, for Applicant; Standing Counsel, for Opposite Parties.

CASES CITED:

(A) (1899) 68 LJQB 560: (1899) 1 QB 444
(B) (1929) 98 LJKB 20: 1929-1 KB 450
(C) ('43) AIR 1943 Oudh 292: 44 Cri LJ 725
(D) ('18) AIR 1918 Bom 139: 42 Bom 629
(E) ('21) AIR 1921 Bom 439: 45 Bom 797
(F) ('02) 7 Cal WN 329: 30 Cal 317
(G) (1898) 67 LJQB 782: (1898) 2 QB 91

MOOTHAM J.: This is a petition under Article 226 of the Constitution wherein the petitioner prays for the issue of a writ of Mandamus to direct the opposite parties to refrain from interfering with the further progress of the building by the petitioner of a temple. The facts upon which reliance is placed by the petitioner can be shortly stated. The petitioner is a Sikh who, together with a number of other members of his community, migrated to India from what is now West Punjab at the time of the partition. These persons were provided with accommodation in a mohalla in the city of Budaun which had been predominantly a Muslim locality. In 1952 the petitioner, in his capacity as Secretary of the "Punjabis Sanatan Dharam Sabha, Budaun" purchased a vacant plot of land for the purpose of constructing a temple, reading room and a 'dharamshala'. On 4-8-1952, he applied under Section 178, U. P. Municipalities Act, 1916, for permission to erect these buildings on the land which he had

purchased, and on 5-9-1952, sanction to do so was given to him by the Executive Officer on behalf of the Municipal Board. Work on the construction of the temple was begun, and it is said that about Rs. 20,000/- has already been spent.

(2) Immediately to the west of the plot of land purchased by the petitioner is a mosque which the petitioner says was, at the time he purchased the land, partly in ruins and not in use. The construction of the temple in close proximity to the mosque became a matter of concern to the other Mohammedan inhabitants of Budaun, and on 13-11-1952, the District Magistrate wrote to the President of the Municipal Board a letter in which he expressed the view that the existence of a temple adjacent to the mosque was not desirable from the point of view of law and order, and enquired whether this aspect of the matter had been considered by the Municipal Board. Presumably as a result of this letter a notice was, on 14-11-1952, served by the Board on the petitioner informing him that the sanction had been revoked. That letter has not been produced before us, but according to the petitioner it was stated therein that the sanction had been granted under a mistake as the proposed construction contravened the provisions of Building Bye-law No. 7 which is in the following terms:

"7. No mosque, temple, church or other sacred or religious building shall be erected (a) unless the frontage is at least 15 feet from the centre of the street on which it abuts and (b) unless it is situated at a distance of not less than 100 yards from any other sacred or religious building of another sect or religion."

(3) On behalf of the Municipal Board a lengthy affidavit has been filed a large part of which is hearsay. The case for the Board is that the Executive Officer of the Board sanctioned the plans submitted by the petitioner without applying his mind to the matter, that the plans submitted by the petitioner were not in accordance with Building Bye-laws Nos. 2 and 3, and that the sanction of the Board had been obtained by fraud and misrepresentation on the part of the petitioner. These however are not matters which we can examine in a petition under Article 226, nor in the view which we take is it necessary to do so.

(4) The petitioner's contention is that the Municipal Board having once sanctioned the plan submitted to it had no power subsequently to revoke that sanction. To this it is answered that as the Board's power to sanction the construction of a building is, under sub-section (1) of Section 180, U. P. Municipalities Act, "subject to the provisions of any by-law" the alleged sanction upon which reliance is placed by the petitioner was in law no sanction at all an argument which the petitioner seeks to refute on the ground that the Municipal Board had power to dispense with the requirements of its own bye-laws and that in this case it had done so.

(5) The relevant portion of Section 180 of the Act is in these terms:

"180. 'Sanction of work by board — (1) Subject to the provisions of any bye-law, the board may either refuse to sanction any work of which notice has been given under Section 178 or may sanction it absolutely or subject to certain written directions that it may think fit to issue."

(6) Mr. A. P. Pandey, who appeared for the petitioner, has argued that the use of word 'may' in this sub-section gives the Municipal Board power to ignore the provisions of its bye-laws if it so chooses. No authority has been cited in support of this proposition which would appear to involve construing the expression 'subject to' as the equivalent of 'notwithstanding'. In our opinion the word 'may' has reference to the power to sanction and does not control the opening words of the sub-section.

(7) The law on the point appears to us to be clear. In — 'Yabbicom v. King', (1899) 1 Q B 444 (A) a local authority empowered to make bye-laws for the regulation of buildings within its jurisdiction purported to sanction plans which were not in conformity to such bye-laws. In a case cited by the local justices Day J. said:

"The district council could not control the law, and bye-laws properly made have the effect of laws; a public body cannot any more than private persons dispense with laws that have to be administered; they have no dispensing power whatever."

This case was cited with approval in — 'William Bean & Sons v. Flaxton Rural Council', (1929) 1 K. B. 450 (B) where at p. 467 Sankey L. J said:

"It is clear on the case of '(1899) 1 Q B 444 (A) referred to in the learned judge's judgment, that a local authority has no power to sanction plans in contravention of its own bye-laws properly made."

Mr. Pandey has drawn our attention to certain cases in which the Court has held that a sanction once accorded cannot be revoked namely — 'Nanak Prasad v. Municipal Board, Rae Bareli', A. I. R. 1943 Oudh 292 (C), — 'Vithal Dhonddev v. Alibag Municipality', A. I. R. 1918 Bom 139 (D), — 'Municipality of Sholapur v. Abdul Wahab', A. I. R. 1921 Bom 489 (E) and — 'Tullaram v. The Corporation of Calcutta', 30 Cal 317 (F). We do not however think that these cases are of any assistance to him, for in none of them was the sanction which had been accorded by the municipal authority held to be in excess of its power; in each case the sanction was a valid sanction which, it was held, could not be revoked in the absence of express statutory provision. Particular reliance was placed by Mr. Pandey on 'Tullaram's case (F)'. In that case the Corporation had granted to the plaintiff sanction to erect a mill on his giving a certain undertaking to the Corporation. The undertaking not having been complied with the Corporation purported to withdraw its sanction. It was held that the sanction having been validly granted under Section 247, Calcutta Municipal Consolidation Act, it became absolute and the Corporation had its remedy in a civil Court for enforcement of that condition. The case does not therefore, in our opinion, touch upon the question which we have to consider here.

(8) Finally it was suggested on behalf of the petitioner that Building Bye-law No. 7 was an unreasonable bye-law and therefore invalid. With this suggestion we are wholly unable to agree. A municipal board has under sub-section (1) of Section 298 of the Act. power to make bye-laws applicable to the whole or part of the municipality consistent with the Act and with any rule, for the purpose of promoting or maintaining the health safety and convenience of the inhabitants of the municipality; and under sub-section (2) of the same section it has the power given to it by item (g) of List I-A to make bye-laws

"prescribing the circumstances in which a mosque, temple, church or other sacred building may or may not be erected, re-erected or altered."

This Court will be slow to declare invalid the legislative act of a local authority. The bye-laws of such a body ought to be supported if possible, or as it has been said they ought to be "benevo-

lently' interpreted and credit ought to be given to those who have to administer them that they will be reasonably administered": — 'Kruse v. Johnson', (1898) 2 Q B 91 (G). Learned counsel for the petitioner conceded that the test was whether the bye-law involved an oppressive interference with the rights of the subject. We are unable to see that this bye-law has any such effect.

(9) Although the petitioner has stated that at the time sanction was given to him the adjoining mosque was not in use and neglected an allegation which is strongly denied by the Municipal Board it has not been argued before us that it did not constitute a religious building within the meaning of Building Bye-law No. 7. It is not in dispute that the erection of the proposed temple would constitute a contravention of this bye-law, (assuming that the Bye-law is not invalid as being unreasonable), and therefore we are of opinion that the sanction which the Executive Officer purported to accord to the petitioner on 5-9-1952, was not a valid sanction in law. In our opinion therefore this petition fails and must be dismissed.

(10) During the course of the hearing we granted the parties at their request an adjournment to explore the possibility of arriving at an agreement satisfactory to both parties. Unfortunately no agreement has been reached. Nevertheless the matter appears to us to be eminently one in which the good sense of both parties should prevail. We understand that the building which is in the course of erection is capable, with only very minor alterations, of being used as a 'Dharamshala', and we understand further that the Municipal Board has no objection to it being constructed and used for this or any other secular purpose. In these circumstances we would like to express the view that now that this case is over, the parties will, in the general interest, be able to arrive at a satisfactory adjustment of their difficulties. In the circumstances we make no order as to costs.

A/M.K.S. Petition dismissed.

A. I. R. 1953 ALL. 683 (Vol. 40, C. N. 332)

MALIK C. J. AND V. BHARGAVA J.

Inderchand Hari Ram, Applicant v. Commr. of Income-tax, Respondent.

Misc. Case No. 232 of 1949, D/- 31-3-1953.

† **Income-tax Act (1922), S. 10 (2) (XV) — Expenditure for business.**

The question whether a business is being carried on or not depends in each case on its own facts. A Company may not obtain or be able to execute a single business contract for months and yet it may be deemed to carry on its business if during the period of lull and inactivity it is kept alive. The mere fact that for some time the assessee is not able to secure a contract or do the work which he set out to do does not disqualify him from pleading that the expenditure that he had incurred was expended for the purpose of his business. In considering, however, whether the expenditure can be deducted as business expenditure, it must be remembered that sub-s. (2) (XV) is a part of S. 10 and at the time of the computation of the income of a business, though that income may be nil, the expense incurred wholly and exclusively for the purpose of that business may be a permissible deduction; but in order to be deductible under this clause the expenditure must be incurred for the purpose of the business which was in existence in the accounting year and the profits of which are under assessment. If during the relevant period there was, in fact, no business either because it was discontinued or for some other reason (such as Sugar Control Order in this case) it had ceased to exist, question of computation of its income after deducting the expenses cannot arise and the expenditure cannot be an admissible deduction against the assessee's other income. (Paras 3, 4)

Anno: Income-tax Act, S. 10 N. 13.

C. S. Saran, for Applicant; J. Swarup, for Respondent.

ORDER: This case involves a very short point but as the facts had not been very clearly set out in the statement of the case we had to wade through various papers to find out what exactly the facts were. The assessee is a registered firm which was acting as managing agents of the Shankar Sugar Mills Ltd., Captaingunj, Gorakhpur. The assessee was also carrying on the business as sole selling agents. To carry on the latter business the assessee had an office at Kanpur. Under the Sugar Control Order, 1942, the Sugar Controller for India issued a Notification No. 32-S.-C. (2) 42, dated 25-4-1942, to the following effect:

"In exercise of the powers conferred by cl. 3 of the Sugar Control Order, 1942, the Sugar Controller for India hereby notifies 30-4-1942, as the date after which no producer shall dispose of, or agree to dispose of, or in pursuance of any agreement entered into on or before that date make delivery of, any sugar except —

(i) to a recognised dealer, or

(ii) to a person specially authorised by the Controller to acquire sugar on behalf of the Central Government or of a Provincial Government."

The Sugar Control Order mentioned above had directed that a producer shall dispose of his sugar only to a recognised dealer or a person specially authorised by the Sugar Controller for India etc. The date was left to be determined by a notification issued by the Controller for India and the notification dated 25-4-1942, fixed 30-4-1942, as the date after which it was not open to the Shankar Sugar Mills Ltd., or any other mill producing sugar to have private selling agents of their own. Though the Sugar Control Order, 1942, was superseded by the Government of India Sugar and Sugar Products Control Order, 1943, Rule 10 of this Order provides that

"Notwithstanding the supersession of the Sugar Control Order, 1942, all notifications, rules, orders, authorizations, quotas, requirements, and directions issued thereunder shall, so far as they are not inconsistent with this Order, be deemed to have been made hereunder, and they shall continue in force until rescinded or modified hereunder."

In spite of these notifications the assessee continued to maintain the selling agency office at Kanpur and incurred expenditure thereon. In the assessment year 1946-47, for which the relevant account period was 1-10-1944, to 30-9-1945, the assessee returned an in-

come of Rs. 78,425/- from the managing agency business. From this the assessee wanted a deduction of Rs. 6,823/- for expenses incurred in maintaining the selling agency office at Kanpur. This expenditure was incurred between the dates 1-10-1944, and 7-3-1945. It appears that the Directors of Shankar Sugar Mills Ltd. on 7-3-1945, passed a resolution that the selling agents will not be given any more brokerage for sale of sugar after 1-10-1944. It also appears, though the fact is not clearly set out in either the statement of the case or the order of the Appellate Tribunal, that though the selling agents could no longer work as selling agents by reason of the Government notification, the company continued to pay them brokerage upto 30-9-1944, on sale of sugar made by the company direct to the dealers nominated by the Government. This they might have done as the selling agents were appointed for a period and the company was not sure what was the correct legal position between the company and the selling agents as a result of the Government notification. We have it, however, in the order of the Appellate Assistant Commissioner that on 7-3-1945, the Directors of the Shankar Sugar Mills Ltd., passed a resolution that from 1-10-1944, they would not pay any brokerage to the selling agents and it was on 7-3-1945, when the resolution was passed that the assessee disbanded the staff at Kanpur and closed the selling agency office.

(2) The question for consideration is whether in these circumstances the assessee is entitled to claim that the expenses incurred in maintaining the selling agency office at Kanpur between 1-10-1944, and 7-3-1945, should be deducted as expenditure laid out or expended wholly and exclusively for the purpose of the selling agency business. The question referred to us is as follows:

"Whether in the circumstances of the case, the expenditure incurred for the maintenance of the staff of the selling agency during the period when it carried on no business was an admissible deduction under S. 10(2) (xv) of the Income-tax Act against the assessee's other income?"

(3) The Tribunal in the appellate order as well as in the statement of the case had laid stress on the fact that during this period 1-10-1944, to 30-9-1945, the assessee did not enter into any agreement and did not receive any sugar from the company, nor did they do any work as selling agents nor were they paid any brokerage. These may be relevant considerations, but the question whether a business is being carried on or not must depend in each case on its own facts. A Company may not obtain or be able to execute a single business contract for months and yet it may be deemed to carry on its business if during the period of lull and inactivity it is kept alive, retains its registered office and holds meetings etc. It is not necessary that a business to be in existence should have work all the time. There may be long intervals of inactivity and a concern may still be a going concern though it may, for some time, be quiet and dormant. The mere fact that a businessman has not been able to obtain a contract and the business has for some time been, in that sense, dormant would not mean that it has ceased to exist if the assessee continues to maintain an establishment and incur expenses in the expectation that work would come and the business will be successful. How long he shall remain in hope and in what manner he must carry on his work to gain success is primarily his own concern. The mere fact that for some time he is not able to secure a contract or do the work which he set out to do should not disqualify him from pleading that the expenditure that he had incurred was expended for the purpose of his business. The question as to what the business 'carried on' by him means has not been mooted at the bar and it is not necessary for us, therefore, to discuss the question. The question with which we are concerned in this case is whether the expenses incurred were in connection with the business of selling agency.

(4) In considering, however, whether the expenditure can be deducted as business expenditure one must remember that sub-s. (2) (xv) is a part of S. 10 and at the time of the computation of the income of a business, though that income may be nil, the expenses incurred wholly and exclusively for the purpose of that business may be a permissible deduction, but in order to be deductible under this clause the expenditure must be incurred for the purpose of the business which was in existence in the accounting year and the profits of which are under assessment. If during the relevant period there was, in fact, no business either because it was discontinued or for some other reason it had ceased to exist, the question of computation if its income after deducting the expenses cannot arise. In the case before us, by reason of the Sugar Control Order & the notification issued thereunder, the assessee could not do any selling agency business in sugar. By merely maintaining an office at Kanpur it cannot be said that he was carrying on business the expenses of which he was entitled to deduct. There being, therefore, no business, there could be no question of computation of its income and no question of any deduction of expenses incurred wholly or exclusively for such business arises.

(5) In this view of the matter, our answer to the question must be in the negative.

(6) The department is entitled to its costs which we assess at Rs. 400/-.

B/H.G.P. Reference answered.

A. I. R. 1953 ALL. 684 (Vol. 40, C. N. 333)

DESAI J.

B. Gajadhar Singh, Applicant v. State through Sadho, Opposite Party.

Criminal Revn. No. 711 of 1953, D/- 21-4-1953.

Criminal P. C. (1898), Ss. 145, 522 — Evicted in due course of law.

Ordinarily, a person against whom an order is passed under S. 145(6) will go to a civil Court for getting the other party evicted; but if he can get him evicted by a Court of another jurisdiction, such as of a criminal Court in proceedings under S. 447, Penal Code, he can certainly do so. When the criminal Court has under S. 522 ordered the opposite party to be put in possession of the property in dispute, it amounts to eviction of the applicant and as that order has been passed in due course of law, that amounts to the

applicant's eviction in due course of law. 29 Cal 187 (PC), Rel. on; Case law Ref. (Para 7)

Anno: Cr. P. C., S. 145 N. 53; S. 522 N. 1.

Rajeshwari Prasad, for Applicant.

CASES CITED:
(A) ('39) AIR 1939 Pat 611: 41 Cri LJ 191
(B) ('36) AIR 1936 Cal 659: 38 Cri LJ 79
(C) ('43) AIR 1943 Oudh 231: 206 Ind Cas 179
(D) ('36) AIR 1936 All 322: 37 Cri LJ 694
(E) ('02) 29 Ind App 24: 29 Cal 187 (PC)

ORDER: This is an application in revision against an order of the Sessions Judge of Banaras rejecting the applicant's application for being restored to possession of property attached in proceedings under S. 145, Cr. P. C.

(2) The applicant started proceedings under S. 145, Cr. P. C. against the opposite party some time in February, 1945, in respect of the property in dispute. That property was attached during the pendency of those proceedings.

(3) The Magistrate holding the proceedings passed an order under S. 145(6), Cr. P. C. on 18-5-1945 holding that the applicant was in possession of the property on the date on which the preliminary order under S. 145(1) had been passed, (its date is not known) and declaring him to be entitled to remain in possession until evicted therefrom in due course of law. The exact order passed by the Magistrate is not before me, but it should have been in the form mentioned by me. The Magistrate also ordered that the property should be released from attachment in the applicant's favour.

(4) It appears that immediately after the passing of this order, the opposite party filed a case under S. 447, I. P. C. against the applicant. He must have alleged in the case that he had been in possession of the property in dispute and had been dispossessed by the applicant on a certain date; that date is not known.

(5) The Court trying the complaint convicted the applicant under S. 447, I. P. C. on 1-2-1946.

(6) It appears that, while the case was pending, the release in favour of the applicant of the property attached in the proceedings under S. 145, Cr. P. C. had been stayed and the applicant had not been restored to possession. On conviction of the applicant, the opposite party obtained an order under S. 522, Cr. P. C. on 14-6-1946 from the Court convicting the applicant; under that order the opposite party was to be restored to possession over the property in dispute from which he had been proved to have been dispossessed by the applicant through the commission of the offence under S. 447, I. P. C. The applicant did not challenge that order passed under S. 522, Cr. P. C. He made an application before the Magistrate who had passed the order under S. 145(6) that he should be restored to possession over the property in pursuance of the order. The learned Magistrate dismissed his application on the ground that the opposite party had acquired an order in his favour under S. 522, Cr. P. C. The applicant challenges that order in revision.

(7) The order under S. 145(6) was, or should have been, that the applicant was entitled to possession of the property in dispute "until evicted therefrom in due course of law." After that order, an order under S. 522, Cr. P. C. was passed by a Court putting the opposite party into possession of the property. Both the orders cannot be executed, and one has to give way to the other. The question is which should give way. Obviously the earlier order passed under S. 145(6), Cr. P. C. should give way, because it expressly purports to be subject to an order of eviction in due course of law. Under that order the applicant was entitled to be in possession not permanently but until he was evicted in due course of law. There is no such condition in the order of possession passed under S. 522, Cr. P. C. It is an order putting the opposite party into possession absolutely and regardless of everything. There is no justification for saying that eviction of the applicant under that order is not eviction "in due course of law." The real question is whether eviction under S. 522, Cr. P. C. is eviction in due course of law within the meaning of S. 145(6), Cr. P. C. or not. Mr. Rajeshwari Prasad could not cite any authority laying down that it is not. He relied on — 'Ambika Thakur v. Emperor', AIR 1939 Pat 611 (A); — 'Elimuddin Sarkar v. Umed Ali Bepari', AIR 1936 Cal 659 (B); — 'Debi Dayal v. Annu Singh', AIR 1943 Oudh 231 (C) and — 'Kunj Behari Das v. Emperor', AIR 1936 All 322 (D) but none of them is of any assistance in the disposal of the dispute before me. In none of them did the words "evicted therefrom in due course of law" come up for interpretation. Not only did none of them decide that eviction in execution of an order under S. 522, Cr. P. C. is not eviction in due course of law but also none of them decided that eviction in pursuance of a decree passed by a civil Court is the only eviction in due course of law. None of them purported to decide how a person can be evicted in due course of law. Undoubtedly in some of them it was stated that the remedy of a party aggrieved by an order under S. 145(6), Cr. P. C. is to go to a civil Court, but that does not mean that that is the only remedy and that eviction in execution of a decree passed by a civil Court is the only eviction in due course of law.

Ordinarily, a person against whom an order is passed under S. 145(6) will go to a civil Court for getting the other party evicted; but if he can get him evicted by a Court of another jurisdiction, he can certainly do so. When the Court has ordered the opposite party to be put in possession of the property in dispute, it amounts to eviction of the applicant and as that order has been passed in due course of law, that amounts to the applicant's eviction in due course of law. Therefore, the applicant had a right to be entitled to remain in possession until the restoration of the opposite party to possession in execution of the order under S. 522, Cr. P. C. In — 'Dinomoni v. Brajo Mohini', 29 Cal 187 (E), their Lordships of the Judicial Committee observed at p. 199 that although an order under S. 145(6) confers no title, the fact of possession remains, and that the person in possession can only be evicted by a person who can prove a better right to the possession himself. A better right to the possession can be proved not only in a civil Court but also in a criminal Court in proper proceedings. Here the opposite party proved a better right to the possession in a criminal Court by proving that he had been in possession previously and had been wrongly and forcibly dispossessed by the applicant. Therefore, his right to the posses-

sion was better than that acquired by the applicant through the commission of the offence under S. 447, I. P. C. When the opposite party proved a better right to the possession, he could evict the applicant and he could do so under S. 522, Cr. P. C.

(8) The order passed by the Court below is correct and the application is dismissed.

C/H.G.P. Application dismissed.

A. I. R. 1953 ALL. 686 (Vol. 40, C. N. 334)

MALIK C. J. AND V. BHARGAVA J.

Hazari Lal, Defendant-Appellant v. Kanhaiya Lal, Plaintiff-Respondent.

Letters Patent Appeal No. 13 of 1951, D/- 13-3-1953, against judgment of this Court, in S. A. No. 1397 of 1949, D/- 4-12-1950.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3, 14 and 15 — "Commencement of Act" — Act extended to area — (U. P. General Clauses Act (1 of 1904), Ss. 4(10), 5(2)) — (General Clauses Act (1897), Ss. 5, 3 (12)).

The words "commencement of the Act" in Ss. 14 and 15 with reference to a particular area to which the Act was extended by notification must be interpreted to mean the date on which the Act became applicable to that area and not 1st Oct. 1940. Case law Ref. (Para 13)
Anno: General Clauses Act, S. 5 N. 1.

M. L. Chaturvedi, for Appellant; Brij Lal Gupta, for Respondent.

CASES CITED:

(A) ('52) AIR 1952 All 584: 1952 All L J 3
(B) ('50) AIR 1950 All 396: 1950 All LJ 642
(C) ('51) 1951 All WR (HC) 167: 1951 All LJ 256
(D) ('39) AIR 1939 FC 74: 1939 FCR 193
(E) ('41) AIR 1941 FC 5: 1940 FCR 84
(F) ('50) AIR 1950 All 504: 1950 All LJ 345
(G) ('52) AIR 1952 All 654: 1951 All LJ 736
(H) ('53) AIR 1953 All 322: 1952 All LJ 102
(I) ('51) AIR 1951 All 568: 1951 All WR (HC) 151
(J) ('50) AIR 1950 All 666: 1950 All LJ 817
(K) ('52) AIR 1952 All 500: 1952 All LJ 157
(L) (1882) 52 LJQB 44: 9 QBD 672

MALIK C. J.: This is an appeal against the judgment of a learned single Judge of this Court and the point raised relates to the interpretation of the provisions of the U. P. Control of Rent and Eviction Act, 1947. This Act received the assent of the Governor General on 28-2-1947, under S. 76 of the Government of India Act, 1935, and was published in the United Provinces Government Gazette, Extraordinary, on the 1st of March, 1947. Section 1 (3) of this Act provides that the Act shall be deemed to have come into force on 1-10-1946.

(2) On 10-5-1947, a suit was filed for ejectment of the defendant from a shop situate in the town of Raya. It is the common case of the parties that at the time when the suit was filed the U. P. Control of Rent and Eviction Act had not been extended, by notification of the State Government, to apply to the town of Raya. In view of that admission, it is not necessary to deal with the various amendments made to the original sub-section (2) of S. 1 of the Act at length but we might quote the sub-section as it originally stood and indicate how it was later amended. The original sub-section (2) to S. 1 of the Act was as follows:

" 1(2): It extends to the whole of the United Provinces and applies to the municipal areas, cantonment areas and to every notified area contiguous to such municipal area situated in these provinces and to accommodation situated within one mile of the boundaries of any such municipal area, cantonment area, and notified area, and to such other areas as the Provincial Government may, from time to time, notify in the official Gazette in this behalf;....."

This sub-section was amended by the Amending Act 44 of 1948 and it was divided into two sub-sections, sub-section (2) and sub-section (2-A). This was later again amended by a number of ordinances and notifications and the latest amendment is by Act No. 17 of 1951. The two sub-sections now read as follows:

"(2) It shall extend to the whole of the United Provinces.

(2-A) It shall apply to every Municipality, Notified Area contiguous to a Municipal or Cantonment Area and to areas situate within two miles of such Municipality or notified area:

Provided that the State Government may by notification in the official Gazette declare that it shall cease to apply to any area or shall apply in whole or in part to any other area, as may be specified."

(3) The suit was contested on various grounds and one of the grounds, we are informed by learned counsel, was that the notice for ejectment was defective.

(4) On 21-7-1948, the suit was dismissed as the notice for ejectment served on the defendant was found to be not in accordance with law.

(5) An appeal was filed before the learned Civil Judge and, while that appeal was still pending, the State Government by a notification in the official Gazette extended the operation of the Act to the town of Raya on 24-9-1949. On 27-9-1949, the lower appellate court held that the notice was valid, allowed the appeal and directed ejectment of the defendant.

(6) The defendant came up in second appeal before this Court and it was urged before the learned single Judge that, after the Act had been made applicable to the town of Raya, the defendant could not be rejected, except in accordance with the provisions of S. 3 of the Act. This argument did not find favour with the learned single Judge and he dismissed the appeal but allowed leave to file an appeal under the Letters Patent. The learned single Judge was of opinion that S. 15 of the U. P. Control of Rent and Eviction Act did not apply to this case as the suit was not filed before "the commencement of the Act."

(7) On the question as to the applicability of S. 15, U. P. Control of Rent and Eviction Act there has been considerable difference of opinion in this Court. Section 15 is as follows:

"In all suits for eviction of a tenant from any accommodation pending on the date of the commencement of this Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in S. 3."

(8) The argument for the plaintiff is that S. 15 must be confined to suits pending on 1-10-1946, and, it will not apply to a suit which may have been filed after 1-10-1946, with respect to an area to which the Act was extended by a

notification of the State Government after the institution of the suit.

(9) The scheme of the Act has been carefully considered in several division bench rulings of this Court and it is not necessary for us to cover the same ground. It was pointed out in those cases that Ss. 14 and 15 of the Act should be read together and between the two sections it was intended that all cases of ejectment of tenants should be covered. Section 14 deals with cases where a decree was passed before the date of commencement of the Act but the decree was being executed after the date of commencement. In such cases, even though the decree had become final, S. 14 directs that the decree shall not be executed and a tenant shall not be ejected except on any of the grounds mentioned in S. 3 of the Act. For suits instituted after the Act came into force no express provision was necessary as the Act would apply to such suits and the cases will have to be decided in accordance with the provisions of the Act, and, as regards suits pending on the date when the Act came into force, S. 15 expressly provided that to them the Act will apply and they will have to be decided in accordance with provisions of S. 3. So far, therefore as areas to which the Act applied when it was passed there is no difficulty and this Court has held in at least 3 division bench rulings that the word 'suit' in S. 15, U.P. Control of Rent and Eviction Act, includes not only the suit but also appeals arising therefrom. The first case on the point decided by a bench of this Court is — 'Raj Narain v. Sita Ram', AIR 1952 All 584 (A). This case was decided on 3-11-1949. It was observed in that case that —

> "Confining ourselves to the language of S. 15 alone it would appear that the Act was intended to have a retrospective effect and to apply to all suits for eviction of a tenant pending on the date of the commencement of the Act. It further appears to make it clear that no decree for eviction shall be passed against a tenant except on one or more of the grounds mentioned in S. 3."

It was then held that the word 'suit' in S. 15 was intended to apply not only to suits pending in the trial court but also to a suit in its later stages right up to the court of final appeal. It is not necessary to repeat the reasons given for these findings as they are already mentioned in the decision which has now been reported. Independently of this decision, as the case had not been till then reported, another bench of this Court took the same view in — 'Niranjan Lal v. Mt. Ram Kali Devi', AIR 1950 All 396 (B). After having carefully examined the provisions of the Act the bench held that:

> "the Act does not anywhere provide specifically for appeals and we consider that the 'suit' mentioned in S. 15 includes a suit while it is before the Court of first instance and also while it is before the appellate Court. An appeal is but a continuation of a suit. The learned counsel for the appellant is, therefore, right in his contention, that the decree for the eviction of the appellant should not be passed unless it is shown that the case is covered by any one or more of the grounds mentioned in S. 3 of the Act."

The same point arose before another bench in — 'Har Sarup v. Lokeshwar Prasad', 1951 All LJ 256 (C). The arguments were again considered in this case and it was observed that the Federal Court in — 'Shyamakant Lal v. Rambhajan Singh', AIR 1939 FC 74 (D) and — 'Lachmeshwar Prasad v. Keshwar Lal', AIR 1941 FC 5 (E) had held that

> "an appeal was merely a continuation of a suit and Courts of Appeal in India were not merely courts of error and the hearing of an appeal was in the nature of a re-hearing of the suit so that the Courts of appeal must pass decrees in accordance with law that exists on the day when the case comes up for hearing."

It was, therefore, held that S. 15 not only applied to a case where a suit was pending in the first court but also to case where a suit was pending in an appeal. So far, therefore, as this point is concerned, the decisions of this Court appear to be all one way and, even in cases where learned Judges have taken the view that the Act does not apply to a case which had been instituted after the 1-10-1946, relating to an area to which the notification was made after the institution of the suit, the proposition of law that the word 'suit' in S. 15 includes an appeal has not been doubted.

(9A) The whole difficulty has arisen by reason of the words "suits ..... pending on the date of the commencement of this Act" in S. 15 of the Act. It is urged that the date of the commencement of the Act must be deemed to be the date fixed in accordance with the provisions of S. 1(3) of the Act and even to areas to which the Act was later made applicable the date of commencement of the Act is the date fixed in the Act itself i.e., 1-10-1946. Reliance is placed on the United Provinces General Clauses Act, 1904, where the word "commencement" has been defined in S. 4(10) as follows:

> "Commencement" used with reference to an Act, shall mean the day on which the Act comes into force."

This definition, however, must be read subject to the opening words of the section that "In all United Provinces Acts, unless there is anything repugnant in the subject or context" the definition in the General Clauses Act were to apply. Reliance is also placed on S. 5(2) of this Act which is as follows:

> "Unless the contrary is expressed, a United Provinces Act shall be construed as coming into operation immediately on the expiration of the day preceding its commencement."

Sub-section (2) of S. 5 is not helpful as in the case before us a contrary intention was expressed in the Act itself. The Act was passed by the legislature in 1947, it received the assent of the Governor General on 28-2-1947, and was published in the official Gazette on 1-3-1947, but it was made retrospective and was to operate from 1-10-1946, at any rate with respect to the area to which the Act was applicable without any notification of the United Provinces Government.

The whole point for decision, therefore, is whether the words "the date of the commencement of this Act" in S. 15 mean the original date when the Act came into force or the date when the Act was made applicable to a particular area. The learned Judges, as we have already said, are divided in opinion. In — 'Rup Lal v. Ram Swarup', AIR 1950 All 504 (F), Seth J. held that the date of the commencement of the Act was 1-10-1946, and even to areas to which it might have been extended by a later notification the original date fixed in S. 1(3) must be deemed to be the date of the commencement of the Act. The same view

was expressed by him in another case in — 'Ram Chand v. Ram Swarup', AIR 1952 All 654 (G). The same view was also taken by Mushtaq Ahmad J. in — 'Shyam Sundar Lal v. Shagun', AIR 1953 All 322 (H). P. L. Bhargava J. also took the same view in — 'Ganga Prasad v. Mt. Saroop Dei', AIR 1951 All 568 (I) and held that S. 15 did not apply to a case where a suit was instituted after the 1-10-1946, but the Act was made applicable to that area during the pendency of the suit. The only other single Judge decision to which reference has been made is not directly in point and that is the case of — 'Abhilakh Ram v. Uma Shankar', AIR 1950 All 666 (J). The point was, however, carefully considered by a division bench of this Court in—'Kedar Nath v. Kishan Lal', AIR 1952 All 500 (K). Mr. Bind Basni Prasad J. after having carefully considered the previous authorities on the point came to the conclusion that to areas to which the Act was subsequently made applicable the date of commencement of the Act within the meaning of S. 15 must be the date when the Act was so extended by notification. Learned counsel has urged that the decision of the bench in — 'Kedar Nath's case (K)', should be reconsidered by a larger bench. We have, therefore, heard him at some length and we are not satisfied that there is any reason to differ from the conclusion arrived at in — 'Kedar Nath's case (K)'.

(10) As we have already said, the Act was intended for the benefit of tenants in view of the shortage of housing accommodation in the State. The Act was made applicable to municipal and other areas where there was the greatest pressure and it was later extended to every area where the State Government thought it necessary to give protection to the tenants by reason of lack of accommodation and competition for housing accommodation. The Act must be interpreted so as to carry out the intention of the legislature and to give protection to tenants for whose ejectment decrees had either already been passed or proceedings for whose ejectment were pending either in the trial court or a court of appeal. It was pointed out in — 'Raj Narain v. Sita Ram (A)', quoted above, that in — 'Quilter v. Mapleson', (1882) 9 QBD 672 (L) though there was nothing in the Act to show that it was retrospective the Court of Appeal held that the Act was passed with the intention of giving relief against forfeiture to a lessee and the Act must be so interpreted as to give that relief even in proceedings which were pending before the court on the day when the Act was passed.

(11) In order to achieve the object of protecting tenants from ejectments by landlords, except under special circumstances mentioned in S. 3 of the Act, provision was made for different contingencies that could arise. Section 3 obviously governs all suits which were or may be instituted after the Act became applicable. Where decrees had already been passed the right of execution and claim ejectment of the tenant was limited by S. 14. Section 15 was enacted in order to apply the same principles to suits which were pending. Obviously, the three sections are complementary to one another and are designed to cover all cases of tenants who had not yet been physically ejected from the accommodation which they were occupying as tenants. This object of granting protection to all the tenants would only be achieved if it be held that Ss. 14 and 15 would govern all decrees already passed and all suits already instituted upto the date on which S. 3 came into effect so as to govern all suits instituted thereafter. Obviously, therefore, the date of commencement of the Act mentioned in Ss. 14 and 15 must be the date on which S. 3 of the Act came into operation so as to govern suits instituted thereafter. The date of the commencement of the Act for purposes of Ss. 14 and 15 must, therefore, be the date on which the Act became applicable.

In the case of every Municipality, Cantonment areas, every Notified area contiguous to a Municipal or Cantonment area, and every area situate within two miles of such Municipal or Notified areas, the Act became applicable as soon as the Act was published by virtue of S. 1(2A) of the Act. Under sub-s. (3) of S. 1 the Act was deemed to have come into force on 1-10-1946 but even in those areas the Act became applicable only on 1-3-1947 when the Act was published in the U. P. Gazette Extraordinary of that date. Suits instituted on or after 1-3-1947 would, in such areas, be governed by S. 3 of the Act and the purpose of the Act can only be served if Ss. 14 and 15 are so interpreted that all decrees passed before 1-3-1947, are governed by Ss. 14 and 15. In respect of the other areas to which the Act was made applicable by a notification issued by the State Government subsequently the same purpose would be achieved if a similar interpretation is put, so that suits instituted after the date on which the Act was applied to those areas would come within the purview of S. 3 of the Act whereas all decrees passed upto that date and all suits pending on that date within the purview of Ss. 14 and 15.

(12) On the interpretation sought to be put on the words "Commencement of the Act" in Ss. 14 and 15 by learned counsel for the plaintiff, S. 3 would only govern suits instituted on or after the date on which the Act became applicable whereas Ss. 14 and 15 would govern decrees passed before 1-10-1946 or suits pending on that day. The result would be that decrees passed between 1-10-1946 and 1-3-1947, in the case of areas to which the Act was made applicable as soon as published under sub-s. (2A) of S. 1, and suits instituted after 1-10-1946, and before 1-3-1947, arising out of the said areas would not be governed by the provisions of Ss. 14 and 15. Similarly, in other areas to which the Act might be applied later by a subsequent notification, decrees passed between 1-10-1946, and the date on which the Act was applied as well as suits instituted between these two dates would not be governed by these sections. Of course, S. 3 can, in no case, govern these decrees and suits. There might be cases where a suit might have been instituted after 1-10-1946, and decided on some day prior to the date on which the Act became applicable to the area from which that suit arose and such decrees would also not be governed by the provisions of the Act at all. It is clear that the legislature could never have intended to create discrimination between various tenants and to grant no protection at all to those tenants against whom suits were instituted after 1-10-1946, and which were either decreed before or were still pending on the date on which the Act was applied to the area from which the suit arose. The interpretation that would create such an anomalous position must, therefore, clearly be ruled out.

(13) The words "commencement of the Act" in Ss. 14 and 15 with reference to a particular area must be interpreted to mean the date on which the Act became applic ble to that area. This is the only interpretation that would effectively serve the purpose of the Act. We, therefore, agree with the decision in — 'Kedar Nath's case (K)', and hold that the words "the date of the commencement of the Act" in S. 15 of the Act must mean the date when the Act was made applicable to an area.

(14) We, therefore, allow the appeal, set aside the decrees passed by the lower courts and send the case back to the trial court through the lower appellate court to re-admit it to its original number and to give the parties an opportunity to amend their pleadings in the light of the provisions of S. 3 of the Act. The parties will have the right to give fresh evidence.

(15) Cost will abide the result.

B/R.G.D. Appeal allowed.

A. I. R. 1953 ALL. 689 (Vol. 40, C. N. 335)

SAPRU AND AGARWALA JJ.

Union of India, Applicant v. Firm Vishudh Ghee Vyopar Mandal, Respondent.

Civil Revn. No. 1280 of 1952, D/- 2-4-1953.

(a) Civil P. C. (1908), S. 115 — Interlocutory order.

It cannot be said that an interlocutory order can never amount to a case decided. However, when the hearing of a case on the merits is pending in the Court below and an interlocutory order is passed in connection therewith which does not decide any right of the parties and does not prevent them from obtaining relief in respect of any part of their claim or from taking any plea in defence, it can hardly be said that any case has been decided by the Court below. 14 Cal 768, Disting. (Para 5)

Anno: C. P. C., S. 115 N. 5.

(b) Evidence Act (1872), S. 163 — Documents called and produced.

By virtue of S. 4, Delhi Special Police Establishment Act, 1946, the superintendence of the Delhi Special Police Establishment vests in the Central Government. Hence it is a department of the Union of India, and under its control. Where, therefore, in a suit by the plaintiff against the Union of India, on an application made by the plaintiff, the Court issues notice in consequence of which documents are produced by the Superintendent of the Special Police Establishment, then the documents being in possession of the Superintendent must be said to be under the Control of the defendant. Thus, the documents having been produced in compliance with the call of the plaintiff as ordered by the Court and the documents when inspected by the plaintiff are bound to be given as evidence when required to do so by the defendant. (Para 6)

Even if the documents are assumed to have been produced by a witness namely, the Superintendent and not by the defendant, they are the plaintiff's documents as they are filed in Court at his instance; and the defendant can admit such of them as he likes and thereupon ask the Court to treat them as evidence in the case. (Para 6)

Anno: Evi. Act, S. 163 N. 1.

(c) Evidence Act (1872), S. 163 — Notice to produce documents — (Civil P. C. (1908), O. 11, R. 16 and O. 12, R. 8).

Order 12, Rule 8, Civil P. C. refers to a notice to produce documents "at the time of the hearing" so that if they are not produced, the party calling for them may give secondary evidence of the same. Another kind of notice to produce documents is the one mentioned in O. 11. It is a notice to produce documents 'before' the hearing of the case so that they may be inspected by the party calling for them. Section 163, Evidence Act, mentions inspection of the documents of which notice has been given by a party to produce. Clearly notice to produce documents mentioned in S. 163, Evidence Act, refers to a notice to produce documents as mentioned in O. 11, Civil P. C. (Para 6)

(d) Evidence Act (1872), S. 163 — Notice.

Notice contemplated by S. 163 may be given by a party privately to the other party concerned and, if the other party does not produce the documents, an order of the Court for the production of the documents for inspection may also be made. The mere fact that the agency which has ordered the production of the documents is the Court is immaterial. (Para 6)

Anno: Evi. Act, S. 163 N. 1.

S. S. Dhavan, for Applicant; Hari Sarup and Jagdish Sarup, for Respondent.

CASE CITED:

(A) ('87) 14 Cal 768

AGARWALA J.: This is an application in revision under S. 115, Civil P. C. and also Art. 227 of the Constitution. It arises in the following circumstances:

(2) The opposite party, Firm Vishudh Ghee Vyopar Mandal, filed a suit in the Court of the Civil Judge, Agra, for recovery of a sum of Rs. 4,90,423/6/- as the price of ghee supplied to the applicant, the Union of India, for damages for breach of a contract and for refund of the security deposited by it with the Union of India.

(3) The suit was resisted by the applicant the Union of India, on the ground that the opposite party had supplied adulterated ghee and the adulteration was brought about by fraud practised by the opposite party on the Union of India and the opposite party was not entitled to the money claimed.

(4) It appears that prior to the suit there was some investigation by the Special Police Establishment created under the Delhi Special Police Establishment Act, 1946 (Act 25 of 1946) into the matter. The Special Police took away certain correspondence that had passed between the parties 'inter se' or between them and their agents and certain documents from the possession of the opposite party. In the suit filed by the opposite party an application was made by it, asking the Court to direct the applicant, Union of India, to produce the documents which the Special Police had seized from its possession. That application was made on 31-8-1951. It was stated therein that the Special Police

Establishment had taken away most of the documentary evidence upon which the plaintiff could and should rely and they were still in their possession, that with a view to find which particular documents the plaintiff should produce in the case it was necessary to inspect all those documents which were in the possession of the Special Police Establishment, that the Special Police Establishment was not prepared to permit inspection of the documents aforesaid to the plaintiff and that an order of the Court was necessary to secure an inspection of the documents above-mentioned. To this application a reply was given on behalf of the Union of India to the effect that the inspection prayed for by the plaintiff could not be ordered as the documents were in the possession of the Special Police Establishment and not of the Union of India and that the plaintiff could summon the documents by the usual procedure provided for in the Code of Civil Procedure. The position that the Union of India took up at that stage was that the Special Police Establishment was not under its control. The plaintiff, however, again insisted that the Special Police Establishment was under the control of the Union Government and that an order for production of the documents should be made. At a later stage, however, the plaintiff made an application that the documents in the possession of the Special Police Establishment may be summoned in the ordinary course and that, after inspection, it would tender such documents as its evidence as it considered necessary. Summonses were issued to the Inspector General and the Superintendent of the Special Police Establishment on 17-12-1951, directing them to produce the documents concerned on 2-1-1952. On that date, however, the documents were not produced in Court upon which the plaintiff applied that a commissioner might be appointed to bring the documents before the Court or in the alternative the Court might be pleased to order that, if the papers were not produced as per order of the Court, the defendant would be penalised. It added that the defendant was in default by not having complied with the order. The Court thereupon passed an order directing that such documents be produced in Court within three weeks. In compliance with the order of the Court the Superintendent of the Special Police Establishment sent the papers to Court through one of his officers on or about 20-1-1952. The papers having been filed in Court, the plaintiff inspected them in the usual manner as records in the custody of a Court are inspected but did not tender all the documents inspected by it as its evidence. It wanted to tender some of them only in evidence. Thereupon, the defendant made out a list of other documents out of the documents inspected by the plaintiff and filed it in Court and called upon the plaintiff to give them in evidence under S. 163, Evidence Act. The plaintiff refused to do so on the ground that the said documents had not been summoned from the defendant, but were summoned from a witness and that therefore S. 163, Evidence Act did not apply. The learned Civil Judge considered that as the documents had been produced by a third party and not by the defendant, S. 163, Evidence Act could not apply and the plaintiff could not be compelled to give them as its evidence in the case or to admit the documents filed by the defendant. The Court added that the documents had not been tendered by the defendant with proper lists. "As soon as they are filed with proper list, the plaintiff shall admit or deny them as they are bound to do." It is against this order that the defendant has come up in revision to this Court.

(5) A preliminary objection to the hearing of the application has been raised by Mr. Jagdish Sarup on behalf of the plaintiff opposite party. He has argued that the order of the Court below is not a case decided within the meaning of S. 115, Civil P. C. as the case in the Court below is still pending and that no revision lies to this Court. On behalf of the Union of India our attention has been invited to a case of the Calcutta High Court, namely, — 'Dhapi v. Ram Pershad', 14 Cal 768 (A). The facts of that case were, however, different from those of the present case and we do not think that the decision in that case governs the present case. The order of the Court below was passed in a matter which was directly connected with the hearing of the case on the merits. While it cannot be said that an interlocutory order can never amount to a case decided, we think that when the hearing of a case on the merits is pending in the Court below and an interlocutory order is passed in connection therewith which does not decide any right of the parties and does not prevent them from obtaining relief in respect of any part of their claim or from taking any plea in defence, it can hardly be said that any case had been decided by the Court below. We think that the preliminary objection raised by Mr. Jagdish Sarup should prevail. Nor do we think that Art. 227 of the Constitution confers on us jurisdiction to interfere in a matter of this kind.

(6) Though we are allowing the preliminary objection to prevail and are clearly of the opinion that the order impugned is not revisable, we think it desirable, in view of the importance of the case, to state that, in our opinion, the Court below fell into an error in thinking that the documents could not be taken in evidence under S. 163, Evidence Act. We shall now proceed to state our reasons that the view taken by the learned Civil Judge in this matter is a mistaken one. The Special Police Establishment was created by Act 25 of 1946. Section 4 of that Act provides that the superintendence of the Delhi Special Police Establishment shall vest in the Central Government. It was, therefore, a department of the Union of India and under its control. As such the documents in the possession of the Superintendent of the Special Police Establishment were also under the control of the Union of India. Indeed, this was the position that the plaintiff opposite-party had adopted all along in the case and at one stage of the case the Court below itself had held to the same effect. All the requirements of S. 163, Evidence Act were fulfilled in the case. Notice to produce the documents had been given by means of an application to the Court. The documents had been produced in compliance with the call of the plaintiff as ordered by the Court and the documents had been inspected by the plaintiff. The plaintiff was, therefore, bound to give them as its evidence when required to do so by the defendant. It was urged by Mr. Jagdish Swarup that the notice to produce mentioned in S. 163 is a private notice without the agency of the Court. He pointed out that the notice to produce as mentioned in S. 163 of the Evidence Act is the one which is men-

tioned in O. 12, R. 8, Civil P. C. This contention is incorrect. That rule refers to a notice to produce documents "at the time of the hearing" so that if they are not produced, the party calling for them may give secondary evidence of the same. Another kind of notice to produce documents is the one mentioned in O. 11. It is a notice to prcduce documents 'before' the hearing of the case so that they may be inspected by the party calling for them. Section 163, Evidence Act mentions inspection of the documents of which notice has been given by a party to produce. Clearly notice to produce documents mentioned in S. 163, Evidence Act refers to a notice to prcduce documents as mentioned in O. 11, Civil P. C. Such a notice may be given by a party privately to the other party concerned and, if the other party does not produce the documents, an order of the Court for the production of the documents for inspection may also be made. The mere fact that the agency which has ordered the production of the documents is the Court is immaterial. Further, it was urged that the documents having been produced by a witness, they could not fall within the category of documents contemplated in S. 163. As we have already pointed out, the documents were summoned by the plaintiff from the Superintendent of the Special Police Establishment after an application to that effect had been made by the plaintiff. As the Superintendent of the Special Police Establishment was an official of the defendant and was under its control, the production of the documents by the Superintendent of the Special Police Establishment was a production by the defendant itself and it was immaterial that a summons at one stage had been issued to him for their production. Even if the documents were assumed to have been produced by a witness and not by the defendant, they were the plaintiff's documents as they were filed in Court at its instance; and the defendant could admit such of them as it liked and thereupon ask the Court to treat them as evidence in the case.

(7) A proper list of the documents as required by the rules should have no doubt been furnished by the defendant. It can still do so as directed by the Court and we have no doubt that the Court below will act according to law.

(8) As, however, the preliminary objection prevails, this application must be dismissed. Accordingly, we dismiss this application in revision; but in the circumstances of the case we make no order as to costs.

B/V.S.B. Revision dismissed.

A. I. R. 1953 ALL. 691 (Vol. 40, C. N. 336)

MUKERJI J.

Raghubar Dayal, Applicant v. State.

Criminal Revn. No. 1496 of 1951, D/-4-2-1953.

(a) U. P. Rabi Foodgrains Price Control Order (1950), Cls. 3 and 5—Scope and applicability.

Where a District Magistrate sells a certain foodgrain at rates higher than the controlled rates with the intention of trapping certain grain dealers who indulge in forbidden purchase, the sale would nonetheless be a sale by a District Magistrate to which Cl. 5 will apply and the purchaser will not be guilty under Cl. 3. Clause 5 does not give protection to the seller as such but gives protection to the transaction of sale which must include both the seller as also the purchaser. The question of guilty intention of the purchaser does not arise as Cls. 3 and 5 do not take into account the intention either of the seller or the purchaser.

(Paras 5 and 6)

(b) Interpretation of Statutes — Control Orders.

By the control orders individual freedom of contracts is severely restricted. Further, these control orders make provision for punishing of breaches of these control orders. They are, therefore, in the nature of penal statutes and they have to be interpreted strictly. (Para 6)

(c) U. P. Rabi Foodgrains Price Control Order (1950), Cl. 3 — Consistency with S. 9, Sale of Goods Act — (Sale of Goods Act (1930), S. 9).

Clause 3 is not inconsistent with S. 9, Sale of Goods Act, 1930. (Para 7)

P. C. Chaturvedi, for Applicant; Shri Rama Dy. Govt. Advocate, for the State.

ORDER: This application in revision came before me on 22-12-1952 when it was argued by Mr. Chaturvedi on behalf of the applicant at some length. The case was adjourned to this date at the request of Mr. Chaturvedi, because during the course of argument it appeared that it was necessary to consider certain provisions of the Essential Supplies Act and a particular control order and some provisions of the Sale of Goods Act a little more carefully.

(2) The facts, which have given rise to this revision, lie within a very narrow compass and are admitted on both sides. On 28-4-1951, the applicant purchased 19 maunds and 30 seers of gram from one Mr. L. P. Garg, a Magistrate of the first class, for a sum of Rs. 308/6/- the gram having been purchased at the rate of Rs. 16/3/6 per maund. The controlled rate at which gram could have been sold in April 1951 in that area was Rs. 12/- per maund. Therefore, the purchase, which had been made by the applicant, was at a much higher price than the controlled price for the commodity purchased. It appears that the Dist. Magistrate of Jhansi wanted to trap certain purchasers of Jhansi who were making purchases of gram at rates higher than controlled rates in order to stop prices soaring higher than was contemplated by the authorities who were anxious to control and stabilise prices in that area. The District Magistrate consequently ordered his subordinate Magistrate, Mr. Garg, to offer Government gram for sale at higher prices than the contolled rate for the commodity. The applicant coming to know that gram was available from Mr. Garg — who, to the applicant, did not appear as a Magistrate but merely as a seller — offered to purchase some gram at Rs. 16/3/6 per maund. As I have stated earlier, the applicant purchased 19 maunds and 30 seers of gram from Mr. Garg and paid him the price which amounted to Rs. 308/6/-. Immediately after the sale had been completed, that is, the goods had been taken possession of and the price paid, there appeared on the scene a police officen who apprehended the applicant on the allegation that he had committed an offence under Cl. 3, U. P. Rabi Foodgrains Price Control Order, 1950.

(3) The applicant was prosecuted under S. 7, Essential Supplies (Temporary Powers) Act, 1946.

and he was convicted under that section for a breach of R. 3 of the Rabi Foodgrains Price Control Order. The applicant was awarded a sentence of one year's simple imprisonment and a fine of Rs. 500/-, in default of which he was ordered further simple imprisonment for a period of six months. The appeal made by the applicant was dismissed by the learned Sessions Judge of Jhansi, except in so far that the learned Judge thought it fit to reduce the sentence of imprisonment to the sentence of fine only and he has, therefore, come up in revision to this Court.

(4) On behalf of the applicant two questions of law were argued by Mr. Chaturvedi first, that the applicant could not be convicted under Cl. 3 of the Rabi Foodgrains Price Control Order, 1950, because of the provisions of Cl. 5. Clause 3 of the Conrol Order is in these words:

"No person shall sell or offer for sale and no person shall purchase or offer to purchase any 'rabi' foodgrain specified in Sch. I at a price in excess of the maximum price".

Clause 5 is in these words:

"Nothing in this Order shall apply to the 'sale' of foodgrains by the State Government, a Controller or a District Magistrate."

Clause 3 takes into account the two parties to a sale and it makes it an offence for either of those two parties who are necessary to complete a sale to enter into a transaction of sale at a price which is higher than the maximum price fixed under the provisions of the Order. Therefore, a person, who purchases at a higher price is equally guilty with the person who sells a commodity at a higher price than the maximum price fixed. Clause 5, on the other hand, does not concern itself with the two parts which go to make up a sale, viz. that part which consists of the offer of sale and is the act of the seller and that part which consists of the purchase and is the act of the purchaser, but takes the transaction as a whole and, therefore, in my judgment embraces the two transactions which I have mentioned above that go to make a sale. The position, to my mind, therefore, is that any person, who purchases any foodgrains which is sold by either the State Government, a Controller and a District Magistrate, is outside the scope of the mischief of cl. 3 inasmuch as cl. 5 makes the entire Order inapplicable to sales made by the three authorities named in that clause. The sale in this particular case was admittedly by and on behalf of the District Magistrate. Mr. Sri Ram, appearing on behalf of the State, conceded, for he had to, on the facts found by the Courts below, that the sale was by the District Magistrate and the sale was of foodgrains belonging to the State Government. It was, therefore, contended by the learned counsel for the applicant that the sale in this case was covered by the provisions of cl. 5 and therefore, the purchase made by the applicant could not be penalised under cl. 3, for cl. 3 must be deemed to be non-existent when a sale is made by authorities mentioned in cl. 5. Mr. Sri Ram, appearing on behalf of the State, contended that the sale referred to in cl. 5 must be held to relate to a 'bona fide' sale and not to a 'bogus' sale as was made in this particular case. I have been unable to see the distinction which was attempted to be drawn between the sale in question and the other sale that the District Magistrate was authorised to make under cl. 5. Sale has been defined in the Sale of Goods Act. According to this definition an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property or the goods is to be transferred. On the facts of this particular case all the requisite conditions for a valid sale were complied with. Therefore, I do not see how the transaction in question could not be termed a sale or how the transaction in question could be qualified by adjectives like 'bogus'. If the sale made by the District Magistrate was not a sale, there was no purchase by the applicant and, in my judgment, there would then be no offence committed under cl. 3, but when faced with this situation Mr. Sri Ram shifted his position and said that it was a sale for the purposes of making it an offence but it was not a sale within the meaning of clause 5. I must say I cannot agree with this for the obvious reason that I find no justification for drawing a distinction between the scope of a sale under clause 3 and the scope of a sale under cl. 5.

(5) It was next contended on behalf of the State by Mr. Sri Ram that the purchaser in this case, viz. the applicant, made the purchase according to his knowledge, not from a District Magistrate, but from a Seth, because he took Mr. Garg to be a Seth and further it was pointed out by Mr. Sri Ram that the applicant, when he made the purchase, did so with the guilty intention and the guilty knowledge that he was paying a higher price than he should have. It was, therefore, argued that the applicant could not get the protection which clause 5 offered to other purchasers at sales made by the State Government, a Controller or a District Magistrate. Mr. Sri Ram's argument was also to the effect that clause 5 only protects a seller if the seller happens to be the State Government, a controller or a District Magistrate, but it does not protect the purchaser. I am unable to agree with this contention because clause 5 does not in term give protection either to the seller or to the purchaser. The protection is given to the transaction of sale which must include both the seller as also the purchaser. I am also unable to agree with the contention of learned counsel for the State, Mr. Sri Ram, that the applicant cannot escape liability because of his guilty intention in making the purchase. Clause 3 does not, in my judgment, take into account the intention of either the seller or the purchaser—the clause is confined to the actual acts of sale and purchase. Similarly, cl. 5 takes no account of the intention of the seller when making a sale.

(6) By the control orders individual freedom of contracts is severely restricted. Further, these control orders make provision for punishing of breaches of these control orders. These are, therefore, in the nature of penal statutes and they have to be interpreted strictly. I have no doubt that the intention with which the sale was made by the District Magistrate in this particular case was to trap certain grain dealers, who were indulging in forbidden purchase but that did none the less make the sale of the gram in this particular case a sale by the District Magistrate to which the provisions of cl. 5 of the U. P. Rabi Foodgrains Price Control Order, 1950, applied.

(7) Mr. Chaturvedi raised a second point, viz. that this Court having declared the provisions of Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 'ultra vires' the U. P. Rabi Foodgrains Price Control Order, 1950 also became 'ultra vires'. His argument was that since the provisions of clause 3 of this Order were inconsistent with the provisions of Section 9, Sale of Goods Act, the provisions of the Order could not survive because there was no Section 6 in the Essential Supplies (Temporary Powers) Act, any more to make its survival possible. I am unable to accept this contention of Mr. Chaturvedi for, in my judgment, clause 3 of the Rabi Foodgrains Price

Control Order is not inconsistent with Section 9, Sale of Goods Act. I do not consider it necessary to elaborate this point because, in my judgment, the revision must succeed on the first point raised by Mr. Chaturvedi.

(8) In the result, I am of the opinion that the applicant could not be held guilty of a breach of clause 3, Rabi Foodgrains Price Control Order, 1950 and that his conviction under S. 7, Essential Supplies (Temporary Powers) Act, 1946 was illegal. I accordingly set aside his conviction and sentence.

(9) The trial Court made an order for forfeiting the sum of Rs. 308/6/-, which the applicant has paid as price for the gram which he had purchased, to the State. This order of forfeiture is also set aside. The sum of Rs. 308/6/- shall be refunded to the applicant. The realisation of the fine was stayed by an order of this Court, and I take it that the fine has not been realised. But in the event of the fine having been realised from the applicant, the same also be refunded.

B/G.M.J. Conviction and sentence set aside.

A. I. R. 1953 ALL. 693 (Vol. 40, C. N. 337)

MALIK C. J. AND V. BHARGAVA J.

P. C. Dwadash Sherni and Co. Ltd., Applicant v. Commr. of Income-tax, U.P. and V.P., Lucknow, Respondent.

Misc. Case No. 314 of 1951, D/- 1-4-1953.

Income-tax Act (1922), S. 28 — Penalty.

The two provisos (a) and (b) of S. 28 clearly show that the assessee has a right to show that his income was less than Rs. 3,500/- or that he had no income liable to tax. Sub-s. (3) of S. 28 also makes it clear that, before a penalty is imposed, the assessee should be given a reasonable opportunity of being heard. — AIR 1933 Rang 30 (FB), Foll. (Para 4)
Anno: Income-tax Act, S. 28 N. 5.

Kalbe Abbas, for Applicant; S. C. Das, for Respondent.

CASE CITED:
(A) ('33) AIR 1933 Rang 30: 1933-1 ITR 285 (FB)

ORDER: The question referred to us for decision under Secton 66 (1), Income-tax Act, runs as follows:

"Whether, in the proceedings under Section 28, an assessee is entitled to an opportunity to prove either that he had no income liable to tax or that his income liable to tax is less than the income on which it has been finally assessed under S. 23 (4)?"

The question does not clearly bring out the point in controversy between the parties. It was not the contention of the assessee that, in an appeal against the proceedings for imposition of penalty under Section 28, Income-tax Act it could have the assessment made under Section 23 (4) of the Act re-opened but its contention was that it should have been given an opportunity, only for purposes of imposition of penalty, to show cause why a penalty should not be imposed on it. That is what the Income-tax Appellate Tribunal meant when they referred the question to us for opinion but they have not clearly brought out what they meant. The assessee wanted the following question to be referred to us:

"Whether, under the circumstances of the case proviso (b) to Section 28 (1) entitles an assessee who has failed to comply with a notice under sub-section (2) of Section 22 to prove that he has no income liable to tax or his income is below the assessable limit?"

Learned counsel for the Department agrees that the question as framed by the assessee is appropriate and may be answered by the Court.

(2) The assessee is a limited company. A notice was served on the assessee under Section 22 (2), Income tax Act, requiring it to file the return for the assessment year 1944-45, but the assessee failed to make a return. The Income-tax Officer thereupon made a best judgment assessment under Section 23 (4) of the Act. After having made a best judgment assessment, the Income-tax Officer proceeded to impose a penalty. He passed an order imposing a penalty of Rs. 8,943/- under Section 28 (1) (a) of the Act. The assessee filed an appeal against that order before the Appellate Assistant Commissioner of Income-tax who came to the conclusion that the Income-tax Officer should have, before imposing the penalty, given an opportunity to the assessee to show cause why a penalty should not be imposed. He, therefore, set aside the order of the Income-tax Officer and sent the case back to him for re-imposition of the penalty, if any, after giving the assessee an opportunity to put forward his contentions. There was an appeal filed by the Commissioner of Income-tax before the Income-tax Appellate Tribunal. The Tribunal held that the Appellate Assistant Commissioner of Income-tax was wrong in his view that the assessee must necessarily be given an opportunity to prove that he had no income liable to tax before any penalty under S. 28 (1)(a), Income-tax Act, could be imposed. The Tribunal differed from a decision of a Full Bench of the Rangoon High Court in — 'Commr. of Income-tax, Burma v. A. A. R. Chettiar Concern, Maubin', AIR 1933 Rang 30 (FB) (A). In the result, they allowed the appeal, set aside the order of the Appellate Assistant Commissioner of Income-tax and restored the appeal to his file for determining it on its merits according to law. The assessee then applied that a reference be made to this Court.

(3) It has been urged on behalf of the assessee that though the assessment order passed under S. 23(4) of the Act may have become final and it may not be open to the assessee to adduce fresh materials to prove that it should not have been assessed at all or it should have been assessed at a lower income, yet, for purposes of imposition of penalty under S. 28, it should be given an opportunity to prove whether a penalty ought to have been imposed at all and, if so, what should have been the amount of penalty imposed on it.

(4) The language of S. 28, Income-tax Act, makes it abundantly clear that, before imposing the penalty, the Income-tax Officer should give the assessee an opportunity to show cause. In the statement of the case, the first two provisos to S. 28(1) have been quoted as follows:

"Proviso (a) — No penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-s. (2) of S. 22.

(b) Where a person has failed to comply with a notice under sub-s. (2) of S. 22 or S. 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be penalty not exceeding twenty-five rupees."

The two provisos quoted above clearly show that the assessee has a right to show that his income was less than Rs. 3,500/- or that he had no income liable to tax. Further sub-s. (3) of S. 28, which provides that

"no order shall be made under sub-s. (1) or sub-s. (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard"

makes it clear that, before a penalty is imposed, the assessee should be given a reasonable opportunity of being heard. The Income-tax Appellate Tribunal was, therefore, not correct in their view that the penalty could be imposed without giving the assessee an opportunity to show cause. We agree with the decision of the Full Bench of the Rangoon High Court in 'AIR 1933 Rang 30 (FB) (A)'.

(5) Shri Das on behalf of the Department has urged that, under S. 31, Income-tax Act, on an appeal, the appellate Assistant Commissioner of Income-tax may, before disposing of an appeal himself, make such further enquiries as he thinks fit, or, cause further enquiries to be made by the Income-tax Officer and, having had these enquiries made, he can pass only one of the orders mentioned in sub-s. (3) of that section. The relevant provision pointed out by the learned counsel runs as follows.

"31(3) — * * * *
* * * *
or, in the case of an order under section 28..
.....
(f) confirm or cancel such order or vary it so as either to enhance or reduce the penalty."

Learned counsel has urged that the Appellate Assistant Commissioner of Income-tax had no right to remand the case and the Income-tax Appellate Tribunal was right in cancelling that order and all that the Appellate Assistant Commissioner could do was either to give an opportunity himself to the assessee to show cause or ask the Income-tax Officer to make a fresh report after giving an opportunity to the assessee to show cause and could then pass final orders either confirming the order passed under S. 28, or cancelling it, or varying it so as either to enhance or reduce the amount of penalty as he deemed fit. Sri Kalbe Abbas for the assessee has, however, contended that the order passed by the Assistant Commissioner is not an order of remand and is in fact an order cancelling the imposition of the penalty and is thus valid under S. 31(3)(f) quoted above. We are not really concerned with this part of the argument. We are only entitled under S. 66, Income-tax Act, to answer the question referred to us.

(6) Our answer to the question as framed by the assessee and agreed to by learned counsel for the Department is in the affirmative.

(7) The assessee is entitled to its costs which we assess at Rs. 300/-.

B/H.G.P. Reference answered.

A. I. R. 1953 ALL. 694 (Vol. 40, C. N. 338)
(LUCKNOW BENCH)
SAPRU AND MUKERJI JJ.

The State v. Pyarey Mohan Lal Srivastava, Accused-Respondent.

Criminal Revn. No. 1 of 1953, D/- 8-4-1953.

(a) Criminal Law Amendment Act (1952), S. 7(1) — S. 7(1) is not retrospective.

Section 7 has not been made retrospective by the Legislature specifically. There are no necessary implications arising from the phraseology used to hold that the section is retrospective in its effect. The use of the word "only" in S. 7(1) emphasizes the fact that Special Judges are to have exclusive jurisdiction from the moment the Act comes into force in respect of offences mentioned in S. 6. AIR 1953 Mad 451, Rel. on. (Para 4)

(b) Criminal P. C. (1898), S. 556 — Commitment and trial by same officer.

The law never has countenanced the same officer conduct both the commitment proceedings as also the trial consequent upon such commitment. The accused has a valuable right under the law of being tried by a Judge who has not conducted the inquiry in the case. (Para 3)

Anno: Cr. P. C., S. 556 N. 5, 19.

(c) Interpretation of Statutes — Retrospective operation of law — (Civil P. C. (1908), Pre.).

The normal rule of interpretation is that unless amending law indicates clearly that the intention of the legislature was to make it retrospective, Courts do not generally view such law as being retrospective. In cases where parties have acquired certain valuable rights under the old law, then Courts have always refused to deprive parties of that valuable right by interpreting a change in the law as being retrospective, unless of course the Legislature clearly said so. (Para 4)

Anno: C. P. C., Pre. N. 3.

(d) Criminal P. C. (1898), S. 268 — Trial with the aid of the jury and of the assessors — Distinction between the essential principle on which both rest is the utility of enlisting the aid of the average citizen in the administration of justice — This is a principle of far-reaching significance in a democratic State. (Para 5)

Anno: Cr. P. C., S. 268 N. 3.

Asst. Govt. Advocate, for the State; Vishwa Nath Seth, for Respondent.

CASE CITED:
(A) ('53) AIR 1953 Mad 451: 1953-1 Mad LJ 45: 1953 Cri LJ 882

MUKERJI J.: This is an application in revision by the State against an order of the learned Sessions Judge of Lucknow holding that by virtue of S. 7 of the Criminal Law Amendment Act (Act 46 of 1952), he had no jurisdiction to continue the trial of the case. Section 7 of the Criminal Law Amendment Act of 1952 is in these words:

"7(1) Notwithstanding anything contained in the Code of Criminal Procedure 1898 (Act 5 of 1898) or in any other law the offences specified in sub-s. (1) of S. 6 shall be triable by Special Judges only.

(2) Every offence specified in sub-s. (1) of S. 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government.

(3) When trying any case, a Special Judge may also try any offence other than an

offence specified in S. 6 with which the accused may, under the Code of Criminal Procedure, 1898, be charged at the same trial."

(2) The facts of the present case need be stated now. The opposite party Pyarey Mohan Lal Srivastava along with five others was suspected of having committed an offence of taking bribe. Pyarey Mohan Lal Srivastava was suspended from his duties on 7-12-1948. The matter was investigated by the police, who submitted a charge sheet on 20-3-1950. The trial commenced before the committing Magistrate on 6-4-1950, and an order of commitment was made by the Magistrate on 28-5-1951, that is to say, the proceedings remained in the Court of the Magistrate for over one year; indeed 72 witnesses were examined before the Magistrate on behalf of the prosecution. On 21-4-1952, the trial opened in the Court of Session and continued in that Court from day to day except Fridays, Saturdays and other public holidays upto 27-8-1952. The prosecution examined no less than 54 witnesses before the Sessions Judge. In the conduct of the trial from the stage at which the enquiry started in the Court of the Committing Magistrate to the date when the learned Sessions Judge made his order, which is the subject-matter of this revision, namely, 15-12-1952, there has not only been an extraordinary amount of delay, but there has also been a good deal of recording of evidence, which obviously means expenditure of time and money of the accused. If the view of the learned Sessions Judge is accepted, then the result will be that the accused and the prosecution will have to commence the trial afresh, necessitating more expenditure of time and money and a good deal of unnecessary harassment to the accused.

(3) We may mention another circumstance which in our judgment is of importance, namely, that this particular case as also all the cases in respect of which the other reference has been filed were enquired into by Shri Girja Shanker Misra, who was a special Magistrate of the first class, and it was he who made in this and all those cases orders of commitment to the Court of Session. Shri Girja Shankar Misra has now been appointed a Special Judge, we are informed by counsel for the State, under S. 6 of the Criminal Law Amendment Act of 1952. The position, therefore, would be, if the view of the learned Sessions Judge in regard to the interpretation of S. 7 of the Act were accepted, that Sri Girja Shankar Misra, who made the commitments in the cases would be trying those very cases as Special Judge. The law never has countenanced the same officer conduct both the commitment proceedings as also the trial consequent upon such commitment. The accused has a valuable right under the law of being tried by a Judge who has not conducted the inquiry in the case. If we were to accept the interpretation, which has been put by the learned Sessions Judge on S. 7, we would be destroying this valuable right of the accused in all these cases, inasmuch as, we shall be letting them stand their trial before a Judge who has already made up his mind, in regard to there being, at least, a prima facie case against the accused.

(4) A reading of S. 7 of the Criminal Law Amendment Act which we have quoted earlier in this judgment indicates to us that the section has not been made retrospective by the Legislature specifically. In our judgment there are no necessary implications arising from the phraseology used which can force us to hold that the section is retrospective in its effect. The normal rule of interpretation is that unless amending law indicates clearly that the intention of the Legislature was to make it retrospective, Courts do not generally view such law as being retrospective. In cases where parties have acquired certain valuable rights under the old law, then Courts have always refused to deprive parties of that valuable right by interpreting a change in the law as being retrospective, unless of course the Legislature clearly said so. The only word in the section which possibly caused difficulty to the learned Sessions Judge is the word 'only' after the words 'special Judges' in S. 7 (1) of the Criminal Law Amendment Act of 1952. In our judgment the use of the word 'only' in that sequence does not make the section retrospective in its application. It only emphasizes the fact that Special Judges were to have exclusive jurisdiction from the moment the Act came into force in respect of offences mentioned in S. 6 of the Criminal Law Amendment Act and no more.

(5) Learned counsel for the State has relied on an authority of the Madras High Court in — 'The State v. P. K. Swamy', reported in AIR 1953 Mad 451 (A), where Somasundaram J. took the same view which we have taken of S. 7. That learned Judge held that S. 7 was not retrospective and the Courts would not hold the change as merely, a change in the law of procedure because, by this change substantive rights of accused persons were affected. Somasundaram J., pointed out that in Madras an accused was entitled to have a jury assisting a learned Sessions Judge at his trial and that such a right was a substantive and a valuable right which could not be taken away by a change of the law as had been made by S. 7 of the Criminal Law Amendment Act. No doubt trial with the aid of assessors does not enjoy the same sanctity as a trial with the aid of a jury, yet, in our judgment, on principle there is no basic difference, for trial with the aid of assessors can be just as valuable for the accused as a trial with the aid of a jury. The only distinction that we can see between a jury trial and a trial with the aid of assessors is that the verdict of a jury is binding on the learned Sessions Judge; while the verdict of a body of assessors is not so binding. Nevertheless, the verdict of assessors has a good deal of persuasive value for a Judge trying the case with their aid. The essential principle on which both rest is the utility of enlisting the aid of the average citizen in the administration of justice. This is a principle of far-reaching significance in a democratic State.

(6) We may further point out that S. 7 if it was intended to be retrospective in its effect would have itself provided for a Sessions Judge seized of a case returning that case or sending it to a Special Judge for trial. There is, we find, no provision in the Criminal Law Amendment Act (Act 46 of 1952) whereby a Judge seized of a sessions trial has been authorized or directed to send such a case to a Special Judge. Under the scheme of this Amendment, trials by Special Judges commence on a commitment made to them in that behalf by a Magistrate. There being no provision in the Amendment Act for Special Judges being competent to try cases sent to them by Sessions Judges, we find it difficult to say how the Special Judge would have jurisdiction, properly speaking, to try those

cases. The creation of a Court of a Special Judge is a creature of the special statute and we would have expected this special statute to provide for all contingencies in which such Special Judges could act; indeed this Amendment has provided by S. 10 for the transfer of cases pending before any Magistrate to the file of Special Judges. Section 10 is in these words:

> "All cases triable by a Special Judge under S. 7 which, immediately before the commencement of this Act, were pending before any Magistrate shall, on such commencement, be forwarded for trial to the Special Judge having jurisdiction over such cases."

If the intention of the Legislature was that sessions trials involving offences mentioned in S. 6 of the Criminal Law Amendment Act were also to be so transferred to the file of the Special Judge then it would have been clearly put down by the Legislature in this section or in some other separate section.

(7) From what we have stated above, we are of the opinion that the learned Sessions Judge of Lucknow was not right in holding that he had no jurisdiction to continue the trial of the case pending in his Court. We consequently set aside his order dated 15-12-1952, and direct that he should continue the trial of Pyarey Mohan Lal Srivastava and others in accordance with law.

B/V.S.B. Revision allowed.

A. I. R. 1953 ALL. 696 (Vol. 40, C. N. 339)

AGARWALA J.

Karim Ullah, Defendant-Appellant v. Abdul Hamid, Plaintiff and another, Pro forma defendant, Respondents.

Second Appeal No. 1179 of 1947, D/- 16-4-53.

Pre-emption — Original sale being subject to agreement for reconveyance — Pre-emptor can pre-empt the property and get into the shoes of the vendee subject to the same condition — Vendee reselling property to vendor — Pre-emptor loses his right of pre-emption. 7 All 775 (FB) and AIR 1940 All 90, Rel. on; AIR 1924 All 806, Distinguished. (Para 2)

H. N. Seth, for Appellant; Aqiq Hasan, for Respondents.

CASES CITED:
(A) ('85) 1885 All WN 182: 7 All 775 (FB)
(B) ('40) AIR 1940 All 90: 1939 All LJ 1147
(C) ('24) AIR 1924 All 806: 46 All 889

JUDGMENT: This is a defendant's appeal arising out of a suit for pre-emption. The property in dispute is a house situated in the town of Amroha. The plaintiff-respondent is a co-sharer in the house. The house consists of two kothas, a courtyard, a latrine and a passage. One kotha was owned by defendant 2 and the other by the plaintiff-respondent. The courtyard, the latrine and the passage were owned by both of them jointly. Defendant 2 transferred his share of the house to defendant 1 by a sale-deed dated 1-12-1943. The plaintiff instituted a suit for pre-emption of the house on 25-10-1944, which has given rise to this appeal. On 4-8-1945, defendant 1 re-transferred the house to defendant 2, the original vendor. It was alleged in the sale-deed that when the original transfer was made by defendant 2 in favour of defendant 1 on 1-12-1943, it was orally agreed that the vendee would transfer the house to the vendor if the vendor paid the price within two years. It was further alleged that in pursuance of that oral agreement an agreement on the stamp paper was also executed on 27-12-1943. That agreement is on the record.

(2) The defence to the suit was that the plaintiff had no right of suit, inasmuch as the re-sale had been effected by defendant 1 in pursuance of the oral agreement of sale entered into at the time of the provisional sale. The trial Court dismissed the suit holding that the oral agreement of re-conveyance as embodied in the written agreement of 27-12-1943 was established. The lower appellate Court, however, decreed the plaintiff's suit on the ground that even if there was a contract as alleged by the defendant, the plaintiff's right could not be affected thereby and that the re-sale was of no effect. The lower Court has assumed the existence of the contract of re-conveyance without giving any finding of its own. In this appeal by the defendant it has been urged that the view of the law taken by the Court below is erroneous. I agree with this argument. The right of pre-emption is a right not of re-purchase from the vendee but of substitution in place of the vendee.

As was observed by Mahmood J. in — 'Gobind Dayal v. Inayatullah', 7 All 775 at p. 809 (FB) (A):

> "The right of pre-emption is not a right of 're-purchase' either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place."

If the sale to defendant 1 was subject to an agreement for re-conveyance of the property sold, the sale by defendant 2 to defendant 1 was in pursuance of the condition of re-purchase. The pre-emptor could pre-empt the property and get into the shoes of the vendee subject to the same condition. He could not obtain the property without complying with the condition. Even if the suit for pre-emption were decreed he would have to part with the property if the original vendor required him to sell it to him on the same price.

As on the date of the sale-deed executed by defendant 1, i.e. 4-8-1945, the pre-emptor had not yet become the owner of the property, defendant 1 was authorised to re-sell the property according to the terms of the contract of re-purchase to defendant 2. This having been done, the plaintiff lost his right of pre-emption. This view is supported by a decision of Iqbal Ahmed J. in — 'Chunni Lal v. Ram Prasad', AIR 1940 All 90 (B). It is true that case was under the Agra Pre-emption Act, but the decision was on general principles and applied equally to the facts of the present case. Learned counsel for the respondent relied on a decision in — Abdul Rahman Khan v. Mohd. Ayyub Khan', AIR 1924 All 806 (C). That was a case in which a transfer by the vendee, sought to be pre-empted, was made to the pre-emptor not in pursuance of an agreement of repurchase but simply to defeat the right of the pre-emptor to pre-empt the property. The facts of that case were therefore, entirely different. The Court below has not gone into the question whether there was in fact an agreement of re-sale between the parties.

(3) The result, therefore, is that the appeal is allowed, the decree of the Court below is set aside and the case is remanded to that Court for decision of the case after recording a finding as to the existence of the agreement of re-purchase of the property between defendant 1 and defendant 2.

(4) Costs here and hitherto will abide the result.

(5) Leave to appeal to a Division Bench is refused.

Appeal allowed.

B/D.H.Z.

A. I. R. 1953 ALL. 697 (Vol. 40, C. N. 340)

MALIK C. J. AND V. BHARGAVA J.

Jethamal Sada Sukh, Applicant v. Commr. of Income-tax, Respondent.

Misc. Case No. 291 of 1949, D/- 1-4-1953.

(a) Income-tax Act (1922), Ss. 2 (11), 33 — Previous year.

The whole assessment proceedings are not vitiated by reason of the fact that the Income-tax Officer had treated the account for 13 months and 5 days as the profits of the previous year and it was open to the Tribunal to correct the mistake and treat the income for 12 months out of the 13 months and 5 days as income for the previous year. (Para 2)

Anno: Income-tax Act, S. 2 N. 10; S. 33 N. 1.

(b) Income-tax Act (1922), S. 25 — Discontinuance of business.

Held that whether 1-11-1941, the actual date of decision, or 30-3-1946 when the order of Income-tax Officer was passed, was treated as the date of disruption of the Hindu undivided family it could not affect the assessment for the year 1944-45 as neither of the two dates fell within the relevant accounting period for this assessment year. In no case, would any part of the income earned in the accounting period relevant to the assessment year 1944-45 be exempt from liability to income-tax. AIR 1947 Oudh 230, Ref. (Para 5)

Anno: Income-tax Act, S. 25 N. 2, 3.

Brij Lal Gupta, for Applicant; S. C. Das and J. Swarup, for Respondent.

CASE CITED:

(A) ('47) AIR 1947 Oudh 230: 1948-16 ITR 12

MALIK C. J.: This is a reference under S. 66(1), Income-tax Act in which the Income-tax Appellate Tribunal has referred the following three questions for our decision:

"1. Whether, in the circumstances of the case, the mere fact that the Income-tax Officer treated the income of 13 months and 5 days as the income of the previous year of 12 months ending Kartik Samvat 2000 made the entire assessment proceedings 'ultra vires' although the Tribunal in appeal excluded the income of one month five days from the assessment?

2. Whether, in the circumstances of the case, the date of succession for purposes of S. 25(4), Income-tax Act is the date of actual succession viz. 1-11-41 as fixed in the order passed under S. 25A(1) or the date on which the order is actually passed during the assessment year 1944-45?

3. Whether, in the circumstances of the case, the relief under S. 25 (4) was open to the applicant in the assessment year 1944-45?

(2) In this reference the relevant assessment year is 1944-45. The relevant accounting period for the assessment year 1944-45 began from 8-11-1942 to some date in November 1943. The assessee, however, did not close his accounts at the end of one year but made computation of the account from 8-11-1942 to 13-12-1943, i.e. for a period of thirteen months and five days. The assessee claimed that though he had closed his accounts at the end of 13 months and 5 days, assessment for the year 1944-45 should be made on the basis of income made during one year, the previous accounting period, and claimed that the account made up by him for 13 months and 5 days should be proportionately reduced. This was not accepted by the Income-tax Officer and the appellate Assistant Commissioner, who were of the opinion that the assessee having made up his account for a period between 8-11-1942 and 13-12-1943, the income made during the whole of that period should be taken into account in making the assessment. The Appellate Tribunal, however, made the necessary correction and held that assessment can be made only on the income made during the previous accounting period which must be a period of twelve months. The Tribunal rightly relied on S. 2(11), Income-tax Act which defines previous year as the twelve months ending on 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said 12 months in respect of a year ending on any date other than the said 31st day of March then at the option of the assessee the year ending on the day to which his accounts have so been made up. On behalf of the assessee, however, it was claimed that the entire assessment proceedings were vitiated by reason of the fact that the Income-tax Officer had treated the income of 13 months and 5 days as the income of the previous year. Learned counsel has not been able to suggest any reason why the whole assessment proceedings were vitiated by reason of the fact that the Income-tax Officer had treated the account for 13 months and 5 days as the profits of the previous year and why it was not open to the Tribunal to correct the mistake and accept the assessee's own contention that the income for 12 months out of the 13 months and 5 days should be treated as income for the previous year.

(3) Our answer, therefore, to the first question is in the negative.

(4) We fail to see how the second and the third questions arise. But as the learned counsel has argued them at great length and with great vehemence it seems necessary to give a few dates.

(5) The assessee, Jethamal Sadasukh, was assessed as a Hindu undivided family in the assessment year 1941-42 and in assessment years previous to that year and in the same status in the assessment years 1942-43 and 1943-44. The relevant accounting period for the assessment year 1942-43 ended on 20-11-1941. In 1942-43 the assessee was assessed on an income of Rs. 16,003/- as a Hindu undivided family. In the year 1943-44 the assessee was assessed on an income of Rs. 69,759/- as a Hindu undivided family. The accounting period for 1943-44 was 21-11-1941 to 7-11-1942. Then came the assessment year 1944-45 with which we are concerned & the accounting period for which was 8-11-1942 to 13-12-1943. It appears that though the assessee was being assessed as Hindu undivided family, as a matter of fact, there

had been a disruption on 1-11-1941, when the assets had been divided. As no claim, however, was made on behalf of any member of the Hindu undivided family u/s. 35A (1) the Income-tax Officer, by reason of the provisions of S. 25A (3), continued to make the assessment treating the assessee as a Hindu undivided family. On some date in 1946 a claim was made that the Hindu undivided family had disrupted and there had been a division of its assets. An order was passed by the Income-tax Officer on 30-3-1946, holding that the division had taken place on 1-11-1941. On 30-3-1946, when the order was passed the assessment for the year 1944-45 had not been completed and on the same day the Income-tax Officer made the assessment for the year 1944-45.

The question that was discussed at the bar was whether 1-11-1941, should be treated as the date of disruption or 30-3-1946 should be treated as the date when the Hindu undivided family ceased to exist, i.e., what was the date when there was a succession and change in the persons carrying on the business. A Bench of the Oudh Chief Court had held in — 'Ganeshdas Ramgopal v. Commr. of Income-tax, U. P., C. P. and Berar', AIR 1947 Oudh 230 (A), that the actual date of disruption should be treated as the date of succession and not the date on which the order was passed. Learned counsel has urged that the case was wrongly decided and the date of succession should be the date of the order, i.e., 30-3-1946. But, whether the date of succession is 1-11-1941, or 30-3-1946, it cannot affect the assessment for the year 1944-45 as neither of the two dates falls within the relevant accounting period for this assessment year. If the date of succession be held to be 1-11-1941, that part of the income, which was earned between the beginning of the previous year relating to the assessment year 1942-43 and the date of succession, would not be liable to tax as the date of succession would then fall in the accounting period relevant to the assessment year 1942-43. Similarly, if the date of succession be held to be 30-3-1946, no tax would be payable on a part of the income earned during the previous year relevant to the assessment year 1947-48. In no case would any part of the income earned in the accounting period relevant to the assessment year 1944-45 be exempt from liability to income-tax. In the circumstances, we fail to see how questions 2 and 3 framed by the Tribunal arise in this case.

(6) Our answer to these two questions is that the questions do not arise out of the appellate order for the assessment year 1944–45.

(7) The assessee must pay the costs which we assess at rupees four hundred.

B/D.H.Z. Answers accordingly.

A. I. R. 1953 ALL. 698 (Vol. 40, C. N. 341)

DESAI J.

Sri Krishna, Applicant v. Baijnath and others, Opposite Parties.

Criminal Misc. No. 2052 of 1952, D/- 10-2-53.

Criminal P. C. (1898), S. 526 (1) (d) — 'Party' and 'Party interested' — Meaning — (Words and Phrases — 'Party' and 'Party interested') — (Interpretation of statutes).

The word "party" is not defined in the Code of Criminal Procedure. When it is used with reference to a proceeding in a Court, its primary meaning is a litigant. It means a person who has a part to play in the proceeding. In the absence of anything to the contrary in the context, the primary meaning of a word should be adopted. (Para 5)

Section 526 (1) (d), Criminal P. C. distinguishes between 'parties' and 'witnesses'; a witness is not considered to be a party. The status of a person who has been injured during the commission of a crime or who makes a report about it to the police is that of a witness only, unless he is the actual complainant before the Court. If a person merely on account of his interest becomes a party, the word "interested" in the phrase 'party interested' would become redundant. A person who makes a report, or is injured on account of the commission of the crime or is related to the person injured or killed, therefore, does not thereby become 'a party interested' within the meaning of S. 526 (3) and has no right to apply for transfer. The High Court cannot go into the merits of the application. Case law discussed. (Paras 13, 14)

Anno: Cr. P. C., S. 526 N. 3 Pt. 1.

B. S. Darbari, for Applicant; B. C. Saxena, for Opposite Parties Nos. 1, 3, 4 and 2.

CASES CITED:

(A) ('30) AIR 1930 All 206: 31 Cri LJ 485 (FB)
(B) (1885) 54 LJQB 392: 15 QBD 54
(C) (1897) 66 LJQB 787: (1897) AC 556
(D) (1882) 51 LJ Ch 940: 21 Ch D 642
(E) (1884) 53 LJ Ch 696: 26 Ch D 605
(F) (1886) 55 LJQB 571: 17 QBD 475
(G) ('20) AIR 1920 Pat 836: 20 Cri LJ 648
(H) (1811) 12 RR 450: 14 East 1
(I) ('41) AIR 1941 Lah 299: 42 Cri LJ 880
(J) ('26) AIR 1926 Lah 156: 27 Cri LJ 411
(K) ('03) 5 Bom LR 869
(L) ('26) AIR 1926 All 307: 27 Cri LJ 454
(M) ('29) AIR 1929 Mad 844: 30 Cri LJ 1163
(N) ('37) AIR 1937 All 664: 39 Cri LJ 33
(O) ('39) AIR 1939 Sind 238: 40 Cri LJ 803
(P) ('25) AIR 1925 Pat 818: 26 Cri LJ 1249
(Q) ('38) AIR 1938 Lah 569: 39 Cri LJ 853
(R) ('50) AIR 1950 All 483: 51 Cri LJ 1291
(S) ('30) AIR 1930 Lah 873: 31 Cri LJ 1174
(T) ('34) AIR 1934 Lah 612: 36 Cri LJ 222
(U) ('47) AIR 1947 Pat 166: 27 Pat LT 257

ORDER: This is an application for transfer of a case pending against the opposite party under S. 302, Penal Code in the Court of the 2nd Additional Sessions Judge, Bareilly.

(2) The opposite party is said to have committed the murder of Raghunandan Prasad, who was the brother of the applicant.

(3) The applicant wrote out the first information report of the occurrence and sent it to the police station with Raghunandan Prasad. Raghunandan Prasad was conscious when he reached the police station. The police investigated the matter and prosecuted the opposite party under S. 302, Penal Code.

(4) The applicant wants the case to be transferred to another Court on the ground that he does not expect a fair and impartial trial in the Court of the learned Additional Sessions Judge.

When the application came up for hearing first, I was informed by the State counsel that he had no instruction either to support or to oppose it. The hearing was adjourned and when it came up again, the State Counsel informed me that he had received instructions to support it. It appears from the opposite party's affidavit that in the interval the applicant had managed to get a telegram sent by the District Magistrate to the State counsel to support it.

(5) It is laid down in Section 526 (3), Criminal P. C. that a High Court may transfer a case

"either on the report of the lower Court, or on the application of a party interested, or on its own initiative."

It is laid down in S. 526 (8) that if

"any party interested intimates to the court that he intends to make an application under this section, the Court shall adjourn the case."

Section 526 is the only provision under which this Court can transfer a case. The first question that arises is whether the applicant is "a party interested"; if he is not, this Court cannot act on his application. The word "party" is not defined in the Code of Criminal Procedure. When it is used with reference to a proceeding in a Court, its primary meaning is a litigant. It means a person who has a part to play in the proceeding. In the absence of anything to the contrary in the context, the primary meaning of a word should be adopted. Wharton defines "parties" as "persons jointly concerned in any deed or act; litigants". If the word is used with reference to an agreement or a deed, the word means those persons who are jointly concerned in the agreement or the deed. If an application for transfer is dismissed, on the ground of its being frivolous or vexatious, the High Court is empowered by S. 526 (6-A) to order the applicant to pay compensation to "any person who has opposed the application."

(6) In 'Emperor v. Kanver Sen', A. I. R. 1930 All. 206 (F. B.) (A) it was argued on behalf of the applicant whose application had been dismissed as frivolous or vexatious, that the word "person" did not include Government, and that Government were not entitled to compensation even though they had opposed the application. It was conceded on behalf of the applicant that the words "a party interested" were wide enough to include the Crown or Government. A Full Bench of this Court held that the word "person" has a wider import than the words "a party interested" in sub-section (3). It was pointed out by the Full Bench that in a criminal case the Crown is a necessary party in view of the immediateness of the public interest involved, that individual interests are not allowed to predominate as in a civil matter, and that public interest balances or in some case even out-weighs the private. It is clear from this decision that "a person interested" is not necessarily "a party interested". "A party interested" is "a person interested" but the converse is not always true. In the face of this ruling it is not open to me to say that "a party interested" means "a person interested".

Under a certain statute "any party requiring" any act to be done by a Judge of a county Court may apply to any superior Court for a writ of mandamus against the County Court; in the — 'Queen v. The Registrar of the Greenwich County Court', (1885) 15 Q. B. D. 54 (B) Brett, M. R. held that the word "party" means the litigants in the Court. Under another statute a person desiring to appeal from an order of licensing Justices must give notice of appeal to "the other party". In — 'Boulter v. The Justices of Kent', (1897) A. C. 556 (C) the Licensing Justices rejected the application for license which was opposed by a member of the public. The House of Lords held that the objector was not a party. Lord Harschell observed on page 569:

"Persons objecting to the grant of a license are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one inter partes at all".

Earlier his Lordship had said at page 568:

"Where proceedings are taken by way of information or complaint, there are always two parties — the person initiating the proceedings, and the person against whom the proceedings are taken."

In the Chancery Amendment Act, 1852, (15 and 16 Vict. c. 1886), the word "party" was used sometimes to mean "a person", but was pointed out by Jessel M. R. in — 'Re Quartz Hill etc. Co.; Ex Parte Young', (1882) 21 Ch. D 642 (D), that the proper sense of the word is different. Section 14 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) enabled the Court at the request of either party to dispose of the claims of the parties against the goods taken in execution and the word "parties" was interpreted to mean the person who claimed title to the goods; see — 'Smith v. Darlow', (1884) 26 Ch. D. 605 (E). In that case the Sherrif, though he had put the Court in motion by bringing in an inter-pleader suit was held to be not a party. Under the Metropolis Water Act, 1871, water companies were empowered to make regulations for the prevention of undue consumption of water and those regulations, after publication in the prescribed manner, were made binding on "all parties". Those words were held to mean that only the consumers of the water but also all other bodies or persons interested in the matter such as the street authorities or those charged with the duty of putting out fire; vide — 'the East London Waters Co. v. The Vestry of Saint Mathew', (1886) 17 Q. B. D. 475 (F). There the word was interpreted to mean other persons because it was used with reference to a regulation and not with reference to proceedings in Court.

(7) In a criminal case initiated on complaint, the complainant may be said to be a party, though the authorities are not unanimous. In the leading case on the point, — Jamuna Kantha v. Rudra Kumar', AIR 1920 Pat 836 (G), Mullick J. was of the opinion that "strictly speaking, the Court does not recognise a private prosecutor who is a complainant, as a party to the case". In his opinion, though every private person has a right to set criminal law in motion, his control over the prosecution is not unlimited. The Crown is in theory the prosecutor for all offences and the individual person can only assist the Crown for the purpose of collecting evidence and bring the offender to justice. According to him, the parties to a criminal case are the persons who have the right to be heard, i. e. persons who have the right to control the proceedings, e. g. the Crown, the accused and parties engaged in conducting certain proceedings of a quasi-civil nature. Under the Code of Criminal Procedure existing then, an exception was made to the general rule and the complainant was treated as a party interested, but Mullick J. held that a person, who had received injuries during the commission of a crime and had made a report to the police, was not a complainant and not a party interested. Jwala Prasad, J. was of a contrary opinion. He conceded that though a private person can commence a criminal prosecution "the prosecution is always at the suit of the Crown — 'Burdett v.

Abbot', (1811) 14 East 1 (H), but held that a person, who lodges a report with the police, is a complainant and can apply for transfer under Section 526, Criminal P. C. It is unnecessary to go into the question whether a complainant is a party or not, because the word "complainant" no longer finds place in Section 526. Jwala Prasad, J. was further of the opinion that a person who lodges a report with the police is a party interested because he is interested in the result of the case and consequently in a fair and impartial trial and has to bear the consequences of the result in — 'Gulam Rasul v. Emperor', A. I. R. 1941 Lah 299 (I) the complainant was held to be a party. In — 'Bagh Ali v. Mohd Din', A. I. R. 1926 Lah. 156 (J) a criminal case was transferred at the instance of the complainant.

(8) In a case prosecuted by the State, the State is certainly a party. The accused also is certainly a party; he is the other party. The question is whether the person who gave information about the crime to the police and moved them to investigate and prosecute the accused, or who was injured during the commission of the crime is related to the injured is a party. Having regard to the primary meaning of the word, I cannot consider him to be a party. He may be interested in the prosecution, and its result, but that by itself would not convert him into a party to the case. In order to have the right to apply for transfer, the applicant must possess two qualifications, one of being a party and the other of having interest. Mere possession of interest will not do. In other words, merely on account of his possessing interest he will not be "a party interested". His position in the case may simply be that of a witness but a witness is not a party. In a majority of cases it has been held that a person who lodges a report with the police is a party but with great respect to the learned Judges, I disagree. I prefer to follow — 'In Re: J. Gannon', 5 Bom. L. R. 869 (K). There a complaint was filed by Gannon, but subsequently the prosecution was taken away from his control and was conducted by the Crown and it was held by Chandavarkar and Aston, JJ. that Gannon could not apply for transfer of the case because he was no longer a party. Though the status of Gannon was more than that of a mere informant, and he had interest in the result of the case, he was held to be not a party.

(9) It stands to reason that if the legislature had intended to give the right of applying for transfer to every person interested, there was nothing to prevent it from using the words "a person interested" instead of the words "a party interested". When the legislature deliberately chose the word "party", it would not be right to hold that it means nothing but a person. — 'Emperor v. Bhik Chand', AIR 1926 All 307 (L), — 'Rajagopal Rao v. Narayana Reddy', AIR 1929 Mad 844 (M)', 'In re Abdul Naseer', AIR 1937 All 664 (N), — 'Om Radhe v. Emperor', AIR 1939 Sind 238 (O), — 'Sheodhari Rai v. Jhingur Rai', AIR 1925 Pat 818 (P), and — 'AIR 1926 Lah 156 (J), the meaning of the word "party" was not discussed and in some of them, particularly 'In re Abdul Naseer' (N), the word "person" was treated as if the word were "party". In 'Bhik Chand's Case, (L)', the applicant for transfer was himself the complainant and therefore the decision in that case is of no help in the instant case. In 'Bagh Ali's case, (J)', it was only by way of obiter that the husband of a woman said to have been abducted was held to be a party interested in the case under S. 366, Penal Code. The learned Judge simply followed the view of Jwala Prasad, J. in the case of 'Jamuna Kantha Rai', (G). The real question there was whether the order of a District Magistrate transferring the case was legal or not; it was held to be legal and therefore the re-transfer at the instance of the husband was refused. Really therefore the question whether he had a right to apply for transfer or not did not arise. In 'Om Radhe's case, (O)', Davis, J. C. said that the word "party" includes an informant under S. 107, Criminal P. C. He, however, found that the applicant was not the informant and that an inspector of police was the real informant. It is not clear whether the learned Judicial Commissioner used the word "informant" to mean the complainant or the person who lodges the information with the police. As the matter related to a proceeding under S. 107, Criminal P. C., in which there is nothing like investigation by the police, it seems to me that the word was used to mean the complainant. If so, that case is no authority for the proposition that one who makes a report of an occurrence at the police station, is a party interested.

(10) An injured person was held to be a party interested in — 'Emperor v. Dhana', AIR 1938 Lah 569 (Q); Abdul Rashid, J. was inclined to treat him as a complainant. In — 'Brahmdutt v. State', AIR 1950 All 483 (R), Raghubar Dayal, J. said that a third person may be an interested party; that was by no means a decision by him that he was. The question really did not arise before my learned brother; what he had to decide was whether a third person had a right to oppose the transfer of a case by the District Magistrate. A person at whose instance a Court lodges a complaint for the offence of S. 193, Penal Code is not a party interested; see — 'Ram Sarup v. Mahomed Mehr Dil Khan', AIR 1930 Lah 873 (S). The Court is really the complainant. The position of that person is not materially different from the position of a person who makes a report to the police. Just as the Court files a complaint and the accused is prosecuted so also do the police file a report and the accused is prosecuted. Just as the police are moved by the person lodging the report so also is the Court moved by the person against whom false evidence is given. If that person is held to be not a party interested, the person making a report to the police also is not a party interested. In — 'Sardar Shah v. Gurdit Singh', AIR 1934 Lah 612 (T), and — 'Sir Rajendra Narain v. Bhagaban Mahapatra', AIR 1947 Pat 166 (U), the maker of a first information report was held to be a party. In Sardar Shah's case, (T)', Agha Haider, J. relied upon the cases of 'Jamuna Kantha Rai, (G)', Bagh Ali (J) and Bhikchand (L). In the case of 'Sir Rajendra Narain, (U)', he was held to be a party interested "in the special circumstances of the case". Therefore not much assistance is to be had from those cases.

(11) In the case of 'Jamuna Kantha Rai, (G)', Jwala Prasad, J., stated that where there is a conflict between the public prosecutor and the private prosecutor in the matter of transfer of the case the right of the former as representing the Crown could naturally prevail and that whatever right the latter may have by virtue of his having commenced the prosecution, it is subordinated to that of the Crown and that when the Crown is opposing the transfer and does not apprehend any unfairness in the trial, the latter's application cannot be entertained. Either this statement is quoted with approval, or similar language is used, in the cases of 'Bhag Ali, (J)', 'Rajagopal, (M)', 'Abdul Naseer, (N)', and 'Dhana, (Q)'. In the cases of 'Bhik Chand, (L)', 'Sardar

Shah, (T)', and 'Ghulam Rasul, (I)', an application for transfer of a Crown case at the instance of the person who had made the first information report was refused on the ground that there existed no exceptionally strong reason. The application was refused on the ground that it was opposed by the Public Prosecutor in the cases of 'Jamuna Kantha Rai, (G)', 'Abdul Naseer, (N)', 'Rajagopal, (M)', and 'Dhana, (Q)'. In the case of 'Abdul Naseer, (N)', Ganga Nath, J. did not go into the merits of the application at all. In 'Dhana's case, (Q)', the opposition of the Public Prosecutor was taken to prove that there was no apprehension of a fair and impartial trial. In the case of 'Sheodhari Rai, (P)', the application was granted, the Public Prosecutor not opposing. In the cases of 'Sardar Shah, (T)', and 'Sir Rajendra Narain, (U)', it was allowed even though opposed by the Public Prosecutor.

(12) The law is not very clearly stated in some of these decisions and sometimes one is left in doubt whether the application for transfer was refused on the ground that it could not be entertained or on the ground that it had no merits. Sometimes the distinction between the maintainability of an application and its merits was not kept in mind. If a person who makes a report to the police is held to be a party interested he has a right to apply for transfer and his application must be granted, notwithstanding the Public Prosecutor's opposition, if he satisfied the Court that a fair and impartial trial cannot be held. If his application is to be dismissed it must be on the ground that there is no such apprehension and not merely on the ground that it is opposed by the Public Prosecutor. Surely an application by a party who has a right to make it cannot be rejected merely on the ground of the Public Prosecutor's opposition even if the Court is satisfied that a fair and impartial trial cannot be held. There is no warrant for dividing parties interested into two classes, one of superior parties interested or parties interested having a superior interest and the other of inferior parties interested or parties interested having an inferior right. The law makes no distinction between one party interested and another; if any party interested satisfied that there is a reasonable apprehension that a fair and impartial trial cannot be had in the court, he is entitled to have the case transferred and no question arises whether his right is subordinate to that of the Public Prosecutor or not. If the Public Prosecutor opposes his application, that is a fact to be taken into consideration in deciding whether there is a reasonable apprehension or not; it has no greater effect. If an application is dismissed, without the merits being gone into, on the sole ground that it is opposed by the Public Prosecutor, it is nothing but laying down that the applicant had no right to apply, in other words, that he is not a party interested. I am not sure if in some of the decisions this was not the real reason, though the ostensible reason was that the application was opposed by the Public Prosecutor.

(13) The word 'party' has been used in several other provisions in the Code. In S. 145(1) a Magistrate is required to make an order 'requiring the parties concerned' in the dispute; there the word 'parties' must necessarily mean persons. As so far there have been no proceedings in Court, it cannot possibly mean litigants in the Court. The word 'parties' goes with the word 'dispute'. The use of the words 'persons interested' in S. 145(5) shows that the legislature distinguishes between 'party interested' and 'person interested'. At the stage when that provision becomes applicable, proceedings have already commenced before the Magistrate and there are parties before him; the words 'any other person interested' are used with reference to persons other than the actual parties. Section 440 is to the effect that no party has any right to be heard before a revision Court; the word cannot mean anybody but the litigants before the Court. Section 556 prohibits a Judge or a Magistrate from trying any case in which 'he is a party or personally interested'; this provision clearly makes a distinction between 'party' and 'person interested'. The word 'party is not used in the sense 'a person interested'. A case may be transferred under S. 526(1)(d) on the ground that the transfer will tend to the general convenience of the 'parties or witnesses'. This provision distinguishes between 'parties' and 'witnesses'; a witness is not considered to be a party. The status of a person who has been injured during the commission of a crime or who makes a report about it to the police is that of a witness only, unless he is the actual complainant before the Court. If a person merely on account of his interest becomes a party, the word 'interested' in the phrase 'party interested' would become redundant. That word is used because all parties are not necessarily interested in having the case transferred as the ground on which transfer is sought may not apply to all the parties arrayed on the same side.

(14) I, therefore, hold that a person who makes a report, or is injured on account of the commission of the crime or is related to the person injured or killed, does not thereby become 'a party interested' within the meaning of S. 526(3). The applicant has, therefore, no right to apply for transfer and this Court cannot go into the merits. No enquiry into the alleged apprehension of fair and impartial trial can be made at all. His apprehension cannot be taken notice of by the Court.

(15) The application is, therefore, dismissed.

B/D.R.R. Application dismissed.

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[1]A. I. R. 1953 ALL. 701 (Vol. 40, C. N. 342)

MALIK C. J. AND V. BHARGAVA J.

Mithoo Lal Tek Chand, Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

Misc. Case No. 5 of 1950, D/- 5-2-1953.

(a) Excess Profits Tax Act (1940), S. 10A—Burden of proof.

If, as a result of a transaction entered into by an assessee, the liability to excess profits tax is affected and the Excess Profits Tax Officer claims that that transaction was entered into with the definite purpose of evading liability to excess profits tax, the burden must be on him to prove that the main purpose behind the transaction was avoidance of the payment of the tax. AIR 1950 All 595; AIR 1953 Mad 221; (1952) 21 ITR 548 (Punj), Ref. (Para 5)

Anno: E. P. T. Act, S. 10A, N. 1.

(b) Income-tax Act (1922), S. 23 (3) — Discovery of receipt of sum of money during account period — Burden of proof.

Where from the books of account of the assessee it appears that during the relevant account period he has received certain sums of money, it is for him to explain from where he got the same, and if his explanation is accepted there is an end of the

matter. The question then may arise, which will be in most cases a question of law, whether the assessee's claim that the receipt — its true source being known — is not taxable income is justified or not. (Para 16)

Where, however, his explanation is rejected, the Tribunal has to record a finding on such materials as may be available, whether the money represents revenue receipt taxable as income of the relevant account period. The burden, in the first instance, must be on the assessee to show the true nature of the receipt and why he claims that it is not taxable income. When the assessee furnishes an explanation, if that explanation is unsatisfactory, that may in itself be a circumstance which the Income-tax Officer may be entitled to take into consideration but it need not necessarily, in every case, lead to the conclusion that the receipt is a revenue receipt taxable as income received in a particular year. (Para 16)

The question must always remain a question of fact which has to be decided on the materials available. In such case the revenue authorities are entitled to take into consideration the fact that the explanation given by the assessee is either unreasonable or is false and then to consider whether that circumstance alone or the other materials available along with that circumstance would entitle them to hold that the amount so deposited represented the undisclosed income of the assessee in the year in question. Case law Ref. (Para 16)

Anno: I. T. Act, S. 23 N. 3.

G. S. Pathak, for Applicant; J. Swarup, for Respondent.

CASES CITED:

(A) ('50) AIR 1950 All 595: 1950-18 ITR 988
(B) ('53) AIR 1953 Mad 221: 1952-22 ITR 324
(C) ('52) 1952-21 ITR 548 (Punj)
(D) ('51) 1951-19 ITR 418 (All)
(E) ('52) Misc. Case No. 3 of 1949, D/- 16-1-52 (All)
(F) ('45) AIR 1945 Cal 62: 1944-12 ITR 441
(G) ('47) 1947-15 ITR 61 (All) (FB)
(H) ('47) AIR 1947 All 414: 1947-15 ITR 393
(I) ('41) 1941-9 ITR 373 (All)
(J) (1948) 30 Tax Cas 1
(K) ('47) AIR 1947 Cal 338: 1946-14 ITR 318
(L) ('49) AIR 1949 Pat 215: 1948-16 ITR 175
(M) ('49) AIR 1949 Mad 246: 1948-16 ITR 385
(N) ('51) 1951-19 ITR 222 (All)
(O) ('52) AIR 1952 Mad 231: 1951-20 ITR 605
(P) ('52) AIR 1952 Bom 459: 1952-22 ITR 18

MALIK C. J.: This reference arises out of three cases, two of them relate to income-tax assessment for the years 1943-44 and 1946-47 and the third to excess profits tax assessment for the year 1946-47. The assessee is a Hindu undivided family which carries on business in grain, cloth, commission agency, speculation etc. The method of accounting, as given in the assessment orders, is mercantile. The relevant account period for the assessment year 1943-44 was from 20-10-1941 to 8-11-1942. The Income-tax Officer found a cash deposit of Rs. 5,000/- in the capital account of the assessee in the name of Surajmal Suraj Ram entered on 25-10-1941. When he asked the assessee from where this amount had come the assessee stated that it was a part of the amount unspent out of the withdrawal of Rs. 30,000/- on 18-7-1940. For the assessment year 1946-47 the relevant account year was from 17-10-1944 to 4-11-1945. On the first day i.e. 17-10-1944, there were three credit entries in the capital account, a sum of Rs. 50,000/- in the name of Surajmal Suraj Ram as having been received from him, another sum of Rs. 10,000/- as having been received from Srikishan Dass and a third sum of Rs. 5,000/- as having been received from Dharam Dass. Surajmal Suraj Ram, Shrikishan Dass and Dharam Dass are all members of the Hindu undivided family.

(2) The explanation given by the assessee was that Surajmal Suraj Ram had withdrawn a sum of Rs. 50,000/- on 10-9-1936, & two sums of Rs. 10,000/- & Rs. 5,000/- were respectively withdrawn by Srikishan Dass and Dharam Das on 18-7-1940, and that it is these three items that had been brought back and redeposited on 17-10-1944. The explanation given by the assessee as regards these 3 items was rejected. The Tribunal pointed out that the assessee could not have kept such large sums of money lying idle for such long periods and the assessee must have utilised the amounnts withdrawn to make other profits; that the assessee carried on business on a large scale and it was not expected that the assessee would instead of investing these large sums let them remain idle; that it was not believable that all these sums would be kept at the family house at Jaselmair where only women and servants resided; and that the assessee had bank accounts and it was not likely that if the money was withdrawn and not utlised the money would not be put back in the business or deposited in the bank and would be allowed to remain unproductive in the hands of the various members of the family. The Tribunal might also have noticed that, if the sum of Rs. 50,000/- withdrawn by Surajmal Suraj Ram on 10-9-1936, (and not 1933 as mentioned by the Appellate Assistant Commissioner) had remained undisposed of in the hands of the assessee, there was no reason why on 18-7-1940, he should have withdrawn from business another sum of Rs. 30,000/- and deposited Rs. 5,000/- out of the latter sum on 25-11-1941, and the sum of Rs. 50,000/- not till 17-10-1944. We have no hesitation, therefore, in agreeing with the Tribunal that there was sufficient material on which the Tribunal could hold that the explanation given by the assessee was false.

(3) The next question that arises is whether it was a reasonable inference that these sums represented secret profits made during the relevant account year. We find from the assessment order of the year 1943-44 that in that year the business income of the assessee was computed at a figure of Rs. 47,666/-. The assessee, as has already been said, carried on extensive business in grain, cloth, commission agency and speculation. The explanation given by the assessee having been rejected & it having been found that he had given false explanation as to the receipt of these items, it could not be said that the inference drawn by the revenue authorities that this represented secret profits of the year in which the amounts were entered was unreasonable.

(4) It has been urged by Shri Pathak that the burden of proving that any receipt is assessable income rests on the Income-tax Officers and the mere fact that the explanation given by the assessee is false does not warrant the inference that the receipt is taxable income. Shri Jagdish

Swarup on behalf of the Department has urged that if it appears from the account books of the assessee or otherwise that, in the relevant account period, the assessee has received a sum of money, the burden lies on the assessee to show that that amount is not taxable income; and, if the explanation given by the assessee is unsatisfactory, the Income-tax Officer can assume that the amount must be taxable income. A large number of cases have been cited at the Bar which Shri Jagdish Swarup has divided into three groups. The first group relates to cases under S. 10A, Excess Profits Tax Act, the second group relates to cases under Section 34, Income-tax Act and the last group relates to the question of assessment under S. 23 (3), Income-tax Act. According to Shri Pathak, there is no justification in this grouping and he has contended that the same principle should govern all these cases. We are, however, inclined to agree with Shri Jagdish Swarup that the cases have to be grouped in the manner suggested by him.

(5) The relevant portion of Section 10A, Excess Profits Tax Act reads as follows:

"10A (1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected ..... was the avoidance or reduction of liability to excess profits tax, he may .....make such adjustments as respects liability to excess profits tax as he considers appropriate ....."

If, as a result of a transaction entered into by an assessee, the liability to excess profits tax is affected and the Excess Profits Tax Officer claims that that transaction was entered into with the definite purpose of evading liability to excess profits tax, the burden must be on him to prove that the main purpose behind the transaction was avoidance of the payment of the tax. To this effect are decisions in — 'Ganga Sahai Umrao Singh v. Commr. of Excess Profits Tax, U. P., C. P. and Berar', A. I. R. 1950 All. 595 (A), a decision by this Bench; in — 'Hajee Mohammad Ibrahim & Co. v. Commr. of Excess Profits Tax, Madras', AIR 1953 Mad. 221 (B), a decision of the Madras High Court; and in — 'Amritsar Rayon and Silk Mills, Ltd. v. Commr. of Income-tax East Punjab', (1952) 21 I. T. R. 548 (Punj) (C), a decision of the East Punjab High Court.

(6) In the second group of cases falling under Section 34, Income-tax Act, it must be borne in mind that the assessment was once completed and the Income-tax Officer wants to reopen the same, the burden must, therefore, lie on him to show that there was sufficient justification for re-opening the proceedings which had once been concluded. The cases cited before us relate to a period before 1948 when Section 34, Income-tax Act was not amended, and it is not necessary for us in this case to consider the effect of the amendment, nor is it necessary to discuss those cases at any length. Those cases are — 'Laljimal Girdhar Das v. Commr. of Income-tax', U. P.', 1951-19 I. T. R. 418 (All.) (D) again a decision by this Bench; — 'Radhey Lal Jawahar Lal v. Commr. of Income-tax, U. P.', Misc. Case No. 3 of 1949, D/-16-1-1952, (All) (E), by this Bench but (unreported); — 'Lal Mohan Krishna Lal v. Commr. of Income-tax, Bengal', A. I. R. 1945 Cal. 62, (F), and a Full Bench case of this Court in — 'In re Ram Datta Sita Ram of Basti', 1947-15 I. T.R., 61 (All) (F. B.) (G). In those cases the burden of proving that it was taxable income of the relevant years was placed on the Income-tax Officer. On the other hand, in—'Mahabir Prasad Munna Lal v. Commr. of Income-tax', AIR 1947 All. 414 (H) where the assessee's explanation was rejected, it was held that in each case it would be a question of fact & the answer would depend on the finding whether the inference was a reasonable inference from the assessee's failure to prove his case.

(7) The cases in the third group are cases where an Income-tax Officer, in the course of an assessment under Section 23 (3) discovers that the assessee has received a sum of money during the relevant account period and his explanation as to the nature of the receipt is not satisfactory. These cases are really in point and we would, therefore, deal with the cases in this group at some length.

(8) The first case that was cited to us is — 'Ganga Prasad v. Commr. of Income-tax, U. P.', 1941-9 I. T. R. 373 All. (I). In that case there was an entry of the receipt of a sum of money. The assessee claimed that the money had been gifted by his aunt. This explanation was not found satisfactory. The Income-tax Officer-further found that he gave an evasive reply to a direct question, whether the money did not represent profits made by himself. It was also found that there was a regular inflow of money year after year from the same source. A conclusion was drawn that the assessee had been carrying on a secret business which yielded income and profit. This Court held that this was a conclusion on a question of fact and no question of law arose.

(9) The facts in — 'Stoneleigh Products Ltd. v. Dodd (H. M. Inspector of Taxes)', (1948) 30 Tax Case 1 (J) are somewhat similar. The assessee claimed that a greater part of the amount represented money belonging to his aunt which she had lent. The aunt was examined and she denied having ever lent the money. The amount was then treated as taxable income. It was held that the question was one of fact.

(10) In — 'J. A. Shellim v. Commr. of Income-tax, Bengal', A. I. R. 1947 Cal. 338 (K) the assessee's bank accounts showed considerable credits for a period of one year. The assessee gave no information as to the source of these credits. The Income-tax Officer was obliged to act under the provisions of Section 13 and in doing so he allowed 2/3rd of the total amount of credits towards expenses and included the balance of 1/3rd in the assessable income. It was held that this was a pure question of fact, there being nothing to show that the Income-tax Officer had in any way acted inconsistently with the provisions of S. 13.

(11) In — 'Jadunandan Sahu Deokisanram v. Commr. of Income-tax, Bihar and Orissa', A. I. R. 1949 Pat 215 (L) the assessee's explanation that the amounts entered were received from the home-chest of the family was disbelieved. The return showed extraordinarily low profits and from the circumstances the Tribunal had held that these were secret profits. On a reference the High Court held that it could not go into the question, whether the conclusion arrived at by the Tribunal was justified so long as there was legal evidence to support it.

(12) In — 'G. M. Madappa v. Commr. of Income-tax, Madras', A. I. R. 1949 Mad. 246 (M) it was held that the burden of proving that cash credits were not profits was on the assessee and not on the Income-tax Officer, and the fact that he had failed to notice similar unexplained cash receipts in earlier years did not affect the question of burden of proof. The observations are important and are as follows:

"There cannot be the slightest conceivable doubt that when both the source and the nature of the cash receipts shown in the accounting year have not been proved, the Income-tax Officer

cannot draw any other inference except that those two amounts are income receipts. He cannot come to the conclusion that they are capital receipts. If it were held that he should the result would be that every assessee will be entitled to enter cash credits in his account and refuse to furnish the requisite particulars about its source and nature and insist that those entries should be automatically treated as capital receipts and not as income receipts."

(13) In — 'In re Udayram Jagnnath', 1951-19 I. T. R. 222 (All) (N) the assessee's explanation that certain cash credits entered in his books represented loans was rejected. The question referred was to the effect, whether the Tribunal was justified in holding that the amount represented revenue receipts disguised as cash deposits. The High Court held that the question was one of fact for the Tribunal to decide and on the facts of the case it could not be said that there were no materials on the record on which the Tribunal could come to the finding it had arrived at.

(14) The facts in — 'Commr. of Income-tax, Excess Profits Tax, Madras v. South Indian Pictures Ltd., Karaikudi', A. I. R. 1952 Mad. 231 (O) were entirely different. There the source of the receipt was known. The amount having been paid to the assessee as compensation for termination of three contracts, the question was whether this was income or a casual receipt or capital receipt. It was held that if the Department claims to exercise the right of taxing a particular receipt, it must be established that the receipt in question was income, profit or gain falling under any of the heads of income mentioned in S. 6 of the Act.

(15) The last case cited at the Bar is — 'Narayandas Kedarnath Firm v. Commr. of Income-tax Central', A. I. R. 1952 Bom 459 (P). The facts in this case were also different. There too the source of the money received by the assessee was established. It represented genuine remittances from outside by partners. The explanation of the partners as to where they got the money from was not accepted. It was held that from the failure to accept the explanation of the partners the Department might be able to draw an inference that the amount represented undisclosed profits of the partners, but there was no material on which it could be held that the remittances were undisclosed profits of the assessee-firm.

(16) An examination of these cases would, therefore, go to show that, if from the books of account of the assessee it appears that during the relevant account period he had received certain sums of money, it is for him to explain from where he got the same, and if his explanation is accepted there is an end of the matter. The question then might arise, which would be in most cases a question of law, whether the assessee's claim that the receipt — its true source being known — is not taxable income is justified or not.

Where, however, his explanation is rejected, the Tribunal has to record a finding on such materials as may be available, whether the money represents revenue receipt taxable as income of the relevant account period. The burden, in the first instance, must be on the assessee to show the true nature of the receipt and why he claims that it is not taxable income. When the assessee furnishes an explanation, if that explanation is unsatisfactory, that may in itself be a circumstance which the Income-tax Officer may be entitled to take into consideration but it need not necessarily, in every case, lead to the conclusion that the receipt is a revenue receipt taxable as income received in a particular year.

The question must always remain a question of fact which has to be decided on the materials available. In each case the revenue authorities are entitled to take into consideration the fact that the explanation given by the assessee is either unreasonable or is false and then to consider whether that circumstance alone or the other materials available along with that circumstance would entitle them to hold that the amount so deposited represented the undisclosed income of the assessee in the year in question.

(17) Mr. Pathak, learned counsel for the assessee, has relied on the fact that the amount of Rs. 5,000/- was deposited on 25-11-1941, i. e., a month and five days from the beginning of the account year, which was 20-10-1941. Considering the extent of the business mentioned above it cannot be said that it was not possible for the assessee to have made secret profits of Rs. 5,000/- in the course of a month and five days. We cannot, therefore, say that the inference drawn was an unreasonable inference.

(18) As regards, however, the cash deposit of Rs. 65,000/-, learned counsel for the assessee has pointed out that the deposit was made on the very first day of the account year and, considering the extent of the business carried on by the assessee, it was not possible that they could have made a profit of Rs. 65,000/- on one day. The Tribunal, however, did not seem to have attached any importance to this argument and have overlooked this aspect. We have looked through the assessment order for the year 1946-47 and we find that in that year the assessee had made a total profit of Rs. 1,08,166/-. After deducting a sum of Rs. 45,378/- for excess profits tax liability, the business profits tax was reduced to Rs. 62,788/-. The sum of Rs. 65,000/- thus was more than half of the total profits made in the course of the year and it is not at all reasonable to expect that this huge profit could have been made on 17-10-1944 the first day of the relevant account year. No attempt was made to go further into this matter or to procure any material which would go to show that this huge profit could be made on the first day when the account year commenced. Mr. Pathak has offered to produce before us the account books to show that after having carried over the previous years balance these were the first entries that were made in the account books. He has suggested that the entries must have been made early in the day and there was, therefore, no likelihood of any secret profit having been made on that day. We do not think we can allow learned counsel to produce fresh evidence before us, but from the circumstances that appear from the statement of the case and the assessment order we do not think we can say that there was any material from which a conclusion could be arrived at that Rs. 65,000/- was the profit made in the account year from 17-10-1944 to 4-11-1945. We may mention that we are not called upon to decide, nor is it the case of the Department that these profits were made in the previous account year 1943-1944.

(19) Our answer, therefore, to the question referred to us is that the Tribunal could reasonably hold that the cash deposit of Rs. 5,000/- in the assessment year 1943-44 represented the assessee's assessable income from some undisclosed source but it was not a reasonable inference that the sum of Rs. 65,000/- was income taxable in the assessment year 1946-47.

(20) As the assessee has substantially won we allow them costs which we assess at Rs. 300/-

B/V.S.B. Ordered accordingly

A.I.R. 1953 ALL. 705 (Vol. 40, C. N. 343)

AGARWALA AND CHATURVEDI JJ.

Mahmood Hasan Khan, Plaintiff-Appellant v. Bhikhari Lal and others, Defendants-Respondents.

Second Appeal No. 1731 of 1950, D/- 13-4-1953.

(a) Transfer of Property Act (1882), S. 8 — Transfer of grove.

When an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendee unless it is expressly reserved by him. (Para 4)

Anno: T. P. Act, S. 8 N. 2, 4, 9.

(b) Muhammadan Law — Pre-emption.

Under the Muhammadan Law where a pre-emptor is equally entitled to the property along with the vendee, the property should be divided equally between the parties. Case law Rel. on. (Para 4)

(c) Muhammadan Law — Pre-emption — Applicability to Hindus.

Held that the Muhammadan Law applied even though the vendees were Hindus. 7 All 775, 12 All 229, Rel. on. (Para 4)

(d) Muhammadan Law — Pre-emption — Vicinage.

The right of pre-emption on the ground of vicinage should not be restricted to plots or gardens adjoining houses. The right of pre-emption extends to plots and gardens whether they adjoin houses or not. (Para 5)

(e) Muhammadan Law — Pre-emption — Vicinage.

Four bighas and five biswas area is not so big as to be taken out of the category of cases in respect of which the right of pre-emption on the ground of vicinage extends. 15 All 104; 33 All 28 and 6 Beng LR 41 (FB), Disting. (Para 5)

(f) Constitution of India, Art. 13 — Retrospective effect.

Article 13 does not act retrospectively so as to affect vested rights. AIR 1951 SC 128 Foll. (Para 6)

Sarvashri Baleshwari Pd., K. C. Saxena and G. N. Kunzru, for Appellant; G. P. Bhargava and N. P. Asthana, for Respondents.

CASES CITED:

(A) ('97) 1887 All WN 118: 19 All 466
(B) ('22) AIR 1922 All 157: 44 All 83
(C) ('20) AIR 1920 Bom 343: 44 Bom 887 (FB)
(D) ('09) 2 Ind Cas 458: 31 All 519
(E) ('85) 7 All 775
(F) ('90) 1890 All WN 93: 12 All 229
(G) ('92) 1892 All WN 240: 15 All 104
(H) ('11) 7 Ind Cas 404: 33 All 28
(I) ('71) 14 WR 1: 6 Beng LR 41 (FB)
(J) ('51) AIR 1951 SC 128: 1951 All LJ (SC) 23: 52 Cri LJ 860 (SC)

AGARWALA, J.: This is a plaintiff's appeal arising out of a suit for per-emption. The property in dispute consists of certain plots of land comprised in Khata Khewat No. 14 in Qasba Fatehpur, Mohal Kamalpur Abdur Rauf Khan. The plots are situated within the Municipal limits of Fatehpur and consist of a guava grove. In a portion of it there is a graveyard as well. The total area of the plots in dispute is 4 bighas and 6 biswas. The defendants 3 and 4 sold these plots to defendants 1 and 2 for an ostensible consideration of Rs. 1300/-. The plaintiff-appellant brought the suit which has given rise to this appeal for pre-emption on the ground that he was a co-sharer in the mohal in which the plots were situated while the vendees were not and further that he held in proprietary right a guava grove adjoining the plots in dispute. According to him, the Muhammadan Law applied to the case and he had made the necessary demands for pre-emption. He further pleaded that in any case he had a right of pre-emption according to the customary law applicable to the mohal. The real sale-consideration was alleged by him to be only Rs. 650/-.

(2) The defence of the vendees was that they themselves were owners of a guava grove in proprietary right adjoining the plots in dispute and that they were also co-sharers in the mohal. They denied the custom of pre-emption and urged that the Muhammadan Law of pre-emption did not apply to them, they being Hindus. They also denied that any demands were made by the plaintiff and that he had any preferential right to pre-empt. The sale consideration was asserted to be Rs. 1300/-. Bar. of estoppel was also raised.

(3) The trial Court held that the Muhammadan Law applied to the case and that while the plaintiff was the owner of an adjoining grove, the defendants had failed to prove that they also owned an adjoining grove. He also held that

"there is some land between the land in suit and the defendants' Khanjari Bagh. The result is that the plaintiff is a Shafi-i-jar under the Muhammadan Law while the defendants are not, and under the terms of the custom, the plaintiff is entitled to pre-emption as a co-sharer while the defendants are not co-sharers in the Mohal".

The sale consideration was held by him to be Rs. 1238/-. He held that demands were made by the plaintiff as required by law. He rejected the plea of estoppel and decreed the plaintiff's suit for possession of the land in dispute on payment of a sum of Rs. 1238/-. The defendants-vendees appealed to the lower appellate Court. At first the appeal was dismissed mainly on the ground that the defendants had failed to prove that they were the proprietors of the land of the grove which they claimed to be their own and which they claimed adjoined the land in dispute. It appears that the defendants had failed to file the sale-deed by which they claimed to be the owners of the adjoining grove. They, therefore, made an application for review of judgment on the ground of discovery of an important piece of evidence in the shape of the sale-deed in their favour which according to them showed that they had purchased not merely the trees but also the land on which the grove stood. Before deciding the application for review the Court ordered that a copy on scale of the plots in dispute and the adjoining plots which the parties claimed to belong to them should be filed, so that the matter may be decided correctly. This order was passed on 4-10-1948.

On 21-10-1948, the defendants-vendees filed a copy of a settlement map showing the plots

in respect of which pre-emption was claimed as also the grove plot which the defendants alleged to belong to them and also the grove plots belonging to the plaintiff. This map showed that the grove claimed by the defendants-vendees as belonging to them and which was numbered as 1779 was indeed adjacent to plot No. 1784, one of the plots which was sold. The grove belonging to the plaintiff was also adjacent to that plot. The learned Judge of the Court below ultimately allowed the application for review and set aside his previous order dismissing the appeal and set down the case for rehearing. Against the order allowing the review application there was an appeal to this Court which was, however, dismissed. The order allowing the application for review, therefore, became final. Ultimately the lower appellate Court allowed the appeal holding that the defendants-vendees were owners of the site of the grove no. 1779 which was adjacent to one of the plots sought to be pre-empted and consequently they were Shafi-i-jars and as such had equal right of pre-emption with the plaintiff who was also shafi-i-jar. It, therefore, dismissed the suit, but it did not take into consideration — and probably the point was not pressed before him — that even though the parties were equal Shafi-i-jars, the plaintiff could claim half the property pre-empted and the suit was not liable to be dismissed merely because the plaintiff had no preferential right over the defendants-vendees. Against the decree of the Court below the plaintiff has preferred this second appeal.

(4) The first point urged before us by learned counsel appearing for the appellant is that the lower Court was not justified in coming to the conclusion that the defendants-vendees were Shafi-i-jars. He has urged that the sale-deed relied upon by the defendants does not convey the land of plot no. 1779 on which the defendants' grove stands. It is pointed out that, although the vendor stated in the sale-deed that he was the owner of the grove as well as of the land underneath it yet in the portion conveying the property he had first written out the word "Arazi Land" along with the grove as the property conveyed but later on stuck out the word "Arazi" from the sale-deed, thus showing an intention to convey merely the trees standing in the grove and not the land underneath it. We have read the sale-deed carefully and although it is true that the vendor does not in so many words refer to the site "Arazi" as having been conveyed and indeed it appears that the word 'Arazi' was cut out from the sale-deed we have no hesitation in coming to the conclusion that on the words of the sale-deed as it stands, the vendor parted with every right that he possessed in the grove. It was a proprietor's grove, the vendor being the sole owner of it. When an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land was also conveyed to the vendee unless it was expressly reserved by him. In the case of a grove in which the groveholder is not the owner of the land, a sale by him would not be deemed to have passed the land to the vendee. But this is not so in the case of a sale by a proprietor of the grove which he has planted over his own land.

On a perusal of the entire sale-deed we must hold that the defendants were the proprietors not only of the trees but also of the site. The map on the file clearly establishes that the defendants' grove adjoins plot no. 1784. It was attempted to show that between the defendants' grove no. 1779 and plots nos. 1786 and 1787 which were sought to be pre-empted, there was a passage or a grave-yard intervening and that, therefore, it cannot be said that the defendants-vendees were shafi-i-jars of the vendors and in this connection the opinion of the trial Court which we have quoted earlier in the judgment was relied upon. As already stated the map clearly shows that plot no. 1779 adjoins plot No. 1784. There is no passage or graveyard between the pre-empted property and the defendants' grove. Indeed the plots constituting the graveyard are part of the property sold which is sought to be pre-empted and the property which is said to be a passage is also included in the sale-deed under pre-emption. It must, therefore, be held that the defendants-vendees are shafi-i-jars of the vendors. The plaintiff and the defendants therefore are both shafi-i-jars and the question is whether the suit should be dismissed as has been done by the Court bolew, or, as claimed by the plaintiff, the property in dispute should be divided half and half between them.

The matter is concluded by authority. Under the Mohammadan Law where a pre-emptor is equally entitled to the property along with the vendee, the property should be divided equally between the parties, vide —'Amir Hasan v. Rahim Baksh', 19 All 466 (A); —'Muhammad Yakub v. Kanhai Lal', AIR 1922 All 157 (B) and —'Vithaldas Kahandas v. Jametram', AIR 1920 Bom 343 (FB) (C). In —'Baldeo v. Badri Nath', 31 All 519 (D), the Court seems to have overlooked this aspect of the case and dismissed the pre-emption suit when the pre-emptor and the vendee were entitled to the property in equal degree. This was commented upon in the subsequent case of —'AIR 1922 All 157 (B)'. It was not disputed that the Mohammedan Law applies even though the vendees are Hindus, vide —'Gobind Dayal v. Inayat Ullah', 7 All 775 (E) and —'Abbas Ali v. Maya Ram', 12 All 229 (F).

(5) On behalf of the defendants-vendees the decision of the Court below was sought to be affirmed on two additional grounds one of which does not seem to have been raised before that Court and the other could not have been raised before it. It was urged that the Muhammadan Law does not allow pre-emption on the ground of vicinage in respect of large estates and allows pre-emption on that ground only in respect of houses, gardens and small plots of land. It was also urged that a garden is different from a grove and that the property in dispute does not fall within the category of a garden. No case in which the property claimed consisted of a few plots and not the entire mohal or a share in a mohal and was dismissed on the ground that such plots of land could not be pre-empted, was shown to us. The cases relied upon were all cases in which the property sought to be pre-empted consisted of mohals or a share in a mohal. —'Abdul Rahim Khan v. Kharag Singh', 15 All 104 (G), was a case in which after a perfect partition, a mohal had been formed and it was sought to

be pre-empted by a co-sharer in the other mohal. It was held that on the ground of vicinage alone under the Muhammadan Law such property could not be pre-empted. In —'Munna Lal v. Hajira Jan', 33 All 28 (H), there was also an entire mohal which was sought to be pre-empted. The leading case on the point is —'Sheikh Mahomed Hussain v. Shaw Mohsin Ali', 6 Bang LR 41 (FB) (I). That was also a case of pre-emption in respect of a considerable estate consisting of a share in a village. It was held that the right of pre-emption on the ground of vicinage alone did not extend to such property. In the course of judgment, however, it was observed that, according to the Muhammadan Law the right of pre-emption possessed by a neighbour extends only to houses, gardens and small parcels of land.

The argument of learned counsel for the vendees-respondents was that the right of pre-emption being a weak right and the right to claim pre-emption on the ground of vicinage being the weakest, it should not be extended to claims in respect of plots so big as the plots in the present case covering an area of 4 bighas and 5 biswas. It appears to us, however, that there is no justification for restricting the right of pre-emption on the ground of vicinage, to plots or gardens adjoining houses. The right of pre-emption extends to plots and gardens whether they adjoin houses or not. The plots in dispute constitute one grove in which there is a small graveyard. It cannot be said that this is an estate within the meaning of the decision of the Full Bench in —'6 Beng LR 41 (I). The property in dispute is not a share in a village or in a mohal. The vendor was the exclusive proprietor of the specific plot sold. Four bighas and 5 biswas area is not so big as to be taken out of the category of cases in respect of which the right of pre-emption on the ground of vicinage extends. In our opinion the plaintiff is entitled to pre-empt.

(6) The second ground on which the judgment of the Court below was sought to be supported was that the Law of Pre-emption has after the commencement of the Constitution, become unconstitutional and as such is void under Art. 13 of the Constitution. Reliance was placed upon Cl. (f) of Art. 19(1) and it was urged that the limitation upon the right conferred on the citizens under that clause could be restricted only in the public interest under sub-cl. (5) of that Article. It is not necessary for us to express any opinion on this question because we find that the right which the plaintiff seeks to enforce in the present litigation is a right which had accrued to him before the commencement of the Constitution. It has been held by the Supreme Court that Art. 13 does not act retrospectively so as to affect vested rights, vide —'Keshavan v. State of Bombay', AIR 1951 SC 128 (J).

(7) There is therefore no force in this contention. The result, therefore, is that we allow this appeal in part, set aside the decree of the Court below and decree the plaintiff's suit for possession of half the property in dispute on payment of Rs. 619/- within two months from to-day's date. In case of the default of the payment within the time fixed therein the plaintiff's suit shall stand dismisssed with cost. The case is one in which there could have been a difference of opinion as to the law applicable. We, therefore, order that in case the plaintiff deposits the amount, the parties shall bear their own costs throughout.

(8) Learned counsel for the appellant states that the whole amount of Rs. 1238/- has already been deposited in the Court. If that is so, Rs. 619/- out of it may be paid to the vendees and the rest may be withdrawn by the plaintiff.

B/D.H.Z. Appeal partly allowed.

A.I.R. 1953 ALL. 707 (Vol. 40, C. N. 344)

MALIK C. J. AND GURTU J.

Sm. Daljit Kaur, B. A., B. T., Appellant v. S. Tarlok Singh and others, Respondents.

First Appeal No. 261 of 1952, D/- 24-3-1953.

Succession Act (1925), Ss. 192, 209, 299 — Order under S. 192.

Order dismissing application under S. 192 — S. 209 applies and appeal does not lie. AIR 1922 All 337 (3), Rel. on. (Para 3)

Anno: Succession Act, S. 192 N. 1; S. 209 N. 1; S. 299 N. 1.

Krishna Shankar, for Appellant; B. D. Gupta, for Respondents.

CASE CITED:

(A) ('22) AIR 1922 All 337 (3): 44 All 546

MALIK C. J.: A preliminary objection has been raised by learned counsel for the respondents that this appeal does not lie. Sardar Mehar Singh, Air Commodore, died in an air-crash in the year 1952. It is said that he left considerable property and the applicant, Baljit Kuar, claiming to be his widow made an application under S. 192, Succession Act in the Court of the District Judge, Rampur. This application was filed against the father and brothers of Sardar Mehar Singh and it was said that they were wrongfully trying to take possession of the property left by the deceased. The applicant, therefore, prayed for the appointment of a curator. The learned District Judge dismissed the application on 21-4-1952 on the ground that no sufficient cause had been made out for taking proceedings under S. 192, Succession Act and the applicant was directed, if she was so minded, to file a regular suit. Against that order, this First Appeal was filed. Learned counsel for the appellant claimed that the appeal lay under S. 299, Succession Act (39 of 1925). Section 299 is to the following effect:

"Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals."

Section 299 is in Part IX of the Act which deals with Probate, Letters of Administration and Administration of Assets of Deceased. Section 192, however, is in Part VII which is for Protection of Property of Deceased pending final adjudication of the rights of rival claimants to the same. Sections 192 to 210 are all included in Part VII and S. 209 of the Act provides that:

"The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review."

Learned counsel has tried to distinguish S. 209 and has urged that the Court of appeal cannot interfere with an order of a District Judge settling the question of actual possession of the property, but an appeal lies from every order of a District Judge as provided for in S. 299.

(2) In considering these sections one must bear in mind that the Indian Succession Act is an Act to consolidate the law applicable to intestate and testamentary succession which was formerly dealt with by a number of Acts and which have all been now consolidated and form part of the Indian Succession Act. A list of these Acts is given in Sch. IX of the Act. Part VII has been taken in the main from an Act known as the Succession (Protection of Property) Act (19 of 1841). The object of the Act was to meet cases of unlawful possession or disturbance of possession under pretended claims of right, and to discountenance the employment of force and fraud. The decision by the Judge was not to be of such a nature as to supersede the necessity of a regular suit as it did not determine the title to the property. The proceedings under Part VII are summary proceedings and S. 209 makes it clear that the only effect of those proceedings would be to settle the question as to who shall remain in actual possession of the property pending decision by a competent Court. All such orders, therefore, which can come under Part VII are governed by S. 209 and are not subject to appeal or review. In — 'Gajadhar v. Megha', AIR 1922 All 337 (3) (A), it was held that an order appointing a curator was not appealable by reason of the provisions of S. 18, Succession (Property Protection) Act (19 of 1841). Though that judgment was delivered under the old Act, the provisions of that Act have more or less been incorporated in Part VII, Succession Act (39 of 1925).

(3) In our view S. 209 applies and the order passed by the District Judge is final. The preliminary objection must, therefore, prevail.

(4) The appeal is dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1953 ALL. 708 (Vol. 40, C. N. 345)

MALIK C. J. AND V. BHARGAVA J.

Chhedi Sahu and another, Appellants v. Mst. Sheoraji and others, Respondents.

Letters Patent Appeal No. 45 of 1946, D/- 1-5-1953, from judgment of Mathur J., D/- 6-5-1946.

(a) Debt Laws — U. P. Debt Redemption Act (13 of 1940), S. 8 — Dismissal of application — Appeal — (Civil P. C. (1908), Ss. 47, 104 and O. 43, R. 1).

Act does not provide for appeal against order dismissing application under section — Order is also not one either under S. 47, Civil P. C. or an appealable order under S. 104 read with O. 43, R. 1 of that Code. Hence no appeal lies against such order: Case law referred to. (Para 7)

Anno: Civil P. C., S. 47 N. 3; S. 104 N. 2, 3; O. 43, R. 1 N. 1.

(b) Civil P. C. (1908), S. 115 — Appeal treated as an application in revision.

Quaere—Whether Letters Patent Appeal filed under permission granted by single Judge of High Court, in second appeal, can be treated as revision against an order passed by the trial Court. (Para 8)

Anno: Civil P. C., S. 115 N. 19.

J. Swarup, for Appellants; Z. H. Lari, K. C. Saxena and Narain Sahai, for Respondents.

CASES CITED:

(A) ('50) AIR 1950 All 713: 1950 All LJ 847 (FB)

(B) ('42) AIR 1942 All 390: 1942 All LJ 578 (FB)

(C) ('46) AIR 1946 All 89: ILR (1946) All 413 (FB)

MALIK C. J.: This appeal has arisen out of proceedings initiated by an application under S. 8 of the U. P. Debt Redemption Act, Act No. 13 of 1940, for amendment of a decree for redemption.

(2) The facts in brief are that on 5-1-1880, one Janki and his son Kanhai mortgaged a house now in dispute, to one Ram Sarup for Rs. 299/-. The mortgage was for possession. On 2-1-1883, the two mortgagors executed a simple mortgage in respect to the same house in favour of the same mortgagee for Rs. 299/- and stipulated therein that it would not be permissible for the mortgagors to redeem the mortgage of 1880 without paying up the amount due under the simple mortgage of 1883.

(3) The mortgagees remained in possession since 1880. Janki and Kanhai both died, and Kanhai's heirs who inherited the property transferred the equity of redemption on 28-8-1936, to the plaintiffs Mt. Sheoraji and Mt. Habiban. They left a sum of Rs. 299/- in their hands for redemption of the possessory mortgage of 1880 and stipulated that the transferee would be liable for payment of whatever amount was found due under that mortgage. No mention however was made of the 1883 mortgage. When Mt. Sheoraji filed a suit for redemption of the mortgage of 1880 the mortgagee relied on the mortgage of 1883 and claimed that before the mortgage of 1880 could be redeemed the plaintiff had to pay the amount due under the mortgage of 1883 as well. This plea evidently found favour with the trial Court and was affirmed by this Court by an order dated 5-11-1942, with the result that the plaintiffs were required to pay Rs. 3,942/- the amount due under both the mortgages of 1880 and 1883 before the mortgage of 1880 could be redeemed.

(4) In the year 1943 the plaintiff filed an application under Ss. 8 and 9 of the Debt Redemption Act for redemption of interest allowed to the mortgagee and for amendment of the decree. This application was dismissed by the learned Munsif on the 18th August 1943, as in his view the amount was not a loan the liability having been transferred by the original mortgagors to the transferees. The defendants had made a declaration that they would not proceed against any land, agricultural produce or person of the agriculturist, but the learned Munsif held that S. 4 of the Debt Redemption Act applied only to a case where the mortgagee had filed a suit to realise the amount due to him from an agriculturist and not to a suit for redemption filed by an agriculturist. Against the order rejecting the application under Ss. 8 and 9 of the Debt Redemption Act, the plaintiff filed an appeal before the learned Civil Judge of Gorakhpur who allowed the appeal on the 11-4-1944 and reduced the amount which the plaintiffs were required to pay for redemption of the mort-

gage. On a further appeal to this Court a learned single Judge dismissed the appeal on the 6th of May 1946, but granted to the defendants leave to appeal. The defendants have now filed this appeal.

(5) It is contended on their behalf that the order passed by the learned Munsif on the 18th August 1943, was not an appealable order and neither the learned Civil Judge of Gorakhpur nor the learned single Judge of this Court had any jurisdiction to entertain appeals. Reliance is placed by learned counsel on certain observations made in a Full Bench decision of this Court in — 'Badri Prasad v. Shankar Lal', AIR 1950 All 713 (A). In view of that decision in which several other Full Bench decisions of this Court have been considered, it is not necessary for us to discuss the law at any length. That case however has settled the law, so far at least as this Court is concerned, that an order under S. 8 of the Debt Redemption Act refusing to amend a decree is not an order under S. 47, Civil P. C. This point was referred to the Full Bench, as in — 'Mt. Ketki Kunwar v. Ram Sarup', AIR 1942 All 390 (B), and other cases where an application for amendment was made during the pendency of execution proceedings this Court had held that the order for amendment of the decree was an order under S. 47, Civil P. C.

(6) The decree for redemption was passed on 5-11-1942. That decree was no doubt appealable under S. 96, Civil P. C. The application for amendment of the decree was filed in the year 1943. As the application was dismissed by the learned Munsif the decree was not amended. The Debt Redemption Act makes no provision for an appeal against an order dismissing an application under S. 8 of the Debt Redemption Act. In — 'Manmohan Lal v. Raj Kumar Lal', AIR 1946 All 89 (C), the question for decision was slightly different. But the law on the point was discussed whether when a decree was amended under S. 8 of the Debt Redemption Act, an appeal would lie from the amended decree. The view expressed by some of the learned Judges was that the amended decree would be appealable but limitation would run from the date of the original decree and an application under S. 5 of the Limitation Act might be necessary where the period of limitation for appeal from the decree on the date it was originally passed had expired. Some observations were made in — 'Badri Prasad's case' (A) that the amended decree as such was appealable under S. 96, Civil P. C. In any case, the question whether the amended decree as such, or the original decree as amended is appealable is of mere academic interest. Section 8, sub-s. (2) provides that the amended decree shall bear the same date as the original decree. An application under S. 5 of the Limitation Act would therefore be required unless the period of limitation for appeal from the date of the original decree had not expired.

(7) Where, however, no amendment has been made and the application under S. 8 has failed and has been rejected, the order can be appealable only if there is a law providing for an appeal. It is now well settled that an appeal is a creature of statute and unless a right of appeal is given by some law an order is not appealable. We have already said that it has been held by this Court that such an order is not an order under S. 47, Civil P. C. It is not an order which is appealable under the provisions of S. 104 read with Order 43, R. 1, Civil P. C. There being no provision for appeal the order passed by the learned Munsif dismissing the application for amendment was not appealable and no appeal lay to the learned Civil Judge or to the learned single Judge of this Court.

(8) Mr. Sri Narain Sahai learned counsel for the respondents has asked us to treat this case as a civil revision under S. 115, Civil P. C. against the order of the learned Munsif dated 18-8-1943. It is doubtful whether a Letters Patent Appeal filed under the permission granted by a learned single Judge of this Court can be treated as a revision against an order passed by the learned Munsif. But even if we were to allow this prayer, the difficulty would arise that there being no error of jurisdiction in the order of the learned Munsif, it being at best an error on a question of law, we shall have no jurisdiction under S. 115 of the Code to revise the order. We therefore, do not see any reason for granting this request.

(9) The result, therefore, is that this appeal is allowed, and the decrees passed by the learned single Judge as also by the learned Civil Judge of Gorakhpur, are set aside. The order of the learned Munsif dated 18-8-1943, therefore will remain operative.

(10) As the objection as regards jurisdiction was not taken either in the lower appellate Court or in this Court, we direct the parties to bear their own costs in all the Courts.

B/M.K.S. Appeal allowed.

A.I.R. 1953 ALL. 709 (Vol. 40, C. N. 346)
(LUCKNOW BENCH)

MALIK C. J. AND C. B. AGARWALA J.

Raja Ram, Defendant-Appellant v. Sheo Behari Singh and another, Plaintiffs-Respondents.

Appeal No. 17 of 1951, D/- 10-2-1953.

Tenancy Laws — U.P. Tenancy Act (17 of 1939), S. 206(a) — Applicability.

Section 206(a) preserves rights of those who were groveholders on the date when the Act came into force — Groveholder ceasing to be groveholder before Act by abandonment and consequent escheat to Zamindari according to custom — Section does not apply. (Para 5)

Ali Hasan, for Appellant.

AGARWALA J.: This is a defendant's special appeal from the judgment of a learned single Judge of this Court. The facts may be briefly stated as follows:

(2) Hanwant Singh, plaintiff, who died during the pendency of the appeal before the learned single Judge and is now represented by his son, Sheo Behari Singh and his grandson Maheshar Baksh Singh, was cosharer in patti No. 2 in village Kathwa in which grove plot No. 67 was situated. Ram Ghulam the maternal grandfather of Raja Ram, appellant, was its groveholder. The plaintiff's case was that Ram Ghulam died in 1934 and was succeeded by defendant-appellant who used to live with him, that in 1937 Raja Ram abandoned the grove and went away to live in village Shivpuri which was not owned by the Zemindars and according to the village custom the grove escheated to the zemindars including the plaintiff. On these allegations the plaintiff

claimed to recover possession from Raja Ram who was alleged to be a trespasser.

(3) Raja Ram's defence was that he had inherited the grove from his maternal grandfather who died not in 1934 but in 1930, that he never lived with his maternal grandfather and that the cause of action, if any, arose in 1930, on the death of Ram Ghulam and as the suit was filed in 1944, it was time barred. The custom pleaded by the plaintiff was also denied and it was further urged that any such custom had no effect in view of the provisions of S. 206(a), U. P. Tenancy Act, 1939.

(4) The trial Court dismissed the suit. The lower appellate Court also affirmed the decree but on different grounds. According to the findings not now challenged before us, Ram Ghulam died in 1931, Raja Ram abandoned the grove in 1937, the custom alleged by the plaintiff was held to be proved and according to that custom the grove escheated to the zemindars in 1937. The lower appellate Court, however, held that under S. 206(a), U. P. Tenancy Act the custom did not apply to the case and that Raja Ram continued to be groveholder of the grove. The learned single Judge in second appeal, however, overruled this contention of the defendant-appellant and held that S. 206 applied only to groveholders who had not ceased to be groveholders before the Act came into force and since Raja Ram had abandoned the grove and according to the custom, the grove had escheated to the zemindars, he had ceased to be a groveholder when the U.P. Tenancy Act came into force and as such S. 206 did not help him at all.

(5) The only point for decision in this special appeal is whether S. 206(a), U. P. Tenancy Act applies to the facts of this case and whether the custom pleaded by the plaintiff-respondent could not apply in view of that section. In our opinion the view taken by the learned single Judge of this Court was correct. According to the custom, Raja Ram had ceased to have any right in the grove. He, therefore, became a trespasser. He could not be said to be a groveholder after 1937 and was not such when the U.P. Tenancy Act came into force. Section 206(a) preserves the rights of groveholders, that is to say, persons who were groveholders on the date the Act came into force.

It was, however, urged that S. 206(a) was retrospective in operation. No doubt the chapter relating to groveholders was retrospective in the sense that it applied not only to groves planted by groveholders after the commencement of the Act but also to persons who were groveholders on the date on which the Act came into force. But it was not retrospective in the sense that the rights that had been forfeited or lost before its commencement were revived by it. Those persons who had ceased to be groveholders before the commencement of the Act did not become groveholders after its commencement and, therefore, S. 206 could not be of any help to the defendant-appellant.

(6) In this view of the matter there is no force in this appeal. It is dismissed. As no one appears on behalf of the respondent, we make no order as to costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 ALL. 710 (Vol. 40, C. N. 347)

V. BHARGAVA AND GURTU JJ.

Kundomal Ganga Ram, (Judgment-debtor), Appellant v. Topamal Chotamal, (Decree-holder), Respondent.

Exn. First Appeal No. 393 of 1952, D/- 10-2-1953.

(a) Civil P. C. (1908), O. 41, R. 22 — Cross-objection against person not impleaded in appeal.

A cross-objection cannot be filed against a person who is not a party to the appeal and who is not impleaded as a party in the cross-objection either. (Para 2)

Anno: Civil P. C., O. 41, R. 22 N. 13 Pt. 1.

(b) Civil P. C. (1908), S. 38 and O. 21, R. 50 (1) — Decree specifically against firm and its assets in hands of partners — Execution against partners personally.

It is not for the executing Court to vary the terms of a decree. It has to execute the decree as it stands. (Para 3)

Where a decree is specifically against the firm itself and the assets of the firm in the hands of the partners and the specific claim by the decree-holder that the decree should be against the partners personally was decided against the decree-holder, the executing Court is bound by the limitation placed on the decree itself and cannot execute it against the partners personally. (Para 2)

Anno: Civil P. C., S. 38 N. 8 Pt. 4; O. 21 R. 50 N. 1.

(c) Hindu Law — Joint family — Trading families — Presumption as to property of family being not separate from assets of family business.

Where it is not alleged that the brothers constituting a joint family were members of a trading family or that they had any ancestral business, there is no presumption that the property belonging to the family in any way represents the assets of the firm started by them. (Para 4)

Hari Swarup and J. Swarup, for Appellant; Maheshwari Dayal and S. D. Srivastava, for Respondent.

V. BHARGAVA J.: This is a judgment-debtor's appeal arising out of proceedings for execution of a simple money decree for a sum of Rs. 12,140/1/-. The parties to this appeal were original residents of Sind. Some time in 1947, the decree-holder filed Suit No. 533 of 1947 on the original side of the Chief Court of Sind for recovery of money against Firm Kundomal Ganga Ram, and it was alleged that the appellant, Kundomal Ganga Ram, was one of the partners of that firm. In addition, there was an allegation that his four brothers were also partners in the firm and that there was one other partner known as Kodumal. The firm was sued through Kodumal as partner and the service of the summons in the suit was effected on Kodumal. On 8-11-1948, the Chief Court of Sind decreed the plaintiff's suit.

Admittedly, by the time the decree was passed in the Chief Court of Sind, the partition of India had come into existence and the decree was passed by a Court in Pakistan which was naturally, at that time a foreign Court. On the basis of the judgment in that suit, the decree-holder filed another suit (No. 205 of 1949) in the Court of the Civil Judge of Agra. In this

suit, he impleaded not only Firm Kundomal Ganga Ram as defendant but he also impleaded Kundomal Ganga Ram as well as his four brothers as defendants. These five brothers were defendants 2 to 6 and the firm was defendant 1. The firm was again sued through Kodumal as partner though, in the plaint, it was requested that the service be effected on the firm by serving the summons on Kodumal. The suit was decreed by the learned Civil Judge of Agra against Firm Kundomal Ganga Ram in the following terms:

> "I decree the plaintiff's suit for Rs. 12,140/1/- with costs and future and 'pendente lite' interest at 3 per cent. against defendant 1 and such property of the firm M/S Kundomal Gangaram as may be found in the hands of defendants 2 to 6."

It is this decree which was sought to be executed by attachment of certain properties which principally consisted of a shop and the assets inside that shop at Agra. Defendants 2 to 6 filed an objection that this property was not liable to attachment and sale in execution of the decree as the shop and the assets were not the assets of Firm Kundomal Ganga Ram but were the personal property of the joint family property of defendants 2 to 6. The learned Judge of the lower Court held that the assets sought to be attached were not the assets of the firm but that the share of Kundomal Ganga Ram, who was defendant 2 in the suit, in the family property was liable to attachment and sale in execution of the decree under O. 21, R. 50, Civil P. C. The shares of the other four brothers of Kundomal Ganga Ram were held to be not liable to the decree. Kundomal Ganga Ram has, therefore, appealed against the finding which affects his share in the property wereas a cross-objection has been filed by the decree-holder with regard to the shares of the other four brothers in the property.

(2) We may first deal with the cross-objection as it can be disposed of on one very short point. The appeal was filed by Kundomal Ganga Ram and the only respondent in the appeal was the decree-holder, Topamal Chhotamal. The four brothers of Kundomal Ganga Ram were not impleaded as parties in the appeal. The cross-objection could, therefore, be only directed against Kundomal Ganga Ram. His four brothers were not impleaded as parties in the cross-objection either. Since the cross-objection is directed against their shares in the property and as they have not been made parties to the cross-objection, the cross-objection cannot be entertained and must be dismissed.

(3) So far as the appeal is concerned, learned counsel for the appellant has urged that, in this case, the lower Court was wrong in applying the provisions of R. 50 of O. 21, Civil P. C., because when the decree was passed, there was a specific direction by the Court passing the decree that only the assets of the firm in the hands of the appellant or his brothers were liable to the decretal amount and it refused to grant the prayer which had been made in the plaint that there should be a decree for personal liability against the appellant and his brothers. Learned counsel for the respondent has urged that even though there was such a direction in the decree, the executing Court was entitled to proceed under O. 21, R. 50 of the Code against properties of the partners who might satisfy the requirements of Cls. (b) and (c) of sub-r. (1) of R. 50.

We are unable to accept this contention. It is not for the executing Court to vary the terms of the decree. The function of the executing Court is to execute the decree as it stands. The decree is specifically against the firm itself and the assets of the firm in the hands of the appellant and his brothers. During the suit, there was a specific claim by the decree-holder that the decree should be against the appellant and his brothers personally. This plea was fully considered and decided against the decree-holder. The remedy of proceeding against the assets of the partners under R. 50 of O. 21, Civil P. C. can only be permitted in cases where the decree is against a firm and the Court passing the decree has not imposed any limitations on the decree which would govern the executing Court when executing the decree.

If any limitations are placed on the decree itself, the executing Court is bound by them and, to that extent, the powers of the executing Court to proceed under the general provisions of the Code become limited. It may also be noticed that, by using the words 'may execute' in Rule 50 of O. 21, Civil P. C., the Court is only empowered to proceed against the assets of a partner under certain circumstances. When the rule merely empowers the Court and does not enjoin on it to proceed against that property, the Court can only proceed against that property in appropriate cases. In a case where the decree itself prohibits proceedings against that property, it is obvious that the executing Court can never be justified in proceeding against it.

(4) Learned counsel for the respondent tried to support the order of the lower Court on an alternative ground. His contention was that the property sought to be attached and sold consisted of the assets of the partnership firm, and, therefore, the decree-holder-respondent was, in any case, entitled to execute his decree against that property. The learned Judge of the lower Court did not enter into any detailed discussion on this question. His judgment has, however, proceeded on the basis that, in his view, the property sought to be attached and sold did not consist of the assets of the partnership firm but consisted of the property of the appellant and his brothers which could not be held to be the assets of the firm in their hands. Learned counsel has not been able to point out any material on the file of the execution case or in the judgment passed in the suit which could justify our differing from the view taken by the lower Court.

On the execution file, there is an affidavit filed by one of the brothers of Kundomal Ganga Ram viz., Khem Chand. In this affidavit, Khem Chand has explained how he and his brothers came into possession of the property now sought to be attached. He has stated that his father had left property in Karachi which was mostly his self-acquired property. This property devolved on the five brothers. In addition, there was some property belonging to his mother, Shrimati Asan Bai. Further, there was some ancestral zamindari property. The house property, which was the self-acquired property of the father, and the property of the mother were sold when the appellant and his brothers migrated to Agra from Karachi. The zamindari property which was the ancestral property was exchanged for land in India. Out of the assets realised from the sale of the property in Karachi, property was acquired at Agra and a shop was started. These facts given in the affidavit show

that the property, which is now sought to be attached, had nothing to do at all with the assets of the firm.

The affidavit goes on to relate that Kundomal appellant, by that time, started a petty enterprise in the name of Kundomal Ganga Ram which could hardly carry on any business worth the name and died out in its infancy owing to the creation of Pakistan leaving no assets whatsoever. Besides this affidavit, no other evidence was advanced before the lower Court which could tend to show that the property in suit represented the assets of the firm or had been acquired out of the assets of the firm. Learned counsel for the respondent urged that, in case of trading families there would be presumption that the property of the joint Hindu family is not separate from the assets of the ancestral business firm of the family. This proposition of law has no reference at all to the facts of the case before us. In this case, it was nowhere alleged that the appellant and his brothers were members of a trading family or that they had any ancestral business. There is, therefore, no presumption that the property belonging to the family or to the father of the appellant, in any way represented the assets of the firm. Consequently this argument also fails.

(5) As a result, the appeal is allowed with costs, the order passed by the lower Court, directing execution to proceed against one-fifth share in the property belonging to Kundomal Ganga Ram, is set aside and the objection of the objector is allowed. The cross-objection is dismissed with costs.

B/V.R.B. Appeal allowed; Cross-objection dismissed.

A.I.R. 1953 ALL. 712 (Vol. 40, C. N. 348)
(LUCKNOW BENCH)
KIDWAI J.

In re Ram Chand, Applicant.

Criminal Misc. No. 461 of 1951, D/- 4-3-1953.

(a) Criminal P. C. (1898), S. 561-A—Powers of High Court.

The powers possessed by the High Court under S. 561-A are very wide but the very plenitude of the power requires from the Court great caution in the exercise of it. (Para 12)

Anno: Criminal P. C., S. 561A N. 2 Pt. 1.

(b) Criminal Trial—Witness.

The increasing practice of allowing seats on the dias to witnesses particularly in Magistrate's Court, is highly undesirable and should stop. (Para 16)

Niamatullah, K. N. Kapoor and Mohd. Husain, for Applicant; B. L. Kaul, for Govt. Advocate, for the State.

ORDER: Ram Chand is a partner in the firm Jethanand and Sons which carries on the work of Government Contractors. In 1947 the firm took three contracts for the supply of stone ballast to the U. P. P. W. D. at Shankargarh and Lohagra in the Allahabad district. We are not concerned with the third of these contracts. The first two were entered into on the 20th of March and the 27th of May and are evidenced by bonds Nos. 359 and 45 respectively. Deliveries were made under these contracts to P. W. D. overseers on the 22nd March (2,62,420 cu. ft.) and on the 25th May (2,95,157 cu. ft.) by Ram Chand and an agent of his firm, Chetanand, respectively. Very shortly afterwards bills signed by Ram Chand for the price of this ballast were passed and payments were made to Messrs. Jethanand and Sons.

(2) At first there was no trouble about the matter but later, when an enquiry was made by Mr. Sahney, Executive Engineer on 22-12-1947 the Overseer J. P. Mittal on 22-1-1948, sent a report which indicated that there was some confusion about the ownership of the ballast although all of it which had been measured still lay at the spot. This report was forwarded by Mr. Shiam Lal, Assistant Engineer along with his own note and he thought something like fraud had been committed by Jethanand & Sons in getting this ballast measured since their right to it was extremely doubtful. He recommended that Messrs. Jethanand and Sons should be asked to get the matter cleared up; otherwise the police should be approached and legal action taken. Shortly after the Collector and the Superintendent of Police of Allahabad were approached.

(3) A Sub-Inspector of police was deputed and he investigated into the matter, purporting to do so in respect of an offence under S. 420, I. P. C. During the course of this investigation, in July 1948, delivery of the ballast was again made, this time to Mr. Shyam Lal, Assistant Engineer, in the presence of the Police Sub-Inspector, and Narotam Singh, Tara Chand and Anu Singh, who were said to have been removing it on an assertion of title and also in the presence of the agent of the Raja of Bara and Messrs. Meomal from whom Messrs. Jethanand had admittedly purchased most of the ballast.

(4) The Sub-Inspector reported this settlement and added that if the P. W. D. Officers were not satisfied and still wished to proceed under S. 420, I. P. C. they could take criminal action at Lucknow where the accused lived and carried on business and where the contract had been settled.

(5) Mr. Shyam Lal was, however, not satisfied and he reported on 10-9-1948 that, although Ram Chand had again delivered possession, and matters had been quiet for some time, it again appeared that he had delivered ballast not belonging to him.

(6) Some more correspondence took place and Jethanand and Sons made representations directly and also through friends, to the Minister concerned about the matter. Eventually on 17-11-1950 a regular first information report was lodged at police station Hazratganj, Lucknow, under S. 420, I. P. C.

(7) The police investigated the case and prosecuted Ram Chand and Chetan Das. Subsequently, however, the trial of the two accused persons were separated at the request of the prosecution.

(8) Eventually on 10-11-1951 the learned Magistrate framed charges in respect of the first and second contracts but not in respect of the third contract and proceeded to try the case himself although he might, if he so chose, have committed the accused to the Court of Session.

(9) On 20-11-1951 Ram Chand applied for quashing proceedings and also applied that, pending the decision of his application under S. 561A, Cr. P. C., the trial should be stayed. The two applications were directed to be put together.

(10) For the applicant Mr. Niamat Ullah contended that there was no evidence on the basis of which it could be said that even a prima facie case had been made out and that, therefore, further proceedings were an abuse of the process of the Court. He further, urged that, in any case, the whole record having now been placed before this Court, I should look into and if I found that the conviction of the applicant was not possible even if it were only by reason of the benefit of the doubt—I should not allow proceedings to continue.

(11) On the other hand Mr. Asghar Husain, who conducted the case before the Magistrate and appeared with the Government Advocate, contended that the guilt of the accused was fully established and that there was no occasion for the exercise of this Court's powers under S. 561A, Criminal P. C.

(12) The powers possessed by this Court under S. 561-A, Cr. P. C. are very wide but as I have had occasion to point out more than once, the very plenitude of the power requires from the Court great caution in the exercise of it. The High Court will not allow a prosecution to degenerate into persecution nor will it permit the processes of the criminal law to be abused in order to attain ulterior objects e. g. it will not allow a criminal prosecution to be held in terrorem in order to right a civil wrong, even though a technical breach of the criminal law eventually be found to have been established. At the same time it will not stiffle a legitimate prosecution nor will it transform itself into a Court of original criminal jurisdiction in a round about way and take upon itself the responsibility of a first hand appraisement of evidence recorded by another Court in respect of which that other Court has had no opportunity of expressing its opinion.

(13) In the present case I have heard the learned Advocates at considerable length and have perused much of the evidence but, since I have come to the conclusion that proceedings should not be quashed, I have not gone into the details of the evidence and think it inadvisable to make any comments about it. This decision does not indicate that I consider the prosecution evidence of such force as to justify the conviction of the applicant nor, obviously, does it indicate that I consider that evidence worthless.

(14) While refusing to quash proceedings I, however, accede to the request of the applicant that this is a fit case in which to direct the Magistrate trying it not to proceed with the trial but to commit it to the Court of Session.

(15) It appears from the application and the affidavit accompanying it that some of the witnesses were allowed seats on the dias. It is true that some high officials were among the witnesses but that is no ground for allowing them to sit near or, even on the same level as the Magistrate, when they are giving evidence. Respect is shown to a Court sitting to try a case not in its personal capacity but because it represents the Majesty of the law and is exercising the judicial functions of the Sovereign State. It should be no respector of persons and should treat all who appear before it in exactly the same manner. Otherwise, a feeling might be created in the mind of a person who is in the delicate position of a party, particularly in a criminal case, that the Court attaches greater importance to the evidence of some witnesses than it does to those of others, even without hearing that evidence. All persons, however high, who appear in order to participate in the proceedings of a Court of Law are bound to show their respect in the usual manner i.e., by standing when addressing the Court. This is not meant to be derogatory to their own position or status. No lawyer, however eminent, ever dreams of addressing a Court while seated. There is no reason why a person who appears to give evidence should consider it either right or proper to be allowed a seat merely because of his high position as a servant of the State. Of course if it is a hardship for a person, either on account of his age or physical condition to be called upon to remain standing he may well be allowed to sit, but even then he should be seated either in the witness-box or at some other convenient place. In no case should he be seated near the Presiding Officer in such a position as even to appear to be sharing that officer's high prerogative of being the master of his own Court.

(16) I have felt it necessary to make these remarks because the practice of allowing seats on the dias to witnesses is increasing, particularly in Magistrate's Court, and this practice is highly undesirable and should stop. It is because this has been allowed to happen in this case that I have deemed it proper in exercise of my powers under S. 561-A, Cr. P. C. to direct the Magistrate to commit the case to the Court of Session.

B/V.S.B. Ordered accordingly.

A.I.R. 1953 ALL. 713 (Vol. 40, C. N. 349)

MALIK C. J. AND AGARWALA J.

Laxmi Narain, Applicant v. State.

Criminal Revn. No. 1492 of 1951, D/-4-5-53.

(a) Poisons Act (1919), S. 5 — Argemone Maxicana.

Argemone Maxicana seed commonly known as Bhat Katiya is notified as a poison under the Poisons Act. (Para 2)

(b) U. P. Prevention of Adulteration Act (6 of 1912), Ss. 2 and 4 — Mustard seed.

Not only mustard oil but mustard seed also is food. Mustard seeds are used in cooking, etc. and are also used with spices for flavour. (Para 3)

(c) Poisons Act (1919), S. 6 (2) — Confiscation — (U. P. Prevention of Adulteration Act (6 of 1912), S. 4).

The words "vessels, packages or coverings are wide enough to include a bag of mustard seeds mixed with argemone maxicana which is notified as a poison. Hence, it is not only the poison that can be confiscated but the mustard seeds also with which it is mixed. (Para 4)

Harish Chandra Sharma, for Applicant; Shri Rama, Deputy Govt. Advocate, for the State.

MALIK C. J.: The applicant Laxmi Narain has been convicted under Section 6 (1) (i) Poisons Act (No. 12 of 1919) for contravening Rules 2 (2) (a) (b) and (c) of the Poisons Act. The applicant was also charged under Section 4, U. P. Prevention of Adulteration Act. He was sentenced to pay a fine of Rs. 100/- and the seven bags of adulterated mustard seeds seized by the Sanitary Inspector were confiscated under Section 6 (2) of the same Act. The applicant is a dealer in mustard seeds and on 5-5-1950, the Inspector found in the shop of the applicant seven bags of mustard seeds, sam-

ples of which when sent to the Public Analyst, U. P. Government, were found to contain 12.5 per cent approximately of argemone maxicana. The applicant was convicted and sentenced as mentioned above.

(2) Learned counsel has raised three points. That argemone maxicana is not a poison not having been notified as such under the Poisons Act and the applicant could not, therefore, be convicted under Section 6, Poisons Act. On behalf of the State a notification No. 1107 (3)/VI-648-1950, dated 29-3-1950, has been produced which is as follows:

"Add "Argemone (Argemone Maxicana) seed commonly known as 'Bhat Katiya' and Argemone oil" as item (1-a) after item (1) in the Schedule to the Rules referred to above."

There is, therefore, no force in this point.

(3) The next point urged by learned counsel is that mustard seeds not being article of food the applicant could not be convicted under the Prevention of Adulteration Act, 1912. Learned counsel's argument is that mustard oil may be treated as food but not mustard seeds. The lower court found on that point against the applicant. There can be no doubt that not only mustard oil but mustard seed is food. Mustard seeds are used in cooking etc., and are also used with spices for flavour. There is, therefore, no substance in this point also.

(4) Lastly, it is urged that under sub-s. (2) of S. 6, Poisons Act it is only the poison that could be confiscated and not the mustard seeds with which it was mixed. Sub-section (2) of S. 6 is as follows:

"Any poison in respect of which an offence has been committed under this section, together with the vessels, packages or coverings in which the same is found, shall be liable to confiscation."

The words "vessels, packages or coverings" are wide enough to include a bag of mustard seeds mixed with argemone maxicana. In Webster's New International Dictionary, Second Edition, the word "package" has been defined as

"A collection of things packed together; a cargo. Means for packings; receptacles in which to pack. A bundle made up for transportation; a packet; a bale; a parcel; as, a package of goods."

Here the bags contained argemone maxicana seeds mixed with mustard seeds and it cannot be said that the whole thing did not form a package. There is, therefore, no substance in this argument either.

(5) The revision has no force and is dismissed.

B/V.S.B. Revision dismissed.

A.I.R. 1953 ALL. 714 (Vol. 40, C. N. 350)
(LUCKNOW BENCH)

KAUL AND GURTU JJ.

Kali Prasad, Defendant-Applicant v. Birendra Bikram Singh, Opposite Party.

Civil Revn. Appln. No. 146 of 1946, D/- 23-10-1952.

Civil P. C. (1908), O. 41, R. 1, S. 115 — 'Ex parte' decree for thak money by revenue Court — Application for setting aside dismissed — Appeal filed without copy of formal order or without memorandum of cost is tenable — Rejection of appeal is revisable — (U.P. Revenue Manual, R. 91B). (Para 3)

Anno: Civil P. C., S. 115 N. 11, O. 41, R. 1 N. 4.

Hakim Uddin and Halimuddan, for Applicant; Karta Krishna, for Opposite Party.

ORDER: Three suits were filed in the revenue Court against Yusuf Khan and Kali Prasad for recovery of theka money. The suits were decreed 'ex parte' on 2-7-1944. Kali Prasad applied for setting aside these 'ex parte' decrees under O. 9, R. 13, Civil P. C. His applications for setting aside the decrees passed against him 'ex parte' were made on 21-4-1945, 7-5-1945 and 7-7-1945. On 19-11-1945, these applications were dismissed. Three appeals were filed against these orders of dismissal. Though the appellant filed a copy of the order of dismissal passed by the Court, no copy of any formal order or the memorandum of costs was filed in any of these appeals within the time allowed by law for preferring an appeal. The Court of appeal dismissed all the three appeals on the ground that no formal order was filed in any of them. Dissatisfied with this decision Kali Prasad has come up in revision to this Court.

(2) It was contended by his learned Counsel, Mr. Hakimuddin, that under the rules contained in the Revenue Manual, which apply to appeals presented in Revenue Courts, no formal order was to be prepared in any of these cases. All that was necessary to do was to prepare a memorandum of costs in each of these cases as required by R. 91B (3) which reads as follows:

"The preparation of a decree or formal order, apart from the order or judgment recorded by the Court, is not required in any but the cases above specified. But the order or judgment should in all cases state clearly the determination of the case, the costs incurred, and the parties by whom the costs are to be paid, and, if costs are awarded, a memorandum of costs in the prescribed form should be drawn up."

Cases with which we are dealing do not fall within any of the categories above specified.

(3) An examination of these rules shows that different rules employ different expressions to indicate the final adjudication by the Court which further specifies the costs incurred by each party and by whom they are to be paid. In R. 52 we find that the only expression used is "decrees" or "orders" appealed against. In R. 91B (2) the expression used is "formal order in the prescribed form", and in R. 91B (3) the expression used is "memorandum of costs." That a memorandum of costs is different from a formal order is clear from a perusal of sub-r. (3). In fact it expressly says that the preparation of a formal order is not required in any but the cases specified in sub-rr. (1) and (2) of R. 91B. We find that the provisions of O. 41, Rr. 1-4, Civil P. C. have been made applicable to appeals under the rules framed in the Revenue Manual. There is no provision in any of these rules which requires the memorandum of costs to be filed along with the judgment when there is an appeal preferred against an order in which under the rules no formal order should be prepared. We are, therefore, of opinion that the failure of Kali Prasad to file the memorandum of costs prepared in each case along with the appeals prepared by him does not render his appeals infructuous. We are informed by Mr. Hakimuddin that at a later stage his client did file a copy of the memorandum of costs prepared in each case for the purpose of the three appeals. We are satisfied that the view taken by the learned

Civil Judge that the appeals preferred before him were incompetent for want of the memorandum of costs being filed was erroneous. As the view taken by him had led him to refuse to exercise a jurisdiction lawfully vested in him, we allow these revision applications, set aside the order of dismissal in each case and direct that the appeals be disposed of in accordance with law. In the circumstances of the case the parties shall bear their own costs.

C/D.R.R. Application allowed.

A.I.R. 1953 ALL. 715 (Vol. 40, C. N. 351)
(LUCKNOW BENCH)
BEG J.

Hindustan Biologicals Ltd., Complainant-Applicant v. Jagat Narain, Accused-Opposite Party.

Criminal Reference No. 8 of 1952, D/- 26-6-1952.

Companies Act (1913), Ss. 282A, 278 and 3 — Jurisdiction of first Class Magistrate to take cognizance of case under S. 282A and try — (Criminal P. C. (1898), Ss. 5 and 29).

Proceedings relating to trial of offences under S. 282A are not proceedings under Act but are proceedings under Criminal Procedure Code. (Para 7)

Though S. 278 does not clearly specify Court by which offences against Companies Act are to be tried yet sub-ss. (1) and (2) indicate that legislature contemplated their trial by Court of a Presidency Magistrate or a Magistrate of the First Class. (Para 9)

The effect of S. 3 of the Act, by the use of the words "under this Act", is not to make this jurisdiction of the Magistrate to take cognizance and try the case, conditioned upon any necessary direction or sanction given by the High Court. (Para 5)

This view is supported by a reference to the provisions of S. 5, Criminal P. C. and also from the fact that S. 29 of that Code does not give power to the High Court to take cognizance of offences under a law other than Penal Code and try the accused itself without following the procedure laid down in the Code. AIR 1936 All 830 (FB), Foll. (Para 10)

Anno: Companies Act, S. 282A N. 1; S. 278 N. 1; S. 3 N. 1; Cri. P. C., S. 5 N. 6; S. 29 N. 1.

Gaya Prasad Shukla, for Applicant; Sri Ram, for Opposite Party.

CASE CITED:

(A) ('36) AIR 1936 All 830: ILR (1937) All 220: 38 Cri L J 111 (F. B.)

ORDER: This is a reference by the learned Additional Sessions Judge, Lucknow, recommending that the order of Sri C. P. Srivastava, City Magistrate, Lucknow, refusing to entertain the complaint filed by the applicant under S. 282A, Indian Companies Act should be set aside.

(2) On 14-3-1950 the complainant applicant, The Hindustan Biologicals Limited through Amareshwar Ghosh filed a complaint against the opposite party Sri Jagat Narain Rohatgi purporting to be under S. 282A, Indian Companies Act. The allegations in the complaint inter alia are that from September, 1946 to 12-4-1949 the accused opposite party was the managing agent and managing director of the complainant company, that in such capacity the accused wrongfully obtained possession of properties of the company detailed in the complaint, that by dishonest and fraudulent representation (including express assurances that the accused would return all properties held by him on behalf of the company) the accused induced the directors of the complainant-company to accept the accused's resignation, that the accused was refusing to deliver to the company the said articles in spite of demand and was wrongfully and wilfully withholding and dishonestly retaining them to the detriment of the company for his unlawful gain and that the accused as an employee and director of the company had committed the aforesaid offence and he be punished for that according to law.

(3) After the accused was summoned, he filed a petition raising objection to the maintainability of the complaint in the Court of the city Magistrate. This objection was based on S. 3, Indian Companies Act read with S. 282A of the same Act. The learned Magistrate after hearing the arguments on this point allowed the objection of the accused-opposite-party and held that he had no jurisdiction to entertain the complaint.

(4) The applicant filed a revision application which came up for hearing before the learned Additional Sessions Judge Lucknow who disagreed with the view taken by the trial Court and referred the case to this Court with the above recommendation.

(5) Having heard the learned counsel for the parties I am of opinion that this reference must be accepted. The complaint purports to have been lodged under S. 282A, Indian Companies Act according to which wrongful withholding of property by a director, managing agent, manager or other officer or employee of a company is made punishable. Section 3 (1) of the same Act lays down that:

> "that Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate."

The learned counsel appearing for the opposite-party has placed strong reliance on the words "under this Act" and has argued that the effect of the use of these words in S. 3, Indian Companies Act is to make prior sanction of the High Court a condition precedent to the cognisance by a Magistrate of case relating to an offence under the Indian Companies Act. I can find no warrant whatsoever for this interpretation of S. 3, Indian Companies Act. He has not argued that the Magistrate has no jurisdiction to try the case. The argument advanced by him is that the jurisdiction arises only after the necessary direction or sanction is given by the High Court. In order to bar the right of a private individual to lodge a complaint the restriction on such a right should be clear and unambiguous. I find no such restriction on the right of a person to institute a complaint under the aforesaid section.

In this connection it will be relevant to refer to S. 237, Indian Companies Act which deals with the prosecution of delinquent directors. Under S. 237 (2) of the said Act it is laid down that if it appears to the liquidators in the course of voluntary winding up that any past or present director, manager or other officer has been guilty of any offence in relation to the Company for which he is criminally liable he would forthwith report the matter to the Registrar. Sub-section (4) of S. 237 lays down the procedure for the prosecution of such persons in the following words:

"If on any report to the Registrar under sub-s. (2) it appears to him that the case is not one

in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender."

The use of the words "subject to previous sanction" is noteworthy.

(6) It is, therefore, quite evident that where under the Companies Act the legislature thought that prior sanction of the Court was necessary for launching prosecution of the offenders, the said condition was laid down explicitly and clearly. No such condition with regard to the prosecution of persons under S. 282A of the Companies Act seems to have been laid down either under S. 3, Indian Companies Act or in any other section of the Act. This argument of the learned counsel, therefore, seems to be devoid of all merit.

(7) Section 282A, Indian Companies Act is only a declaratory section specifying the ingredients constituting an offence under the Indian Companies Act. The proceedings relating to the trial of such offences are not proceedings under the Indian Companies Act but they are proceedings under the Criminal P. C. Section 3, Indian Companies Act was interpreted by the Allahabad High Court in a Full Bench case reported in — 'Harish Chandra v. Kavindra Narain Sinha', AIR 1936 All 839 (A). It was laid down in that case that:

"the jurisdiction of the High Court referred to in S. 3 (1) of the Companies Act is obviously the jurisdiction exercised by virtue of the specific provisions of the Act and not a jurisdiction which may be invoked where merely a criminal offence is declared. This section does not say that the High Court would be the Court of first instance to try persons who are guilty of offences committed by breaches of the statutory provisions of the Act."

(8) Section 3, Companies Act is found in Part 1 of the said Act, the heading of which is "Preliminary". Section 1 of the said Act relates to short title, commencement and extent. Section 2 deals with definitions. Section 2A relates to provisions as to companies registered in Burma or Aden before their separation from India. Section 3 deals with jurisdiction of the Court. The above sections are the only sections constituting Part I of the said Act. It would appear that the said part merely contains some general provisions relating to Company matters which are specifically dealt with by the Indian Companies Act. The provisions relating to legal proceedings and offences are contained in Part 11 of the Companies Act under the heading "Supplemental" and sub-heading "Legal proceedings, offences, etc." Section 278 deals with the cognizance of offences and sub-cls. (1) and (2) of the said section run as follows:

"(1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Court of a judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held."

(9) It is no doubt correct that the said section does not clearly specify the Court by which the offences against the Companies Act are to be tried but they do indicate that the legislature at any rate contemplated their trial by the Court of a Presidency Magistrate or a Magistrate of the First Class. In an indirect way they are indicative of the intention of the legislature. Sub-clause (3) of S. 278 further states as follows:

"Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purpose of the said Code, be deemed to be non-cognizable."

The above section also indicates that the Companies Act contemplated the trial of offences according to the Criminal Procedure Code except in so far as the said Code was specifically modified by the Companies Act. In this connection reference may also be made to S. 5, Criminal P. C., 1898, sub-ss. (1) and (2) of which run as follows:

"(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

(10) In the Full Bench case of the Allahabad High Court mentioned above it was laid down that

"Section 29, Criminal P. C. merely empowers the High Court, when no Court is mentioned for any offence under any law other than the Indian Penal Code, to try such offences. Reading it with S. 5(2) of the Code, it is clear cognizance of the offence straight off and try the accused itself, without following the procedure laid down in the Code."

In view of the law laid down in the said case I am unable to see any force in the arguments of the learned Counsel for the applicants.

(11) The learned Counsel for the opposite-party has also raised certain other points which according to him, are legal points and go to the root of the matter. He has argued that according to the complaint itself no ingredients of any offence either under the Indian Companies Act or under the Indian Penal Code have been made out. Further he has submitted that S. 282A, Indian Companies Act ceases to be applicable as soon as the property is taken into 'custodia legis'. He has also argued that in order to make out an offence under S. 282A, Indian Companies Act the accused must be holding the post of director, managing agent, manager, officer or other employee of a company at the date of the complaint. At this state I am not concerned with the merits of these objections and I do not express any opinion on them. It is open to him to urge these points when the case goes back to the trial Court for proceedings according to law or bring this matter to the notice of the Court by means of a proper application stating the grounds on which he bases his prayer for quashing these proceedings.

(12) I am of opinion that the order of the Magistrate refusing to entertain the complaint is clearly wrong and must be set aside.

(13) I accordingly accept this reference, set aside the order of the trial Court refusing to entertain the complaint and direct that the case shall be sent back to the Court concerned for disposal according to law.

B/M.K.S. Order accordingly.

A.I.R. 1953 ALL. 717 (Vol. 40, C. N. 352)

AGARWALA AND ASTHANA JJ.

Basdeo, Plaintiff-Appellant v. John and Co. and others, Defendants-Respondents.

Ex. First Appeal No. 308 of 1952, D/- 20-4-53.

Civil P. C. (1908), O. 40, R. 1 and O. 21, R. 52 — Attachment of property in possession of Receiver.

A receiver appointed by a Court is an officer of the Court. No one can proceed against a receiver without first obtaining the leave of the Court appointing him. Even when leave to sue has been given, if execution of the decree against the receiver by attachment and sale of the properties in his possession is desired, fresh leave has to be obtained of the Court appointing him. However, such permission is only necessary when it is proposed to proceed against the receiver direct. AIR 1923 Mad 144 (2); AIR 1928 Pat 321 and AIR 1924 Pat 491, Rel. on. (Para 4)

There is another method provided under O. 21, R. 52. Where execution is desired in respect of property in the hands of a receiver or other officer of a Court the procedure laid down in that rule may be followed and in such a case there is no necessity of leave of the Court appointing the receiver being obtained in the first instance. (Para 5)

Anno: Civil P. C., O. 40, R. 1 N, 30; O. 21, R. 52 N. 3.

B. Dayal, for Appellant; Gopal Behari, for Respondents.

CASES CITED:

(A) ('23) AIR 1923 Mad 144(2): 47 Mad 47
(B) ('24) AIR 1924 Pat 491: 3 Pat 357
(C) ('28) AIR 1928 Pat 321: 7 Pat 684

AGARWALA J.: This is an appeal arising out of execution proceedings. The facts may be briefly stated as follows:

(2) In a suit filed in the Court of the Civil Judge, Agra by one Loonkaran Sethiya against I. E. John and others for recovery of money and for a declaration of a charge over the movable properties of the defendants who own a group of mills at Agra which are called the Johns Mills, an order for attachment before judgment was made and receivers were also appointed for running the mills. There was an appeal to this Court against that order. This Court modified the order appointing receivers and directed that the receivers shall act for the protection of the interests of Loonkaran Sethiya and shall be in possession of the moneys that may be received from certain sources mentioned in the order. The receivers in this manner came to be in possession of a certain sum of money which they deposited in the Imperial Bank at Agra. While the suit of Loonkaran Sethiya was pending in the Civil Judge's Court at Agra another suit was filed by another creditor of the Johns family in the Court of the Additional Civil Judge, Agra. This was the suit of Basdeo appellant in the present appeal. It was also a suit for recovery of money and a decree was obtained on 29-1-1951, for a sum of Rs. 25,000 and odd. Basdeo appellant then applied for attachment of the money in the hands of the receivers. This attachment was made in two modes. The Additional Civil Judge sent an order of attachment of money direct to the Imperial Bank at Agra. He also sent a request to the Civil Judge, Agra, to make the money available to that Court for payment to Basdeo appellant, decree-holder. The request to the Civil Judge was apparently sent under the provisions of O. 21, R. 52, Civil P. C. The receivers filed an objection to the attachment in the Court of the Additional Civil Judge. The learned Additional Civil Judge thereupon heard the parties and allowed the objection of the receivers and withdrew the order of attachment. Against this order the appellant has come up in appeal to this Court.

(3) The only point for consideration before us is whether in the circumstances of the case the order of attachment should have been withdrawn. It has been urged by learned counsel for the appellant that no decree had been passed in the suit of Loonkaran Sethiya and that any order of this Court in the appeal arising out of the order of attachment before judgment and the appointment of the receivers made in the suit of Loonkaran Sethiya would not bind him because he was no party to that litigation and that if any money belonging to his judgment-debtors was in the hands of the receivers he was entitled to attach it and realise it in execution of his decree. On the other hand, learned counsel for the respondents has urged that the appellant could not execute his decree against the receivers who were the officers of the Court appointing them, viz., of the Civil Judge of Agra, and that the appellant could only execute his decree if he had obtained leave to do so from the Civil Judge, Agra, and that the order of attachment made by the Additional Civil Judge was without jurisdiction and, indeed, in contempt of the Court of the Civil Judge.

(4) A receiver appointed by a Court is an officer of the Court. The properties in his possession as such are deemed to be in 'custodia legis'. He being an officer of the Court, if he were allowed to be proceeded against in suits or other proceedings at the instance of private parties it may be that the receiver may not be able to carry out his duties as directed by the Court appointing him. In order to avoid such difficulties it has been held that no one should proceed against a receiver without first obtaining the leave of the Court appointing him, vide — 'Fraser v. Krishna Swami Aiyer', AIR 1923 Mad 144 (2) (A). Even when leave to sue has been given, if execution of the decree against the receiver by attachment and sale of the properties in his possession is desired, fresh leave has to be obtained of the Court appointing him; — 'Sridhar v. Mugniram', AIR 1924 Pat 491 (B) and — 'Sm. Jugal Kishore v. Deva Prasanna', AIR 1928 Pat 321 (C). It will, however, be observed that the permission of the Court is only necessary when it is proposed to proceed against the receiver direct.

(5) There is, however, another method provided under R. 52 of O. 21, Civil P. C. in which execution can be obtained when the execution is in respect of property in the custody of a Court. Under that rule, the executing Court may send a letter of request to the Court in whose custody the property is to hold such property subject to the further order of the attaching Court. There is a proviso to the rule which says that any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or other-

wise shall be determined by such Court in whose custody the property desired to be attached is. Since the property in the possession of a receiver is deemed to be property in the custody of the Court there is no reason why O. 21, R. 52, C. P. C. should not apply to such property. It follows, therefore, that where execution is desired in respect of property in the hands of a receiver or other officer of a Court the procedure laid down in R. 52 of O. 21 may be followed and in such a case there is no necessity of leave of the Court appointing the receiver being obtained in the first instance. Leave would be necessary, as already stated, only when execution is desired directly against the receiver without the intervention of the Court appointing him.

(6) In the present case the Additional Civil Judge had sent a letter of request to the Civil Judge to hold the moneys in the custody of the Court through the receiver subject to the further orders of the Court. When such a letter of request was received by the learned Civil Judge it was open to him to invite any objection from the receiver or from Loonkaran Sethiya, that is to say, from persons who were interested in the disposal of money and to decide any question of title or priority between the different claimants including the appellant Basdeo and if there was no valid objection to the money being placed at the disposal of the Additional Civil Judge to send the money to that Court.

(7) The learned Additional Civil Judge withdrew his order of attachment simply because he found that this Court had in an appeal, to which the appellant was no party, observed that the moneys realised by the receivers were to be earmarked for certain specific purposes. But it would be for the learned Civil Judge to decide whether any moneys could be placed at the disposal of the Additional Civil Judge in execution of the appellant's decree or not. The Additional Civil Judge was not right in withdrawing his letter of request for attachment of the moneys in the custody of an officer of the learned Civil Judge. His order of attachment sent to the Imperial Bank, Agra, was however, not correct.

(8) The result, therefore, is that we allow this appeal, set aside the order of the learned Additional Civil Judge, dated 9-8-1952, and direct that his earlier order requesting the Civil Judge to attach the property in the hands of the receiver will continue in force. In the circumstances of the case we make no order as to costs.

(9) The record of this case will be sent down to the Court below immediately.

B/V.S.B. Appeal allowed.

A.I.R. 1953 ALL. 718 (Vol. 40, C. N. 353)

(LUCKNOW BENCH)

BEG AND MUKERJI JJ.

Sm. Dulari, Applicant v. Addl. Custodian, Evacuee Property and another, Opposite Parties.

Civ. Misc. Appln. No. 835 of 1951, D/- 28-4-1953.

Administration of Evacuee Property Act (1950), Ss. 26(2) and 40 — 'Order' in S. 26(2), meaning of — (Words and Phrases — Order).

The word 'Order' in S. 26(2) is used in its widest connotation and includes an act of confirmation of a sale. It is not correct to say that it is not an order because there is no opposite party contending against such a confirmation; because, the Custodian in whom the law normally vests all properties of evacuees is in effect an opposite party who notionally contends against the confirmation of sale. Being a judicial or a quasi-judicial authority the Custodian's decision is either an order or a judgment and the Custodian has the power to review his own decision under S. 40. (Paras 5, 6)

Where, therefore, after an order of confirmation of sale had been made by the Additional Custodian a certain decision of the Custodian General was brought to his notice which according to the Addl. Custodian conflicted with the view which he had taken in appeal, and therefore the latter issued notice to the appellants to show cause why the order of confirmation be not reviewed and set aside, the order issuing notices was not without jurisdiction or in excess of jurisdiction. (Para 7)

Ram Bharose Lal and Sri Ram, for Applicant; Kanhaiya Lal Misra, Advocate General, for Union of India; G. T. Wadhwani, for Custodian, U. P.

MUKERJI J.: This is an application under Art. 226 of the Constitution by Shrimati Dulari praying that this Court may issue a writ of prohibition or in the alternative appropriate directions, or orders under Art. 226 of the Constitution of India prohibiting opposite party 1, i.e., the Additional Custodian Evacuee Property, Lucknow from reviewing his 'judgment' dated 30-1-1951, passed in Appeal No. 276 of 1950. There is a further prayer that opposite party 2, namely, the Custodian Evacuee Property at Lucknow be prohibited from issuing any notification under S. 7 of Act 31 of 1950 in respect of a certain house, details of which are given in the petition, and treating it as "Evacuee Property".

(2) The facts, briefly stated, which gave rise to this petition, were that on 16-10-1947, the applicant purchased the property in dispute, which is situate at Ghaziabad, from one Shubratan, who made a sale of the property to the applicant for a sum of Rs. 2,500/- on her behalf and on behalf of her minor children and on behalf of another Naboo wife of one Allah Diya. The vendors left India for Pakistan as "Evacuees" on 16-10-1949, and consequently the property in dispute assumed the character of "evacuee property".

(3) Under Ordinance 27 of 1949, namely, the Aministration of Evacuee Property Ordinance, it became necessary under S. 38 to have the confirmation of a sale, which had been made after the 14th day of August, 1947, by or on behalf of an evacuee. Section 38 of the Ordinance is in these words:

"No transfer of any right or interest in any property made in any manner whatsoever after the 14th day of August, 1947, by or on behalf of an evacuee or by or on behalf of a person who has become an evacuee after the date of the transfer, shall be effective so as to confer any rights or remedies on the parties to such transfer or on any person claiming under them unless it is confirmed by the Custodian."

Under this section an application for the confirmation of such a transfer had to be made either by the transferor or by the transferee within a period

of two months from the commencement of the Ordinance. The Ordinance came into force on 18-10-1949. It is important to notice that by sub-s. (3) of S. 38, the provisions of S. 5, Limitation Act were made applicable to applications which were to be made under sub-s. (2) of the section. Ordinance 27 of 1949 was superseded by Act 31 of 1950, namely the Administration of Evacuee Property Act. By S. 40 of this Act a similar provision to S. 38 of the Ordinance was made. By S. 40(2) an application for confirmation of such transfer had to be made within two months of the date of transfer or within two months from the commencement of this Act or within two months from the date of the notification or declaration referred to in sub-s. (1), whichever was later. The provisions of S. 5, Limitation Act were again made applicable to applications which were to be moved under this section for confirmation of transfers.

(4) An application for the confirmation of the transfer dated 16-10-1947, made in favour of the applicant, was made by the applicant on 4-5-1950, to the Deputy Custodian, Meerut — within whose jurisdiction the subject-matter of the transfer was situate. The Deputy Custodian, Meerut, refused to confirm the transfer on the ground that the application, which had been made by the petitioner, had been made beyond limitation. An appeal was preferred against the decision of the Deputy Custodian, Meerut, to the Additional Custodian, Lucknow, who apparently had appellate jurisdiction over the Deputy Custodian, Meerut. By an order dated 30-1-1951, the Additional Custodian allowed the application of the petitioner and directed the confirmation of the sale. It is necessary to notice that the Deputy Custodian, Meerut, had by his decision held the transfer in favour of the petitioner to be bona fide and for consideration.

(5) After the aforesaid order of confirmation had been made by the Additional Custodian, it appears that a certain decision of the Custodian General was brought to his notice, which according to the Additional Custodian conflicted with the view which he had taken in appeal of the question of limitation, which he had decided on 30-1-1951. In the result the Additional Custodian made the following order:

> "At the time when I delivered this judgment the decision of the Custodian General on the point in question was not within my knowledge. It has subsequently come to my knowledge and in the circumstances I consider it necessary that the judgment should be reviewed.
>
> Let a notice be issued to the appellant to show cause why the judgment dated 30-1-51 be not reviewed and set aside."

This application under Art. 226 of the Constitution is in effect directed against the aforequoted order of the Additional Custodian. Learned counsel appearing for the petitioner has contended that the Addtional Custodian has no power of review under the circumstances of the present case. The power of review conferred on the Additional Custodian is to be found in S. 26(2) of Act 31 of 1950. The words of S. 26(2) which gives this power, are these:

> "The Custodian, Additional Custodian or authorized Deputy Custodian (but not a Deputy or an Assistant Custodian) may, after giving notice to the parties concerned, review his own order."

It was argued that confirmation of a sale as contemplated by S. 40 of the Act, was not an "order" and consequently there could be no review possible where there has been only a confirmation of a sale. Mr. Ram Bharosey Lal contended that the word 'order' in sub-s. (2) of S. 26 contemplated a decisibn where there were two parties and an issue was raised between those parties and was determined by the Court. Mr. Ram Bharosey Lal's contention was that an act of confirmation of a sale was not an "order" inasmuch as, there was no opposite party contending against such a confirmation and, therefore, there could be no review possible of an order of confirmation even if there was an order. We are unable to agree with this contention, because in our judgment the word 'order' in S. 26 (2) is used in its widest connotation.

(6) A reference to S. 40 of the Act will indicate that the question of confirmation of a sale has to be raised by an application by either the vendor or the vendee, as the case may be, and the Custodian has to consider the question judicially at an inquiry which has to be held in a prescribed manner. A period of limitation is also prescribed for making the application. The Custodian has, therefore, to give a decision on many matters before he can confirm the sale or deny its confirmation. In either case, he has to give effect to his decision by means of an order. In proceedings of this nature there is in effect an opposite party also, namely, the Custodian in whom the law normally vests all the properties of evacuees and it is he who notionally at any rate, contends against the confirmation of the sale. The position of the Custodian in proceedings under the Administration of Evacuee Property Act is more or less analogous to the position of the Income-tax Officer in proceedings under the Income-tax Act. It is important to notice that by S. 24 appeals have been provided against orders under Ss. 7, 16, 19 and 40 in terms. Section 40 nowhere uses the word 'order' and if the contention of Mr. Ram Bharosey Lal were sound, then there could be no appeal under S. 24 from anything which was done under the powers conferred on the Custodian under S. 40, unless the things that he did — and he must be deemed to be doing things in writing — had the effect of an order. Section 22 of the Act gives the right to the Custodian to declare properties of intending evacuees to be "evacuee property" in certain cases. By S. 25(2) an appeal is provided against a declaration, made under S. 22. Section 22 does not use the word "order" and yet we find that the declaration is made appealable.

(7) In our judgment, if the import of the word 'order' in S. 26(2) were to be confined within the narrow limits within which Mr. Ram Bharosey Lal wishes us to confine it, then it would not be possible for the Custodian to correct his own mistakes — mistakes which may be obvious on the face of the record — and this position in our judgment would lead to serious anomalies and hardships, a situation which we do not think was ever contemplated. As we have said before, a judicial authority or a quasi-judicial authority, whenever it gives effect to its decjsion does so either by means of an order or a judgment. We are, therefore, of the opinion that the Additional Custodian had the power to review his own decision of 30-1-1951, and that the order of the Additional Custodian, Lucknow dated 2-2-1951, was not without jurisdiction or in excess of jurisdiction.

(8) Learned counsel for the petitioner argued no other point before us. The only point which was argued must, in view of what we have stated earlier, be decided against the petitioner.

(9) In the result we dismiss this application with costs. There is an order of stay which was granted by this Court at the time when the petition was admitted. That stay order must be discharged, now that the petition has been unsuccessful, and we accordingly discharge that order.

(10) Mr. Ram Bharosey Lal prays for a certificate under Art. 132(1) of the Constitution, to the effect

that this case involves a substantial question of law as to the interpretation of this Constitution. We have given this prayer our consideration and we are of the opinion that this case involves no substantial question of law as to the interpretation of this Constitution nor was any such question argued or even attempted to be argued before us. We, therefore, refuse the certificate prayed for.

B/H.G.P. Order accordingly.

A.I.R. 1953 ALL. 720 (Vol. 40, C. N. 354)
(LUCKNOW BENCH)

MISRA J.

Shamsher Khan, Applicant v. Sm. Siddiqunnisa and others, Complainant-Opposite Parties.

Criminal Revn. No. 54 of 1952, D/- 17-9-1952.

(a) Criminal P. C. (1898), S. 488 — Revision.

Where the witnesses were cross-examined by the applicant personally but considering that cross-examination to be inadequate he wanted to be given another opportunity for cross-examining them through counsel and his request was refused by the learned Magistrate, there was no irregularity and the High Court would not interfere. (Paras 4, 6)

Anno: Cri. P. C., S. 488 N. 34 Pt. 5.

(b) Criminal P. C. (1898), S. 488(3) — Offer to maintain bona fides.

Where the circumstances of the case indicated that the offer to maintain the wife and children was made merely with the object of escaping the obligations and resisting the claim for maintenance and there was also the fact that the physical as well as legal cruelty was duly established in the case — legal cruelty in the sense that the husband was found to be living with wife's sister.

Held that the so-called offer was not a bona fide one and could not stand in the way of a grant of maintenance allowance. (Para 4)

Anno: Cri. P. C., S. 488 N. 19 Pts. 6 to 9.

(c) Criminal P. C. (1898), S. 488 — Scope.

Liability under S. 488 is distinct from liability under personal law. (Para 8)

Anno: Cri. P. C., S. 488 N. 3 Pt. 1.

B. N. Mulla, for Applicant; B. L. Kaul, for Opposite Parties (Nos. 1 to 4).

ORDER. This criminal revision arises out of proceedings for maintenance under S. 488, Criminal P. C. The Courts below have agreed in holding that Smt. Siddiqunnissa and her three minor children, Ilias, Ishaq and Mushtaq were entitled to get maintenance allowance of Rs. 30/- per month from Shamsher Khan, the husband of Smt. Siddiqunnissa and the father of the minors. They overruled the defence which was to the effect that the application was not bona fide; that there was no refusal on the part of the husband to maintain the wife; that he never ill-treated her or her children and that he is an old man of 65 and has no source of income. The learned Magistrate accepted the version of the claimants, namely, that Shamsher Khan used to chastise Smt. Siddiqunnissa and refused to maintain her or the children; that he has landed property, a grove and a cycle shop at Purwa and that he receives a certain amount of income from Bombay. He summed up his findings thus:

"Thus going through the entire evidence produced by the parties I am of opinion that Shamsher Khan lived with the wife of his Sarhoo Yaqub Khan and as such refused to maintain the applicants and that he has a cycle shop and some land in Purwa and also earns in Bombay. Taking into consideration the means of Shamsher Khan and the fact that there are 4 persons to be maintained I order Shamsher Khan to pay Rs. 30/- as an allowance to the applicant Sm. Siddiqunnissa for her maintenance and the maintenance of her three minor sons."

(2) Before the Additional Sessions Judge, Unnao, who was moved by Shamsher Khan in revision, it was urged that the application was not maintainable inasmuch as a previous application under S. 488, Criminal P. C. on the same cause of action was rejected by the learned Magistrate. It was further contended that in view of the offer made by Shamsher Khan to maintain his wife and children it was incumbent on the learned Magistrate to make an enquiry relating to the genuineness of the offer under the proviso to S. 488(3), Criminal P. C. and that failure on the part of the Magistrate to address himself to the question vitiated the trial Court's proceedings. There was also the complaint that the applicant was shut out from cross-examining the witnesses produced by his wife. None of these contentions, however, found favour with the learned Judge.

(3) The arguments have been repeated in this Court on behalf of the husband but I find myself unable to give effect to them in view of the findings reached by the Courts below.

(4) Orders under S. 488, Criminal P. C. are discretionary and the High Court interferes in these cases only on rare occasions, that is to say, only when it is shown to the satisfaction of the Court that the learned Magistrate did not exercise his discretion judicially and substantial justice was not done. So long, therefore, as the proceedings in the Courts below are in order and so long as the decision rests on appreciation of evidence, the order would be allowed to stand even if the revisional Court entertains some doubt regarding the correctness of the findings reached by the Magistrate. Accepting then the findings arrived at by the Courts below, it has to be seen whether there was any fatal irregularity in the proceedings conducted there. That there was an offer to maintain the wife and the children in the written statement filed by Shamsher Khan does not admit of any doubt. Looked at, however, in the light of Shamsher's previous conduct it is impossible to hold that the offer was a bona fide one. The circumstances of the case indicate that it was made merely with the object of escaping the obligations and resisting the claim for maintenance. There was also the fact that the physical as well as legal cruelty was duly established in the case — legal cruelty in the sense that Shamsher Khan was found to be living with Siddiqunnissa's sister. I am clear that the so-called offer could not stand in the way of a grant of maintenance allowance.

(5) So far as the argument relating to the bar of the present application under S. 488, Criminal P. C. is concerned, the material on the record is wholly insufficient for the purpose of establishing that there was a previous

application under S. 488, Criminal P. C. or that it was on the same facts. The whole argument is based upon a statement made in the application of Siddiqunnissa that the previous application in which the opposite party was ordered to file written statement was dismissed in default of appearance. The nature of that application and the allegations upon which it was based were not disclosed and that it would be a mere surmise to hold that the previous application even if it was under S. 488, Criminal P. C. was based on the same facts as the present one. I may add that there is nothing to show that any adjudication took place in the earlier application.

(6) The argument relating to the shutting out of the cross-examination of the witnesses by Shamsher Khan has no foundation. It would seem that the witnesses were cross-examined by him personally but considering that cross-examination to be inadequate he wanted to be given another opportunity for cross-examining them through counsel and his request was refused by the learned Magistrate. There is, in my judgment, no irregularity there.

(7) There were two subsidiary arguments addressed by the learned counsel on behalf of Shamsher Khan in this Court.

(1) That under the personal law of the parties the father is entitled to the custody of the children and he should (not?) therefore be obliged to pay for their maintenance if they live away from him; and

(2) That the amount of maintenance, considering the circumstances of Shamsher Khan, is excessive.

(8) The statutory liability imposed by S. 488, Criminal P. C. is distinct from the liability under the personal law. It has been proved to the satisfaction of the Courts below that there was a refusal on the part of the husband to maintain his wife and children. I have held that the offer to keep them is not bona fide. It follows that neither the wife nor children can be deprived of the maintenance merely because they chose to live away from Shamsher Khan.

(9) The second point raised relates to the circumstances of Shamsher Khan. It has already been stated that the learned Magistrate held that Shamsher Khan had certain landed property, a grove, a cycle shop and some income from Bombay. Under the circumstances regard being had to the object underlying the proceedings under S. 488, a maintenance of Rs. 30/- for the upkeep of the wife and her three children can scarcely be regarded as excessive.

(10) The application has no substance and I dismiss the revision application and uphold the order passed by the learned Magistrate.

B/H.G.P. Revision dismissed.

A. I. R. 1953 ALL. 721 (Vol. 40, C. N. 355)

BRIJ MOHAN LALL J.

Amar Das, Petitioner v. Dadu Dayalu Mahasabha and others, Objectors.

Testamentary Suit No. 3 of 1952 and Testamentary Case No. 14 of 1952, D/- 6-1-1953.

Court-fees Act (1870), S. 19-I (i) — Probate.

Application for probate under S. 276, Succession Act — Amount of life assurance policy was one of items bequeathed in favour of applicant who was also a nominee in the policy — Money payable under policy to applicant is part of testator's assets and requires court-fees to be paid thereon — (Succession Act (1925), S. 276). (Para 7)

Anno: Court-fees Act, S. 19-I (i), N. 1; Succ. Act, S. 276 N. 1.

A. Sanyal and Devi Narain, for Petitioner; B. Upadhya, A. P. Pandey, G. P. Bhargava and N. D. Ojha, for Objectors.

CASES CITED:

(A) ('30) AIR 1930 Oudh 145: 5 Luck 712 (FB)

(B) ('39) AIR 1939 Sind 52: ILR (1939) Kar 359

(C) ('36) AIR 1936 Mad 477: 59 Mad 855

ORDER: Swami Amar Das has made an application under S. 276, Succession Act (39 of 1925) for probate in respect of the will of late Mahant Mohan Das Swami.

(2) One of the items bequeathed by means of this will in favour of the applicant is a life assurance policy of the deceased for a sum of Rs. 2,000/-. The deceased had under S. 39 (1), Insurance Act (4 of 1938), named the petitioner as the nominee in respect of the said insurance policy. The petitioner contends that by reason of the aforesaid nomination he can, under S. 39 (6), Insurance Act, claim the amount due under the policy from the Insurance Company, and can ignore the bequest contained in the will. He maintains that he need not pay court-fees in respect of this item.

(3) The Junior Secretary, Board of Revenue, has raised an objection to the effect that court-fee must be paid in respect of this sum of Rs. 2,000/- also.

Section 19-I (i), Court-fees Act lays down:

"that no order entitling the petitioner to the grant of probate.....shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the Form set forth in the third schedule and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation."

The Form set forth in the third schedule requires the petitioner to disclose—

"all the property and credits of which the above named deceased died possessed or was entitled to at the time of his death and which have come, or are likely to come to his hands."

It is, therefore, to be seen whether this insurance policy was a part of the assets of the testator at the time of his death or not. If it was, court-fee has to be paid thereon. If it was not, no court-fee need be paid in respect of it.

(4) It is true that a nominee can claim payment from the Insurance Company, but power has been reserved by S. 39 (2), Insurance Act in favour of the insured to cancel the nomination. This power can be exercised by him at any time before the policy matures for payment. The insured could create another nominee either in supersession of the present petitioner or in addition to him. It is, thus, obvious that the testator could exercise all rights of ownership in respect of this policy. If he had survived the maturity of the policy, he would have

received the money himself notwithstanding the nomination in favour of the petitioner. It is further provided by the said sub-s. (2) that the power of cancelling the nomination could be exercised by a will. But the testator, in this case, confirmed the nomination by the will instead of cancelling it. The nomination created in the petitioner's favour a contingent interest only, but the applicant's title to the money was perfected by reason of the bequest contained in the will. It is, therefore, obvious that if the petitioner can claim the amount payable under the policy, it is by virtue of the will and not otherwise.

(5) Reference was made during the course of the argument to cases of nominees under the Provident Funds Act. But this analogy is not of much use. Under S. 3 (2), Provident Funds Act (19 of 1925) the fund vests, subject to certain limitations, in the nominee, if he happens to be a "dependent" of the deceased subscriber within the meaning of S. 2 (c) of the Act. In the Insurance Act, however, there is no provision which vests the money payable under the policy in the nominee at any stage. Moreover, once a nominee is named under the Provident Funds Act no cancellation or alteration thereof is permitted, except in the manner prescribed by the rules. A right to cancel the nomination or to alter it by will has been expressly taken away by S. 5 (1) of the said Act.

(6) But even under the Provident Funds Act it was held in — 'N. M. Robinson v. H. H. Robinson', AIR 1930 Oudh 145 (FB) (A) and — 'In Re Mrs. Daisy Kemp', AIR 1939 Sind 52 (B), that the amount of the provident fund remained a part of the subscriber's assets and did not become the property of the nominee.

(7) A reference was made by the learned counsel for the petitioner to the case of — 'M. Mon Singh v. Mothi Bai', AIR 1936 Mad 477 (C). In that case the subscriber of a provident fund named a nominee in respect of the said fund. The nominee died in the subscriber's lifetime and the latter did not alter the nomination. After his death the nominee's widow applied for succession certificate. It was held that her husband (nominee) had a "vested interest". This case can be no authority in respect of an insurance matter, because a case like the present is expressly provided by the statute under S. 39 (5), Insurance Act, where it is laid down that in such a case the amount will go to the legal representatives of the policy-holder and not to the legal representatives of the nominee. This also illustrates the difference between the status of a nominee under the Provident Funds Act and that of one under Insurance Act. I am not called upon in this case to express any opinion as to what would be the rights of a nominee under the Provident Funds Act. But I have no doubt that a nominee in respect of a policy of insurance does not become the owner of the money payable under the policy merely by reason of the nomination. The policy-holder continues to be the owner up to the end of his life and has full power of disposal over it. I am, therefore, of the opinion that the money payable under the policy should be treated as a part of the testator's assets.

(8) The learned counsel for the petitioner has brought it to my notice that his client has had correspondence with the Insurance Company and that the amount payable under the policy in the different circumstances enumerated below are as follows:

1. A sum of Rs. 1410/10/-, if immediate cash payment is demanded;
2. a sum of Rs. 1733/-, if the policy is converted into a paid up policy and the payment is demanded on 13-3-1954;

and

3. a sum of Rs. 2,000/- less premia for two years at the rate of Rs. 108/8/- per year, if payment is demanded on 13-3-1954. This means a net payment of Rs. 1783/- to legatee.

In the circumstances, I am of the opinion that the value of the policy shall be treated for the purposes of court-fee as Rs. 1783/-.

(9) I am, therefore, of the opinion that the objection raised by the Junior Secretary, Board of Revenue, should be upheld in part. The petitioner shall deposit the additional court-fee within three days.

B/R.G.D. Order accordingly.

A. I. R. 1953 ALL. 722 (Vol. 40, C. N. 356)

(LUCKNOW BENCH)

V. BHARGAVA J.

Liaqat, Appellant v. The State.

Criminal Appeal No. 44 of 1952, D/- 16-10-1952.

Whipping Act (1909), S. 4 — Juvenile offender — Sentence of imprisonment in addition to whipping is legal — (Criminal P. C. (1898), S. 391). AIR 1929 All 322, Foll. AIR 1934 All 976 and AIR 1950 All 726, Not foll. (Para 8)

Anno: Cr. P. C., S. 391 N. 4; Whipping Act, S. 4 N. 1.

Shafiqur Rahman, for Appellant; Shankar Sahai, Asstt. Govt. Advocate, for the State.

CASES CITED:

(A) ('34) AIR 1934 All 976: 36 Cri LJ 368
(B) ('50) AIR 1950 All 726
(C) ('29) AIR 1929 All 322: 30 Cri LJ 1087

ORDER: Liaqat has come up to this Court in appeal against his conviction and sentence of three years' rigorous imprisonment and six stripes for an offence punishable under S. 376 of the Indian Penal Code.

(2) The prosecution case is that the appellant is a close neighbour of one Babhan Mirza, who had a daughter named Kumari Phunda aged about 7½ years. Liaqat appellant is himself a boy aged about 16 years, though the medical examination report shows that he is fully developed & has attained a height of 5 feet 4 inches. On 29-5-1951, when Phunda was playing near the door of her house at about 4 or 4.30 in the evening, the appellant came to her and asked her to come with him to his mango grove promising to give her some mangoes. She agreed and then the appellant carried the girl in his lap to the grove. On reaching the grove, Liaqat removed his own trousers as well as those of the girl, put her on the ground and had sexual intercourse with her. The girl felt pain and cried and thereupon the appellant left her. The girl started bleeding from her private parts. The appellant took her to a pond nearby and there washed the blood stained trousers of the girl as well as his own trousers. He escorted the girl back upto a place somewhere near her house and then left her. He

had told her that she should not disclose the incident to any one otherwise they could both be caught implying that this would result in both being punished. The girl kept quiet at her house for some time; but, probably due to the pain she was feeling, she later disclosed the whole incident to her mother. The incident was then related to her father, who took her to a police station, which was situated three miles away. There the girl lodged a report at 11.30 P.M. The case was investigated and the appellant was prosecuted for committing rape on the girl.

(3) The appellant pleaded not guilty and stated that he had a quarrel with one Qasim, nephew of Babban Mirza, the father of the girl, and it was as a result of that incident that he had been falsely implicated in this case.

(4) In this case the principal evidence against the appellant is naturally that of the girl Phunda, and the main question is whether her evidence is reliable. I have been taken through her statement and I cannot find anything at all in it which would indicate that she is not a reliable or truthful witness. (After discussion of the evidence of this girl the judgment proceeds:) Her statement, therefore, appears to be quite correct.

(5) The statement of the girl is further corroborated by other evidence produced by the prosecution. The principal corroboration is provided by the medical evidence. (After discussion of the medical evidence and the evidence of two prosecution witnesses the judgment proceeded:)

(6) No other witness has been produced by the prosecution to state that he also passed the girl and the appellant, either when they were going towards the grove or returning from it and learned counsel has tried to make a point out of it. His case is that a number of persons must have seen them going and it should have been possible to produce more witnesses in number who might also have been more reliable. The time when the appellant took the girl to the grove was about 4 or 4.30 P.M. on a hot summer day. It would not be surprising if people at that time might have kept indoors. In any case there appears to be no reason to hold that it was necessary for the prosecution to produce more than two witnesses who saw the appellant and the girl going towards the grove. So far as the return journey is concerned, the girl has clearly stated that she did not notice anyone, previously known to her, as she was coming back. They did pass some men, but who they were is not known. If they were strangers, there is no reason to assume that the prosecution were bound to succeed in discovering their identity so as to produce them in Court.

(7) On return to her house the first version was given by the girl to her mother, but she has not been produced as a witness. Learned counsel has alleged that the mother of the girl would have been the best person to corroborate the testimony of the girl, as it was she to whom the first version was given by the girl. No attempt seems to have been made in this case on behalf of the appellant to elicit why the mother was not produced, nor was any explanation volunteered by the prosecution. It is, therefore, not possible for me to hold that it was essential for the mother to be produced when there might be an adequate reason for her non-production. On the face of it the explanation that strikes one is that being a Muslim law she might be observing 'pardah' and might have hesitated in coming to Court if she thought that her husband's evidence would be quite sufficient. Babban, the father of the girl, has been produced and he has corroborated the girl in her version. Of course, corroboration by him does not carry the same value as the corroboration by the mother would have done, but as I have said earlier, corroboration is provided not merely by his evidence but by the medical evidence, the reports of the Chemical Examiner and Imperial Serologist and the evidence of the two witnesses Jumman and Abdus Sattar. The statement of the girl, has also appeared to be impressed with truth. In these circumstances I see no reason to differ from the view taken by the learned Sessions Judge that the charge against the appellant is established.

(8) Learned counsel has urged that the sentence awarded is illegal inasmuch as in the case of a juvenile offender the punishment of whipping cannot be awarded in addition to the sentence of imprisonment as S. 4 of the Whipping Act does not apply to a juvenile offender who is governed by S. 5 of that Act only. Learned counsel in support of this contention has cited before two Single Judge's decisions of this Court, in — 'Lurkhur v. Emperor', AIR 1934 All 976 (A), and — 'Ram Prasad v. The State', AIR 1950 All 726 (B). As against these, there is a Division Bench decision of this Court in — 'Emperor v. Motha', AIR 1929 All 322 (C). In the latter case it was clearly held that a sentence of imprisonment can be inflicted in the case of a juvenile in addition to whipping under S. 4 of the Whipping Act. With respect, I may say that I entirely agree with the view that has been taken by the Bench in this case. Both the decisions by the learned Single Judges cited above were subsequent to this Bench decision, but neither of the two learned Single Judges took notice of this case or of the reasons given in for the view that a juvenile offender can be punished under S. 4 of the Whipping Act with whipping in addition to imprisonment for those offences which are mentioned in that section. Since this Division Bench view is binding on me, and I entirely agree with it, I follow it in preference to the view taken in the two Single Judge's decisions referred to above and hold that the sentences awarded to the appellant in this case were legally correct.

(9) In view of the fact that rape was committed by the appellant in this case on a young child of about 7½ years of age, the sentence awarded does not appear to be at all severe. The appeal is consequently dismissed.

B/K.S. Appeal dismissed.

A. I. R. 1953 ALL. 723 (Vol. 40, C. N. 357)

(LUCKNOW BENCH)

MALIK C. J. AND MUKERJI J.

Kashi Kurmi and others, Appellants v. Chandi Kurmi and others, Respondents.

Appeal No. 5 of 1951, D/- 22-1-1953.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 295-A.

Person a sub-tenant remaining in possession for period of five years under S. 295 — Period expiring on 31-12-1944 and right to remain in possession coming to an end — He is not entitled to benefit under S. 295A, introduced by Amending Act of 1947. (Para 9)

I. A. Abbasi, for Appellants; Ram Bharose Lal, for Respondent No. 1.

MALIK C. J.: This is a defendants' appeal under S. 12 (2) of the Oudh Courts Act read with the U. P. High Courts (Amalgamation) Order, 1948.

(2) The plaintiff and defendant No. 8 were the sub-tenants of a pahi tenant, Hasan Raza. Hasan Raza died in the year 1931. He left a daughter who was impleaded as defendant No. 6 and a son who was impleaded as defendant No. 5 to the suit. After the death of Hasan Raza, his heirs were entitled to remain in possession for the unexpired period of ten years which was the period for which the tenancy was deemed to exist under S. 36 of the Oudh Rent Act. The lower appellate Court has held that the 10 years expired in 1342 Fasli which corresponds to 1934-35. The heirs of Hasan Raza, therefore, were entitled to remain in possession of the property till 1934-35. In the year 1942, the landlord, who is defendant No. 7 to this action, filed proceedings under Ss. 87 and 88 of the U. P. Tenancy Act (No. 17 of 1939) intimating that he wished to treat the holding as abandoned. On 20-11-1942 the objections filed by defendant No. 5, the son, were dismissed and the landlord entered into possession and on the 21st of February, 1944, he let out the plots to defendants 1 to 4. The plaintiff then filed the suit out of which this appeal has arisen against defendants 1 to 4, who were the main contesting defendants, and also impleaded defendants Nos. 5 and 6, son and daughter of Hasan Raza, and defendant No. 7, who was the landlord, and also impleaded as pro forma defendant, defendant No. 8 who it was said was also a sub-tenant along with the plaintiff.

(3) The suit was contested by the defendants who pleaded that abandonment proceedings having been taken against the tenant the sub-tenants could not claim any right to remain in possession. Other objections were also taken which it is not necessary for us here to discuss.

(4) The plaintiff challenged the proceedings under Ss. 87 and 88 of the U. P. Tenancy Act on the ground that defendants 5 and 6, i.e., the son and the daughter, both were the heirs of Hasan Raza and became the tenants of the plots in suit and the abandonment proceedings having been taken only against the son and not against the daughter, the rights of the daughter still survived and it could not be said that the tenant's rights had come to an end.

(5) The learned Munsif framed a number of issues which arose out of the proceedings and remitted issues Nos. 2 to 4 for decision by the revenue Court. The revenue Court held that the defendant No. 6, i.e., the daughter, had never been in possession and had never been recognised as a tenant and, therefore, she had no interest and the proceedings taken against defendant No. 5, were, therefore, valid. As a result of the findings recorded by the revenue Court and by the learned Munsif the plaintiff's suit was dismissed on 19-7-1945.

(6) There was an appeal filed against that decision which was allowed by the learned Civil Judge on 8-4-1946. The learned Judge came to the conclusion that the proceedings under Ss. 87 and 88, U. P. Tenancy Act, against defendant No. 5 were valid and the tenant's rights came to an end on 20-11-1942, but the learned Judge relied on the provisions of S. 295, U. P. Tenancy Act, and held that, as the plaintiff was in possession as a sub-tenant in the year 1940 when the U. P. Tenancy Act came into force, under S. 295 of that Act he became entitled to remain in possession for a period of five years from 1-1-1940, i.e. upto 31-12-1944. The learned Civil Judge failed to notice that the period of five years had expired before the date of the decree passed by him and the plaintiff, therefore, could not claim the right to be put back into possession on that date.

(7) Against the decision of the lower appellate Court there was an appeal filed in this Court. The appeal came up before a learned single Judge on 28-10-1950, and the learned Judge dismissed the appeal relying on S. 295-A which had been added by the U. P. Tenancy (Amendment) Act (No. 10 of 1947).

(8) The learned single Judge did not disagree with the findings recorded by the lower Courts that by reason of the proceedings under Ss. 87 and 88, U. P. Tenancy Act, the tenancy had terminated on 20-11-1942. The learned Judge, however, relied on the decree dated 8-4-1946, passed by the lower appellate Court, which was under appeal before him, and held that, as on that date the lower Court had held that the plaintiff was entitled to get back possession of the property, the plaintiff was a sub-tenant on the 14th of June, 1947, when the new S. 295-A came into force, under the U. P. Tenancy (Amendment) Act of 1947, and became entitled to the benefit given under that section.

Section 295-A is as follows:

"Notwithstanding any contract to the contrary or anything contained in this Act or any other law for the time being in force every person who on the date of the commencement of the United Provinces Tenancy (Amendment) Act, 1947, is a sub-tenant shall, subject to the provisions of the proviso to sub-section (3) of S. 27 of the United Provinces Tenancy (Amendment) Act, 1947, be entitled to retain possession of his holding for a period of five years from that date, and for this period nothing in sub-s. (2) of S. 44 or S. 171 shall render the landholder of such sub-tenant liable to ejectment under the provisions of S. 171;

Provided that nothing in this section shall authorise a sub-tenant of a person who belongs to one of the classes mentioned in S. 41 to retain possession of his holding after the disability of such person has ceased."

The question, therefore, arises whether on the date when the Amendment Act of 1947 came into force the plaintiff could still be called a sub-tenant of the plots in suit. The section gives a person who is a sub-tenant on that date a right to retain possession for a further period of five years. The learned single Judge has not discussed the question whether the plaintiff was or was not a sub-tenant on 14-6-1947, when the Amendment Act came in force. He has, however, assumed, that, as the lower Court had decreed the appeal on 8-4-1946, which decree was the subject-matter of the appeal before him, the plaintiff was entitled to the benefit of the new section.

(9) Examining the facts again with reference to this issue, it emerges from the findings of the lower Courts that the plaintiff was let into possession of these plots as a sub-tenant by Hasan Raza on some date prior to the year 1939. He was in possession as a sub-tenant on the date when the U. P. Tenancy Act of 1939 came into force. Under section 295 of that Act he became entitled to remain in possession for a period of five years. The period of five years expired on the 31st of December 1944, and his right to remain in possession came to an end. He could not, therefore, plead that on 14th June, 1947, he was still a sub-tenant of the plots in suit. It may be further noted that S. 295 nowhere mentions that

the sub-tenant shall continue to be a sub-tenant for a period of five years i.e. his status of a sub-tenant shall be preserved for five years. It only gives him a right to retain possession for a period of five years. The Board of Revenue has taken the view in a recent case that though under S. 295 a sub-tenant has been given the right to remain in possession for five years the section does not provide that the sub-tenancy as such shall continue for a further period of five years. It is not necessary for us to give a final decision on the point as it has not been mooted at the Bar, but even if it be assumed that the plaintiff had continued to be a sub-tenant under the provisions of S. 295, that period also expired in 1945, long before the Amendment Act of 1947 came into force, and there is no evidence nor could there be any, that after 1942 when the principal tenant was ejected there was any further contract of sub-letting express or implied in plaintiff's favour. In any view of the case, therefore, S. 295-A, U. P. Tenancy Act could not apply and the plaintiff's suit should have been dismissed.

(10) The result, therefore, is that we set aside the decrees passed by the learned single Judge and the lower appellate Court and restore that of the Court of first instance with costs in all the Courts.

(11) As the suit has been dismissed, the stay order is discharged.

C/R.G.D. Appeal allowed.

A. I. R. 1953 ALL. 725 (Vol. 40, C. N. 358)
(LUCKNOW BENCH)
BEG J.

Ram Nath and others (Accused), Applicants v. The State.

Criminal Revn. No. 342 of 1951, D/- 23-5-52.

(a) Penal Code (1860), S. 441 — Intention — Complainant in peaceful possession of shop — Accused beating complainant and forcibly ejecting him from shop — Accused tried for offences under Ss. 147, 323, 379, 448 and 504, Penal Code — Conviction only for offences under Ss. 147 and 448 — Though accused were acquitted under Ss. 323, 379 and 504, necessary intention held could be inferred from circumstances. AIR 1950 All 157, Rel. on. (Para 5)

Anno: Penal Code, S. 441 N. 1.

(b) Penal Code (1860), S. 441 — Person in peaceful possession of property for long time — Resort to force by claimant even claiming title bona fide to eject such person is illegal. AIR 1950 All 653, Foll. (Para 6)

Anno: Penal Code, S. 441 N. 5.

M. G. Walford and Nazir Ahmad, for Applicants; Rashid Husain and Ramesh Chandra Sinha, for the State.

CASES CITED:

(A) ('50) AIR 1950 All 157: 51 Cri LJ 496

(B) ('50) AIR 1950 All 653: 51 Cri LJ 1167

ORDER: One Mathura Kahar filed a complaint against Ram Nath Bhurji, his wife Shrimati Seeta, and Pyarey, Barsati and Kishori servants of Ram Nath. Mathura belongs to Azamgarh District and came to Lucknow about 4 or 5 years ago and got employed in the shop of Ramnath at Kaiserbagh. It is alleged that one year previous to the alleged incident, he opened his own private business and constructed a shop close to Jai Hind Cinema on the Bisheshwar Nath Road. The case of Mathura was that the plot of land on which his shop was built was acquired by him through Ramnath, who fraudulently got the lease executed in his own name. According to his allegations, on 25-4-1951, at about 11 A.M. all the five persons mentioned above formed an unlawful assembly for the purpose of dispossessing him. They went to his shop, beat him and his brother Ramai and took forcible possession of his shop.

(2) The defence of the accused was that the shop belonged to them, that the rent receipts of the shop were in the name of Ramnath and they were asserting their own rights in bona fide manner and were not guilty of any offence.

(3) The story narrated by the complainant P. W. 1 Mathura was corroborated by the independent evidence of reliable persons. The names of witnesses who corroborated him are Shri Lati Bhusan (P. W. 2), Munney (P. W. 3), Mrs. R. Sollose (P. W. 4), Shri T. R. Joseph (P. W. 5), Maiku Lal (P. W. 6) and Ismail (P. W. 7). The evidence of these witnesses has been believed by both the Courts and the concurrent findings given by them are that Mathura was in peaceful possession of the shop, that on the day in question the applicants formed an unlawful assembly, went to the shop and took forcible possession of it. In view of the said findings the applicants have been convicted under Ss. 147 and 448, I. P. C. Under S. 147, I. P. C. applicant No. 1 has been ordered to undergo three months' R. I. & u/s. 448, I.P.C. he has been ordered to pay a fine of Rs. 200/- only. The remaining applicants were sentenced to pay a fine of Rs. 100/- each under S. 147, I. P. C. and to pay a fine of Rs. 50/- each under S. 448, I. P. C.

(4) Having heard the learned counsel for the parties at length I am of opinion that this revision must be dismissed. The findings arrived at by both the Courts are based on evidence on record. These findings are neither perverse nor unreasonable. It is clear that Mathura had been in peaceful possession of the shop for about a year. It is further clear that the applicants instead of ejecting Mathura through a Court of law took the law into their own hands and forcibly ejected him from his shop and took possession of it.

(5) It has been argued on behalf of the applicants that in view of the acquittal of the applicants of the offences under Ss. 323, 379 and 504, I. P. C. it cannot be said that the intention of the applicants was to commit any offence or to intimidate, insult or annoy any person in possession of his property. It is no doubt true that they have been acquitted under the aforesaid sections, but the trial Court has clearly given a finding to the effect that Mathura was beaten by the applicants and the appellate Court has upheld the conclusions arrived at by the trial Court. In view of the said findings the mere fact that they were acquitted under the aforesaid sections is quite immaterial. The fact remains that the applicants did resort to wrongful force for taking possession of the said shop. They had absolutely no justification for doing it. It has been held in — 'Keshar Singh v. Rex', AIR 1950 All 157 (A), that

"it would be impossible to produce direct evidence of the intention. The intention has in most cases to be inferred from the circumstances. Where the probable consequence of the act alleged to be criminal trespass was to cause annoyance to the persons in possession it will be presumed that it was committed with that intention. The presumption will hold good if it is not rebutted."

(6) It has further been argued on behalf of the applicants that Ramnath was the real owner of the shop and that if the title vested in him, he cannot be guilty of any offence, if he took forcible possession of the property. I do not think that there is any merit in this argument. Where a person has been in peaceful possession of property for a fairly long time, it is not open to the claimant of the property to resort to force for the purpose of ejecting him. As has been held in — 'Sm. Ram Kali v. Gaya Prasad', AIR 1950 All 653 (B):

> "Section 441 is designed to protect possession as distinguished from title in the sense that the question in whom title to the land or property vests is foreign to the offence. The mere fact that the accused put forward a bona fide claim to the property would not save him from the consequences of the entry into the house in possession of the complainant if his intention was to take the property out of the complainant's possession without her consent and to cause wrongful gain to himself or wrongful loss to her."

(7) I understand that Ramnath has filed a civil suit for determination of the question of title. The civil Court is, therefore, the proper forum for giving a finding on that particular point. So far as the criminal Courts are concerned, they are primarily concerned, with the factum of possession and in view of the evidence adduced on behalf of Mathura in this case, it must be held that possession was clearly with him.

(8) Under the above circumstances I am of opinion that there is no substance in this revision. It is accordingly dismissed. Ramnath applicant is on bail. He shall surrender forthwith and serve out his sentence.

C/V.R.B. Revision dismissed.

A. I. R. 1953 ALL. 726 (Vol. 40, C. N. 359)

ASTHANA J.

Nardeo Singh and others, Appellants v. The State.

Criminal Appeal No. 845 of 1950, D/- 19-5-1953.

(a) Criminal P. C. (1898), S. 154—First information.

A verbal report of the occurrence of an offence made to the Tahsildar who casually happened to be in the village cannot be the first information report because under S. 154 a first information report is a report which is made to an officer in charge of a police station. (Para 9)

Anno: Cr. P. C., S. 154 N. 3.

(b) Penal Code (1860), Ss. 147, 323 and 326 — Legality of conviction.

There is nothing illegal in conviction both under Ss. 147 and 323 or 326. AIR 1926 All 225; AIR 1933 All 819; AIR 1952 All 92; 7 All 757 (FB); AIR 1914 Cal 675, Foll. (Para 14)

Anno: Penal Code, S. 147 N. 3; S. 323 N. 7; S. 326 N. 6.

(c) Penal Code (1860), Ss. 307 and 326 — Conviction under S. 307 and S. 326 for same offence.

Where an accused person shoots one with a pistol and thereby causes hurt to him he is liable to conviction under the latter part of S. 307 and his conviction under S. 326 for the same offence is not warranted. (Para 15)

Anno: Penal Code, S. 307 N. 1; S. 326 N. 6.

Raj Bahadur Pandey, for Appellants; A. G. A., for the State.

CASES CITED:

(A) ('26) AIR 1926 All 225: 24 All LJ 178: 27 Cri LJ 287

(B) ('33) AIR 1933 All 819: 34 Cri LJ 1099

(C) ('52) AIR 1952 All 92: 1951 All WR (HC) 597

(D) ('85) 1885 All WN 195: 7 All 757 (FB)

(E) ('14) AIR 1914 Cal 675: 41 Cal 836: 15 Cri LJ 251

JUDGMENT : The appellants have been convicted by the 1st Additional Sessions Judge of Budaun under Ss. 323, 326 read with S. 149, I. P. C. and have each been sentenced to six months' rigorous imprisonment under S. 323 read with S. 149, I. P. C. and to six years' rigorous imprisonment under each of the two Ss. 326 and 307 read with S. 149, I. P. C. The appellants Tessu, Angan, Mulaim Singh and Gajju Singh have been further convicted under S. 147, I. P. C. and sentenced each to six months' rigorous imprisonment and the appellants Nardeo and Bhikhari under S. 148, I. P. C. and sentenced to one year's rigorous imprisonment each. All these sentences have been made concurrent.

(2) Two appeals were filed, one on behalf of Nardeo, Mulaim Singh and Bhikari and the other on behalf of Tessu, Angan and Gajju Singh. They have both been connected and as they arise out of the same judgment they will be disposed of together.

(3) The prosecution story is that Dan Singh, brother of Chaturi Singh Complainant, had filed a complaint under S. 107, Cr. P. C. against the appellants and other about a month or two before the occurrence and this case was pending at the time of the occurrence that Net Singh and Ram Singh who are prosecution witnesses in this case and who were also injured in the occurrence were prosecuted along with others for the murder of one Bharat Singh and the accused Jiwan Singh and Sughar Singh father of Tondi Singh and Bhola Singh accused had appeared as prosecution witnesses in that case about one and a half year before the occurrence, that on account of these facts there was enmity between the accused and Dan Singh, Chaturi Singh, Net Singh and Ram Singh and it was on account of this enmity that on 8-6-1949, about an hour before sunset when Dan Singh and Chaturi Singh were returning from their field and reached a place near Jiwan Murao's Mandaiya which stood on the way and which adjoined the village talab, they were waylaid by the accused some of whom were sitting in the Mandaiya of Jiwan Singh and the others in a grove at a short distance from there, that they were armed with lathis and pistols and attacked Dan Singh and Chaturi and inflicted a number of injuries on their persons, that on the cries of these two persons Net Singh and Ram Singh who were present at the talab with their cattle where they had gone to give water to them ran to their help and they too were beaten and injured. The accused ran away when other persons reached the spot on hearing the shouts of the injured persons. All the

four injured persons were removed in a cart to P. S. Bilsi which is at a distance of about seven miles from there. They reached the thana sometime about midnight and a report was made there by Chaturi Singh at 1.10 a. m. and in that report the names of all the accused are mentioned. After the report had been recorded the injured persons were sent to the dispensary where their injuries were examined by the Medical officer the next morning.

(4) The appellants in their statements denied that they had committed the offence. Their case was that they had been falsely implicated on account of enmity. The accused Nardeo Singh stated that he did not know whether Dan Singh had filed any complaint under S. 107, Cr. P. C. against him and the other accused and that they were bound over in that case. The accused Tessu, Angan and Mulaim Singh admitted that a case under S. 107, Cr. P. C. had been filed against them and the other accused by Dan Singh and that they were bound over in it. The accused Gajju denied this fact whereas the accused Bhikhari stated that he did not know if Dan Singh had filed any such complaint against him though he admitted that he was bound over.

(5) It appears from the medical evidence that Dan Singh, Net Singh, Ram Singh and Chaturi were examined by Dr. V. P. Singh, Medical officer, Bilsi, on the morning of 9-6-1949. (After describing the several wounds his Lordship says :) There is no doubt that from these injuries it is quite obvious that these four persons were assaulted with lathis and fire-arms sometime in the evening of 8-6-1949, and it was on account of that assault that they had received these injuries. I am not prepared to accept the suggestion on behalf of the appellants that these injuries were self-inflicted or that they had not been caused by a pistol as alleged by the prosecution witnesses.

(6) It was argued for the appellants that the pellet said to have been recovered by Dr. Singh from injury No. 4 on the person of Ram Singh had not been produced as a material exhibit and in the absence of such evidence it was doubtful if any pellet had really been extracted from his body. There is no doubt that the pellet was not produced by the doctor or by the prosecution in this case as a material exhibit. Dr. Singh was not asked about it or he might have given some explanation as to what happened to it and whether he forwarded it to the police or not. In view of the fact that the doctor or the prosecution witnesses were not cross-examined on this point and had no opportunity of explaining as to why it was not produced in the lower Court, I am of opinion that its mere non-production does not affect the case.

(7) It was also argued that it was very unlikely that the pistol injury would have produced a four-sided or four cornered wound and that if really a pistol were used then it would be expected that a round wound be made because a pellet would be round. There is nothing on the record to show whether the pellet was round or square and whether it had four corners or not. If the doctor were cross-examined and were asked on this point he might have been able to give some explanation as to how the four-sided or four-cornered wound was made by the pistol shot.

(8) Another argument which was advanced on behalf of the appellants was that from the prosecution evidence it appeared that only lathi and pistols were used in the assault but the medical evidence disclosed that incised wounds were found on the person of Net Singh and Chaturi and there was no explanation as to how these two injuries were caused when no sharp-edged weapon according to the prosecution evidence was used. As regards the incised wound on Chaturi the doctor in his statement has clearly stated that it had been caused with a fire-arm and he was not cross-examined on this point. As regards the incised wound on Net Singh the evidence of the doctor was that it had been inflicted with some sharp-edged weapon. In my opinion there is no doubt that lathis and pistol were used by the assailants and the above four persons were beaten with these two weapons. There is no doubt that there is no satisfactory explanation as to how the incised wound on Net Singh was caused in the absence of any sharp-edged weapon.

(9) The question which next arises for consideration is whether Dan Singh, Chaturi Singh, Net Singh and Ram Singh were assaulted by the accused or by some other persons. The evidence of these four witnesses clearly shows that the occurrence took place an hour before sunset and they were beaten by the accused on account of the enmity which they had against them on account of the case under S. 107, Cr. P. C. already mentioned above. The accused are also named in the first information report. It was argued on behalf of the appellants that the first information report Ex. P1 was not admissible in evidence and the reason given for it was that from the evidence of Dan Singh (P. W. 2) it appeared that on the day of the occurrence the complaint to Tahsildar was really the first information report and the statement in the report Ex. P1 was made during investigation and was a second report and was, therefore, inadmissible. In my opinion this contention is not correct. There is no doubt that Chaturi Singh made an oral complaint to the Tahsildar who happened to reach the village on the day of the occurrence. But it appears from the statement of the Tehsildar, Sri Radhey Shyam Pande, that when he was told about the occurrence he asked the complainant to go to the thana and make a report about it there and it was on this direction that Chaturi Singh went to the thana and made the report. It cannot be said that the verbal report which was made to the Tehsildar was the first information report because under S. 154, Cr. P. C. a first information report is a report which is made to an officer in charge of a police station. In view of this provision the report Ex. P1 which was the first report and which was made at P. S. Bilsi was the first information report and not the oral complaint which was made to the Tehsildar who casually happened to be in the village. Moreover, S. 162, Cr. P. C. which makes a statement before a police officer during the course of investigation inadmissible is not applicable to the present case because there is nothing on the record to show that the police had already started the investigation when the report Ex. P1 was made. On the contrary, the evidence is that the Tahsildar directed Chaturi Singh to report the matter to the police and then he made the report and it was after this

report that the police started the investigation. In the circumstances I am of opinion that the contention on behalf of the appellants that the report Ex. P1 is not admissible is not correct.

(10) It was next contended that the report was not reliable as according to it it appeared to have been made at 1.10 A. M. but according to the prosecution witnesses Chaturi Singh and Dan Singh it was made in the morning. There is no doubt that Chaturi Singh in his statement said that it was recorded in the morning and Dan Singh said that it was recorded at 10 A. M. in the morning, but both these witnesses clearly stated that they reached the thana sometime about midnight and when they asked the constable clerk present there to write the report he told them that it would be written in the morning and it was for this reason that the report was written in the morning. The explanation given by these two witnesses appears to be quite reasonable. It appears that the constable clerk or that other police men on duty at the police station did not want to be disturbed at night and it was for this reason report was actually not recorded at night as stated by these two witnesses. It may be that the writer of the report in order to avoid any explanation mentioned in the report that it was written at 1.10 A. M. There is, however, no doubt that the report was written in the early morning because the medical examination of the injured persons was started at 7.30 a. m. as appears from the evidence of Dr. Singh. I am not satisfied that there has been any delay on the part of the complainant in making the report, who reached the thana on the night of the occurrence.

(11) If the occurrence took place an hour before sunset as has been stated by Chaturi Singh, Dan Singh, Net Singh, Ram Singh, Babu Ram, Mahendra Singh and Phul Singh, there is no doubt that the injured persons must have seen the assailants and if they knew them from before they must have recognised them. It appears to me somewhat improbable that if the accused did not assault the injured persons and they really had been assaulted by some other persons they would have left out the real assailants and implicated the accused simply because there had been a case under S. 107, Cr. P. C. against them. There is no doubt that there was enmity between the accused and the injured persons and on account of this enmity it is possible for the injured persons to falsely implicate the accused, but it is also possible that on account of this enmity the accused assaulted them and caused them so many injuries.

(12) The question for consideration is how far the evidence of the above seven witnesses is to be believed. There can be no doubt that Chaturi Singh, Dan Singh, Net Singh and Ram Singh were assaulted because they had injuries on their persons. (After discussing the evidence his Lordship concluded :) After a consideration of the entire evidence on the record I am of opinion that the accused formed an unlawful assembly with the common object of beating Chaturi Singh and others and it was in prosecution of that common object that they beat them with lathis and pistol, etc. and caused them a number of injuries. The mere fact that some of them were waiting at one place and some at another place at a short distance from it does not mean that they had nothing in common.

(13) The next question for consideration is what offence has been made out. It was contended on behalf of the appellants that a conviction both under Ss. 147 and 323 or 326, I. P. C. was illegal and could not be maintained. It has, however, been the consistent view of this Court that there is no illegality in such conviction. In —'Chidda v. Emperor', AIR 1926 All 225 (A), it was held by Sulaiman, J. that separate convictions under Ss. 147 and 323 read with S. 149, Penal Code were not illegal. A similar view was expressed by Bajpal J. in — 'Emperor v. Sahab Rai Singh', AIR 1933 All 819 (B). In —'Tiny v. State', AIR 1952 All 92 (C), Brij Mohan Lal J. relying on a Full Bench decision of this Court reported in —'Queen-Empress v. Ram Sarup', 7 All 757 (D), held that a person who actually causes hurt and is also a member of an unlawful assembly can be convicted of committing riot under S. 147 and of causing hurt under S. 323, I. P. C. and there was no illegality in it. In the case of — 'Prokash Chandra v. Emperor', AIR 1914 Cal 675 (E), a Division Bench of the Calcutta High Court consisting of Holmwood and Sharfuddin JJ. held that on a charge of rioting with the common object of assaulting public servants, the accused could be convicted both under S. 147 and S. 353, I. P. C. and there was no illegality in such conviction.

(14) In view of the consistent decisions of this Court I am of opinion that the contention on behalf of the appellants that convictions under both the Ss. 147 and 323 or 326, I. P. C. are illegal cannot be maintained.

(15) It was next argued that the appellants have been convicted both under Ss. 307 and 326, I. P. C. in respect of the same grievous hurt. To my mind the conviction under both the sections for the same injury does not appear to be quite correct. Section 307 clearly provides that whoever does any act with such intention or knowledge and under such circumstances, that, if he by that act causes death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned. There is no doubt that from the evidence on the record it is proved that some of the injured persons were fired at with a pistol and received hurt as a result of it. It is in respect of this hurt which is grievous that they have been convicted both under Ss. 307 and 326, I. P. C. In my opinion where an accused person shoots one with a pistol and thereby causes hurt to him he is liable to conviction under the latter part of S. 307, I. P. C. and his conviction under S. 326 for the same offence is not warranted. It is not the prosecution case that the grievous hurt was caused in any other manner except from a pistol shot. I am, therefore, of opinion that the conviction of the appellants under both the Sections 307 and 326, I. P. C. cannot be maintained.

(16) The result is that these appeals are allowed to this extent only that the conviction and sentence of the appellants under S. 326, I. P. C. is set aside. Their convictions and sen-

tences under the other sections are maintained. Leave to appeal to Supreme Court is refused.

B/V.S.B. Ordered accordingly.

A. I. R. 1953 ALL. 729 (Vol. 40, C. N. 360)

AGARWALA AND CHATURVEDI JJ.

Mohd. Zahir Hasan and another, Plaintiffs, Appellants v. Dulare and others, Defendants, Opposite Parties.

Civil Revn. No. 706 of 1952, D/- 7-5-1953.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 60, 61, 63, 242 — Jurisdiction of Civil Court — (Civil P. C. (1908), S. 9) — AIR 1949 All 257, AIR 1952 All 496, OVERRULED.

Suit for permanent injunction filed on the allegations that the plaintiffs were the zamindars of the land in suit, which was their 'sir' and 'khudkasht', that the defendants had no manner of right in this land, but they wrongly deposited 10 times the rent and sought to obtain 'bhumidari' rights under the provisions of the U. P. Tenants Acquisition of Privileges Act, and that the defendants were also trying to enter into possession of the land — Held that Sec. 60 clearly covered the case; and, therefore, the suit was barred from the cognizance of a civil court by S. 242 inasmuch as it arose out of a cause of action in respect of which a relief for a declaration could be obtained from the revenue Court. Case law discussed. (Para 11)

Anno: Civil P. C., S. 9 N. 50, 51.

Hirdai Narain Kapoor and Masood Hasan, for Applicants; Harnandan Prasad, for Respondents.

CASES CITED:

(A) ('44) AIR 1944 All 81: 1944 All WR (HC) 56
(B) ('30) AIR 1930 All 193: 1930 All LJ 256 (FB)
(C) ('35) AIR 1935 All 526: 1935 All LJ 546
(D) ('46) AIR 1946 All 379: ILR (1946) All 692 (FB)
(E) ('49) AIR 1949 All 257: ILR (1949) All 449
(F) ('52) AIR 1952 All 496: 1952 All LJ 202
(G) ('52) AIR 1952 All 660: ILR (1950) All 431

CHATURVEDI J.: This is a plaintiffs' application in revision arising out of a suit for the issue of a permanent injunction to restrain the defendants from taking possession over the plots specified in the plaint.

(2) The suit was filed in the Court of the Munsif West Allahabad, on the allegations that the plaintiffs were zamindars of the land in suit, which was their 'sir' and 'khudkasht', that the defendants had no manner of right in this land, but they wrongly deposited 10 times the rent and sought to obtain 'bhumidari' rights under the provisions of the U. P. Tenants Acquisition of Privileges Act, and that the defendants were also trying to enter into possession of the land. The actual relief claimed in the plaint was that, on proof of the plaintiff's possession over the land as their 'sir' and 'khudkasht', a permanent injunction be issued to the defendants restraining them from interfering with the plaintiffs' possession of the land in suit. One of the defences taken to the suit was that it was not cognizable by the civil Court and was exclusively triable by the revenue Courts. There were some other defences also, but it is not necessary to mention them for the purposes of this revision. The learned Munsif tried the issue of jurisdiction only, namely, issue No. 3, and came to the conclusion that the suit was not entertainable by him, and ordered the plaint to be returned for presentation to the revenue Court. The plaintiffs went up in appeal, and the lower appellate Court agreed with the decision of the learned Munsif on this point and dismissed the appeal.

(3) The learned counsel for the plaintiffs-applicants has strenuously urged before us that the suit was cognizable by the civil Court, inasmuch as the relief that was claimed in the suit was a relief of a permanent injunction which could not be granted by a revenue Court. He has further argued that he has nowhere admitted in the plaint that the defendants are tenants, and all that he has stated is that they are attempting to obtain possession over the land, and, with that object in view, they deposited certain amounts in the Tahsil with a view to get 'bhumidhari' certificates; and that the plaintiffs had taken steps in the revenue Courts for the cancellation of these certificates. We were informed that, after the institution of the suit, some of the certificates have actually been cancelled.

(4) The learned counsel for the opposite parties has tried to support the judgments of the Courts below and his submission is that, from the allegations in the plaint itself, it is obvious that the defendants were claiming to be tenants of the land in suit, and the plaintiffs knew of this claim of the defendants before the institution of the present suit.

(5) As the above facts would show, the question, which arises for determination in this revision is whether a plaint containing such averments is entertainable by the civil Courts or not. This question arises in numerous cases, and is assuming greater importance now because the tendency on behalf of the plaintiffs is to avoid the revenue Courts and obtain a decision from the civil Court. There is nothing improper in this and their preference for the civil Courts is understandable. But the Courts have to follow the law, as it stands, and give full effect to it.

(6) Before proceeding to discuss the different cases that have been brought to our notice in the course of arguments, we may first refer to the statutory provisions bearing on the question. These provisions are contained in Ss. 60, 61, 63 and 242 of the U. P. Tenancy Act. They are as follows:

"Sec. 60: " The landholder may sue any person claiming to be a tenant of a holding for a declaration of the right of such person."

Sec. 61: "At any time during the continuance of a tenancy, either the landholder or the tenant may sue for a declaration as to any of the matters specified in sub-s. (2) of S. 55."

Sec. 63: "When land claimed by a tenant as his holding or as being under his cultivation is also claimed by the landholder as being held by him as his 'sir' or 'khudkasht', either the landholder or the tenant may sue for a declaration of his status."

Sec. 242: "Subject to the provisions of Sec. 286 all suits and applications of the nature specified in the Fourth Schedule shall be heard and determined by a revenue Court, and no Court other than a revenue Court, shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application, or of any suit or application based on a cause of action in respect of which any relief

could be obtained by means of any such suit or application.

Explanation: If the cause of action "is one in respect of which relief might be granted by the revenue Court, it is immaterial that the relief asked for from the civil Court may not be identical with that which the revenue Court could have granted."

(7) It is the last section mentioned above, namely, S. 242, which bars the jurisdiction of the Civil Courts and confers it exclusively on the revenue Courts provided that (i) the suit or application is of the nature specified in the Fourth Schedule, (ii) it is based on a cause of action in respect of which any relief could be obtained by means of any such suit or application. The Explanation makes it clear that if the relief could be granted by the revenue Court, it makes no difference that the relief actually asked for from the civil Court is not identical with that which the revenue Court could have granted.

(8) The relief asked for in the suit does not come either under S. 60, 61 or 63 because these sections speak only of a suit for a declaration and not of a suit for an injunction. This is, therefore, not a suit which could be said to be actually specified in the Fourth Schedule, though the suits under the above sections are so specified. The question, therefore that arises is whether this is a suit based on a cause of action in respect of which any relief could be obtained by means of a suit brought under any of the three sections mentioned above.

(9) The words "any relief" mentioned in S. 242 are very important, and we might give a brief history of the legislation leading up to the use of the word "any" in this section. In S. 230 of Act 3 of 1926, only those suits came within the purview of the section in which "adequate relief could be obtained" from the revenue Courts. In view of these wordings, what the Courts had to consider was whether the revenue Courts could grant an adequate relief to the plaintiff, and if the revenue Courts were found incapable of granting adequate relief, the suit was held to be cognizable by the civil Courts. The legislature then deleted the word "adequate" from the section as well as from the Explanation. But this Court held that the deletion of the word "adequate" made no difference to the maintainability of the suit in the civil Courts, and the section would exclude from the civil Courts only those suits in which the revenue Courts could grant the relief, which the plaintiff claimed, or a substantial portion of it. See — 'Parmeshwari Das v. Angan Lal, AIR 1944 All 81 (A). It appears that this view was not acceptable to the Legislature and the word "any" was added before the word "relief" in the section, by S. 22 of the U. P. Amendment Act No. 10 of 1947. The section that we have to interpret is this amended section, because the present suit was brought in the year 1950, after this amendment.

(10) The last sentence of S. 242 is very widely worded, and every suit now in respect of a cause of action concerning which "any relief" could be granted by the revenue Courts, has to be filed in the revenue Courts and not in the civil Court. In the present case there cannot be any doubt that a suit could have been filed in the revenue Courts for a declaration that the land in suit was the plaintiff's 'sir' and 'khudkasht' and the defendants had no right of tenancy in this land. The relief of the declaration was as much open to the plaintiffs as the relief of injunction, and it does not make any difference whether the relief that the revenue Courts can grant would be an adequate relief or not. Generally speaking, in a suit instituted for obtaining an injunction, a prayer for granting a declaration also can be made. There are really very few suits for an injunction in which a prayer for a declaration cannot be made. An instance of this kind of suit for the granting of an injunction only may be where a declaration has already been obtained. In such cases it might be said that asking for a declaration again has no meaning because the declaration is already there, and the only prayer, therefore, that could properly be asked for was a prayer for an injunction. In the present case, as already stated, it is quite obvious that a prayer for a declaration could certainly have been added to the plaint, and that being so, this is a case in respect of which a relief could be obtained from the revenue Court, on the cause of action set up in the plaint.

(11) That being so, we may now consider whether if a relief for a declaration had been asked for in the plaint, the suit would have been of the nature specified in the Fourth Schedule, that is, whether it would be covered by any of the S. 60, 61 or 63. Section 61 would clearly not apply to the case because that section only applies where the tenancy admittedly exists, because the words used are "during the continuance of a tenancy", and the declaration that is asked for is concerning the matters specified in sub-s. (2) of S. 55. These are matters concerning the class of tenancy, the area, the number, the boundaries of the plots, the rent payable and such other matters. Section 60 authorises a landholder to sue any person claiming to be a tenant of the holding for a declaration of the right of such person. In our opinion, this section would apply to a case like the present, because the plaintiffs as landholders are suing persons claiming to be tenants of a holding or holdings, and the prayer for a declaration would be that they have no such rights of tenancy.

According to the allegations contained in the plaint, the plaintiffs are landholders, and the defendants claim to be tenants, because they had taken steps to deposit 10 times of the annual rent, and attempted to obtain 'bhumidhari' rights in respect of the land in suit. They could not have deposited the rent and claimed 'bhumidhari' rights, if they were not setting themselves up as tenants of the holding. Section 63 is more specific and applies only to those cases where the land is claimed by the landholder as being his 'sir or khudkasht', and it is claimed by a tenant as his holding or as being under his cultivation. The use of the word "the" before 'landholder' suggests that the section applies only to those cases where the tenant sets himself up as the tenant of a particular landholder who claims the land to be his 'sir' and 'khudkasht'. In the present case, the defendants have denied the plaintiffs' ownership of the land, and it is doubtful whether this section would cover the present case. But, in our opinion, S. 60 clearly covers the case; and, therefore, the present suit is barred from the cognizance of a civil Court by S. 242 of the Act, inasmuch as it arises out of a cause of action in respect of which a relief for a declaration could be obtained from the revenue Court.

(12) We may now consider some of the cases on the point decided by this Court. It is not necessary to go to the earlier cases on the point, and the first case that we propose to consider is reported in — 'Mt. Ananti v. Chhannu', AIR 1930 All 193 (B). This is a Full Bench case, and it is laid down here that the jurisdiction of the

Court is to be initially determined by the allegations made in the plaint, and the allegations made in the written statement cannot oust that jurisdiction, unless and until the allegations of fact contained therein have been gone into and found to be true. It was further held that where the plaintiff alleged himself to be a tenant, and the defendant to be a trespasser, the suit was entertainable by the civil Court; but, that, if the plaintiff tenant had alleged the defendant to be the landholder and, besides a claim for compensation and possession, also claimed an injunction, the suit would have substantially fallen under S. 99 of U. P. Act No. 3 of 1926. The joining of a relief for an injunction would make no difference and the suit would be exclusively cognizable by the revenue Court. The important point decided is the point just mentioned, and the case is an authority for the proposition that the adding of a prayer for an injunction would not oust the jurisdiction of the revenue Court.

(13) In the case reported in — 'Bageshar Misir v. Mahabir Shukul', AIR 1935 All 526 (C), it has been held that in a suit for profits the adding of a relief for joint possession of the land did not take the case out of the jurisdiction of the revenue Court. The peculiar feature of this case was that the plaintiff had himself stated in the plaint that he had obtained joint possession, and had nowhere stated that he had subsequently been dispossessed. On those facts, it is obvious that the relief for joint possession was added only for the purpose of ousting the jurisdiction of the revenue Court. It was, therefore, rightly ignored and the suit held to be cognizable only by the revenue Court.

(14) The Full Bench case of — 'D. N. Rege v. Kazi Muhammad Haider', AIR 1946 All 379 (D), was a case under S. 180, U. P. Tenancy Act, and it clearly lays down that the civil Court has no jurisdiction where a claim to a tenancy has been set up before the institution of the suit. In the present case, the claim to tenancy rights by the defendants was clearly set up when they applied for obtaining the 'bhumidhari sanads', and this claim was known to the plaintiffs before the institution of the suit.

(15) In a subsequent single Judge case reported in — 'Rati Ram v. Sri Krishna', AIR 1949 All 257 (E), a learned single Judge of this Court held that where the defendant's claim to a tenancy was based on the title of a third party, and that third party had, by a decree of Court, himself been held to have not a shadow of title, it could not be said that the defendants were claiming to be the tenants of the plots in suit. The learned Judge observed that the defendants were treated as mere trespassers, and a civil Court had jurisdiction to entertain the suit. The mere assertion in the plaint that the defendants were claiming as tenants, in the circumstances of that case, was held not to amount to an averment which would oust the jurisdiction of the civil Court. We respectfully agree with the learned Judge that such a statement in the plaint may not amount to an averment that the defendants were claiming to be tenants. But we find it difficult to agree with him, when he further holds, that the suit was cognizable by the civil Court. It is obvious that the defendant in that case was only claiming the rights of a tenant though from a third party, and was not setting up any proprietary title in himself. He was, therefore clearly claiming for himself the status of a tenant and not that of a proprietor; and, according to the F. B. decision in — 'D. N. Rege's case (D)', the suit would be cognizable exclusively by the revenue Courts. We do not agree with him when he holds that the suit was cognizable by the civil Court. The actual point that we are considering at present did not arise in the single Judge case, and the case was cited by the learned counsel for the applicants as an authority for the proposition that a suit against a trespasser, with respect to agricultural lands, lay in the civil Courts. The case supports the contention of the learned counsel on this point, but, as stated above, we are of the opinion that this decision of the learned single Judge is opposed to the decision of the Full Bench in — 'D. N. Rege's case (D)'.

(16) The next case cited by the learned counsel for the applicants is also a single Judge case reported in — 'Ishwar Din v. Mohammad Ishaq', AIR 1952 All 493 (F). In this case, it has been held that S. 63, U. P. Tenancy Act, applies only if the suit is for a declaration that the property in dispute constitutes the 'sir' and 'khudkasht' land of the plaintiff, and not to a suit for an injunction. It was further held that where the plaintiff asserted that he was in possession of the plots in dispute, that he was the owner of the same, that he was cultivating them as 'khudkasht' holder, that the defendants were setting up title through a person who was a trespasser, and that the defendants had threatened to take forcible possession of the land, the suit was triable not by the revenue Court but by the civil Court. The learned single Judge followed the case of — 'Rati Ram (E)', discussed above, and referred to certain other cases as well, including the Full Bench case of — 'D. N. Rege (D)', which were all distinguished and held not applicable to the facts of the case before the learned single Judge. The learned Judge observed that S. 63 of the U. P. Tenancy Act was not applicable because the suit was not a suit for a declaration but was a suit for an injunction. Some of the points arising in this case were really covered by the earlier decision in — 'Rati Ram's case (E)', and the learned single Judge was bound to follow that decision. In view of that decision, the learned single Judge probably did not think it necessary to consider the wordings of S. 242 of the Act; and some of the cases, we have mentioned above, also do not appear to have been brought to his notice.

(17) The last case to which we may refer is the case reported in — 'Zahid Ali v. Shahid Ali', AIR 1952 All 660 (G). In this case the suit was one for settlement of accounts and recovery of the plaintiff's share of profits in the property in suit, and a prayer for a perpetual injunction restraining the defendant from looking after the management of the property was also added. It was admitted that a claim for profits 'simpliciter' would be cognizable exclusively by the revenue Court, but the argument was that the suit was cognizable by the civil Court because of the additional prayer for the issue of a permanent injunction. This contention of the learned counsel was overruled, and it was held that the suit was exclusively cognizable by the revenue Court. The learned Judges observed:

> "There is no reason to think that, even after the omission of the word 'adequate' any question about 'insignificant' or 'substantial' relief arises. If the legislature had any such distinction in mind, it must have made it clear by using some other word in place of 'adequate'. On the other hand, we find that the legislature has now added the word 'any' in place of 'adequate', which makes the intention of the legislature perfectly clear."

We respectfully agree with the observations made above.

(18) A resume of the authorities given above shows that the view that we have taken is supported by a majority of decisions of this Court, and the only cases that supported the applicants' contention were the two single Judge cases of — 'Rati Ram (E)' and of — 'Ishwar Din (F)', which do not appear to lay down correct law.

(19) In our view, the decision of the Court below is correct, and we consequently dismiss this revision with costs.

B/D.H.Z. Revision dismissed.

A. I. R. 1953 ALL. 732 (Vol. 40, C. N. 361)

MALIK C. J. AND V. BHARGAVA J.

Devi Prasad, Defendant Appellant v. Janki Prasad, Plaintiff, Opposite Party.

Letters Patent Appeal No. 59 of 1951, D/- 1-5-1953, from Judgment of Mushtaq Ahmad J. in S. A. No. 1413 of 1949, D/- 12-12-1950.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 — Applicability and Scope.

Plaintiff landlord filing suit for ejectment and for arrears of rent without obtaining D. M.'s permission under S. 3 — Permission obtained during pendency of suit — Suit though decreed for arrears of rent, relief of ejectment dismissed on ground that permission given being to file suit, plaintiff could not avail himself of it to continue suit — Plaintiff filing subsequent suit for ejectment and arrears of rent — Fresh suit held was maintainable on basis of permission already obtained. (Para 6)

Baleshwari Pd., for Appellant; D. Sanyal, for Respondent.

MALIK C. J.: This is a defendant's appeal against a judgment of a learned single Judge of this Court. The defendant was a month-to-month tenant of a house. The plaintiff gave a notice on 22-1-1948, requiring the defendant to vacate the house in suit by 29-2-1948. The suit out of which this appeal has arisen was filed on 16-3-1948, for ejectment and arrears of rent. Rent was claimed from 1-10-1946, to 30-6-1947, at the rate of Rs. 37/8/-, and again from 1-10-1947, to 29-2-1948, at the same rate. For the period during which the defendant had continued to occupy the premises after 29-2-1948, that is, from 1-3-1948, to 15-3-1948, damages were claimed at the rate of Rs. 56/4/- per month. As the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) was applicable the plaintiff had taken the permission of the District Magistrate under S. 3 on 27-6-1947, and the plaintiff relied on the permission for his right, to institute the suit. The relevant portion of S. 3 is as follows:

"No suit shall, without the permission of the District Magistrate, be filed in any Civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds,

(a) that the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from the landlords;....."

The exceptions to S. 3 were not of importance as according to the plaintiff he had taken the permission of the District Magistrate and by giving a valid notice to quit had terminated the tenancy with effect from 29-2-1948.

(2) On behalf of the defendant two points were raised, firstly, that the plaintiff could not avail himself of this permission as the permission had exhausted itself, and secondly, that the plaintiff was not entitled to claim damages for the period during which the defendant was holding over. The trial Court held in plaintiff's favour on both the points with the result that he decreed the plaintiff's suit for recovery of Rs. 408/12/- only as rent upto 15-3-1948. The relief for ejectment was refused.

(3) On appeal by the plaintiff the lower appellate Court decreed the suit for ejectment and also allowed the plaintiff damages for the period during which the defendant had held over, i.e., from 1-3-1948 to 15-3-1948.

(4) The defendant filed a Second Appeal in this Court and before the learned single Judge only two points were raised, firstly, that the permission had exhausted itself and the plaintiff was not entitled to rely on it, and secondly, that the defendant having paid rent for the months of July, August and September, 1947, and the plaintiff having accepted the same he had no right to rely on the permission. No point was raised before the learned single Judge as regards damages claimed for the period from 1-3-1948 to 15-3-1948.

(5) In this appeal learned counsel has urged the two points that were urged before the learned single Judge and he has also argued that the plaintiff was not entitled to any damages after 1-3-1948. As the last point was not taken before the learned single Judge, we cannot allow him to raise a new point before us. As regards the ground that the permission had exhausted itself and that the plaintiff, by reason of his acceptance of rent, was not entitled to rely on the same, we are not satisfied that the appellant has been able to make out a good case.

(6) The ground on which the argument is based is that the plaintiff had filed a suit on 18-12-1946, being Suit No. 790 of 1946, for the ejectment of the defendant and for arrears of rent. The plaintiff had not obtained any permission of the District Magistrate for the institution of the suit. That suit was dismissed on 20-9-1947, for ejectment though arrears of rent claimed were decreed. During the pendency of that suit, the plaintiff had applied to the District Magistrate for permission and the District Magistrate on 27-6-1947, had granted the permission in these terms:

"Reference your letter dated 6-6-47 for permission to file a civil suit against Mr. Debi Pd. Retd. D. S. P. for ejectment of the kothi occupied by him. Permission is hereby given to file a civil suit for ejectment against Mr. Debi Pd. Retd. D. S. P.

Sd/- S. N. Dey,
For District Magistrate,
Bulandshahr.
27-6-47."

Learned counsel has urged that having filed this permission in the previous suit and that suit having been dismissed, the plaintiff cannot file a second suit on the strength of the same permission. The previous suit was dismissed on the ground that the District Magistrate had to give permission to file a suit and the permission given by the District Magistrate being to file a suit the plaintiff cannot avail himself of that permission to continue a suit already filed. The suit was no suit at all in the eye of law and the defect of not obtaining the permission to institute it could not be cured by the subsequent obtaining of the permission. That being the position, the plaintiff was entitled to file a fresh suit on the basis of the permission already given and there is nothing in that permission given by the District Magis-

trate to show that he meant by that permission that the plaintiff was allowed only to continue suit No. 790 of 1946 which had already been instituted. As a matter of fact the permission is clearly worded and shows that the learned Magistrate granted the permission in accordance with the provisions of S. 3 to file a suit in the civil court.

(7) The other argument that the acceptance of rent for the months of July, August & September 1947 put an end to this permission has also no substance. The defendant was a month-to-month tenant. Under the Transfer of Property Act, the landlord was entitled to terminate the tenancy by a notice in accordance with the provisions of S. 106, Transfer of Property Act. By reason of the provisions of the U. P. (Temporary) Control of Rent and Eviction Act, however, this notice could be of no avail unless the District Magistrate's permission had been taken to file a suit. The defendant was liable to pay rent to the plaintiff every month the rent as it became due and by accepting rent for the months of July, August and September it cannot be said that the plaintiff had done something to disqualify himself from claiming his legal right to eject. The notice for ejectment, as we have already mentioned, was given on 22-1-1948, and it is not suggested that any rent was accepted by the plaintiff after the date of the expiry of the notice.

(8) The appeal has no force and is dismissed with costs. The stay order is discharged. The record may be sent down to the lower Court by an early date.

B/H.G.P. Appeal dismissed.

A. I. R. 1953 ALL. 733 (Vol. 40, C. N. 362)

(LUCKNOW BENCH)

KIDWAI J.

Rudan, Defendant-Applicant v. Ujagar Singh and another, Plaintiffs-Opposite Party.

Appln. No. 56 of 1947, D/- 26-10-1951.

†Tenancy Laws — U.P. Tenancy Act (XVII (17) of 1939), S. 242 — Suit under S. 9, Specific Relief Act — Defendant not alleged to be tenant — Jurisdiction of Civil Court is not barred — (Specific Relief Act (1877), S. 9).

Where in a suit under S. 9, Specific Relief Act, there is no allegation to the effect that the defendant claims to be the tenant, but what is alleged is that the defendant has unlawfully ejected the plaintiff from possession and the case does not fall under S. 180, U.P. Tenancy Act, the suit lies in the Civil Court and the jurisdiction of that Court is not barred by S. 242, U.P. Tenancy Act: AIR 1950 All 407, Applied; AIR 1946 All 379 (FB); ILR (1951) 2 All 16, Rel. on.; 1950 All LJ 645, Ref. (Para 7)

Anno: Specific Relief Act, S. 9, N. 5, 17.

Hargovind Dayal Srivastava, for Applicant; B. N. Mulla, for Opposite Party.

CASES CITED:

(A) ('42) AIR 1942 Oudh 179: 1941 Oudh WN 1237

(B) ('51) ILR (1951) 2 All 16: 1950 All LJ 288

(C) ('50) 1950 All WR 236: 1950 All LJ 645

(D) ('50) AIR 1950 All 407: 1951 All LJ 290

(E) ('46) AIR 1946 All 379: 1946 All LJ 369 (FB)

ORDER: On 2-11-1946, Th. Ujagar Singh and Shrimati Jagrani, his wife, instituted the suit out of which this appeal arises under Section 9 of the Specific Relief Act against Rudan Chamar alleging that they were in possession of the land of which they were the owners and that Rudan had wrongfully dispossessed them on 10-7-1946. They claimed possession by reason of this dispossession within six months under S. 9, Specific Relief Act.

(2) The defence was that the plaintiffs had never been in possession and that the defendant had all along been in possession as a tenant. It was also alleged that the plaintiffs alone were not the owners, but that other co-sharers were also owners and so the suit did not lie.

(3) The trial court upheld the pleas of the plaintiffs and found that they had been in possession and had been dispossessed within six months of the institution of the suit. One of the pleas taken before the court was that the civil court had no jurisdiction. The learned Munsif found that the suit fell within his jurisdiction since it was one under S. 9, Specific Relief Act.

(4) Rudan has now come up in revision and his learned Advocate contends that the civil court had no jurisdiction to try the case).

(5) It has been laid down in — 'Rajai Singh v. Suraj Bali', AIR 1942 Oudh 179 (A); — 'Jadunath Singh v. Bishunath Singh', 1950 All LJ 288 (B) and — 'Jagdish Singh v. Mehi Lal', 1950 All LJ 645 (C) that the suit under S. 9, Specific Relief Act, lies in a civil court and that the jurisdiction of that court is not barred by reason of S. 242, U.P. Tenancy Act read with Ss. 180 and 183 of that Act.

(6) This view has been slightly modified in — 'Ganga Din v. Gokul Prasad', AIR 1950 All 407 (D) and it has been held that if the plaint shows that the case falls within S. 180 or S. 183, U.P. Tenancy Act, the suit would be barred from cognizance by the civil court by reason of S. 242, even if it was a suit under S. 9, Specific Relief Act. This latter judgment does not consider the earlier judgments, particularly the judgment in 1950 All LJ 288 (B), which was also a Bench decision. It is, however, not necessary for me to go into that question because, in the present case, the jurisdiction of the civil court is not barred. even if the view taken in AIR 1950 All 407 (D) is applied.

(7) It is true that in paragraph 1 of the plaint it is stated that the plaintiffs are the owners of the land. This, however, does not indicate that the suit is one governed by S. 180, U.P. Tenancy Act. It has been laid down in — 'D. N. Rege v. Muhammad Haider', AIR 1946 All 379 (FB) (E) by a Full Bench that it is only in suits in which it is alleged in the plaint that the defendant is setting up title to hold the land as tenant that the civil court has no jurisdiction. If there is no such allegation then the civil court will have jurisdiction, because the revenue court is not competent to decide questions of title between two rival claimants to the possession of the property. In the present case there is no allegation to the effect that the defendant claims to be the tenant, but what is alleged is that the defendant has unlawfully ejected the plaintiffs from possession. Thus, in view of the Full Bench decision, this is not a case which falls under

S. 180, U.P. Tenancy Act, and consequently S. 242 of that Act does not apply. That being so, even on the reasoning adopted in AIR 1950 All 407 (D), civil court's jurisdiction was not barred.

(8) This application, therefore, fails and is dismissed with costs.

B/R.G.D. Revision dismissed.

A. I. R. 1953 ALL. 734 (Vol. 40, C. N. 363)

P. L. BHARGAVA J.

Jiwan Singh, Applicant v. Mazhar Khan, Defendant-Opposite Party.

Civil Revn. No. 192 of 1951, D/- 31-3-1952.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3A and 5 (4) — Suit for settlement of rent — Maintainability.

There is no provision in the Control of Rent and Eviction Act for the institution of a suit for settlement or fixation of rent by a Civil Court in cases where the rent has not been agreed upon or fixed or determined in the manner provided in S. 5 or S. 3A of the Act. (Para 6)

Krishna Shanker, for Applicant.

ORDER: This is a revision under S. 115, Civil P. C. and it is directed against the judgment and decree of the City Munsif of Saharanpur, dismissing the suit filed by the applicant, Sardar Jiwan Singh, under sub-s. (4) of S. 5 of the United Provinces (Temporary) Control of Rent and Eviction Act (No. 3 of 1947), against Mazhar Khan, the opposite party. The applicant occupies a house, situate in the city of Saharanpur, of which the opposite party is admittedly the owner. It appears, that the City Magistrate of Saharanpur who, I am told, has been authorised by the District Magistrate of Saharanpur to perform his functions under the Act, allotted the house to the applicant and "ordered him to get the fair rent of the house fixed by a civil Court."

Accordingly, the applicant instituted the suit which has given rise to this revision. The applicant alleged that the house had been assessed by the Municipal Board, Saharanpur, on a monthly rental of Rs. 5/8/-, and that on its basis the reasonable monthly rent works out to Rs. 6/14/- but the opposite party refused to accept the same. The opposite party contested the suit on the ground that the applicant was not his tenant, and that he was in possession of the house as a trespasser. He further alleged that he was not the sole owner of the house, which also belongs to his mother and sister.

(2) The learned Munsif of Saharanpur found that the applicant was not the tenant of the house and as such the suit was not maintainable. In this view of the matter, he dismissed the suit. Accordingly, the applicant has filed this revision.

(3) Learned counsel for the applicant has contended that, in the circumstances of the case, it was not open to the opposite party to deny the tenancy but, in my opinion, it was unnecessary to consider the question of tenancy inasmuch as the suit was clearly not maintainable under sub-s. (4) of S. 5, Control of Rent and Eviction Act.

(4) Sub-section (4) of S. 5, Control of Rent and Eviction Act is in these terms:

"If the landlord or the tenant, as the case may be, claims that the annual reasonable rent of any accommodation to which the Act applies, is inadequate or excessive, or if the tenant claims that the agreed rent is higher than the annual reasonable rent he may institute a suit for fixation of rent in the Court of the Munsif having territorial jurisdiction, if the annual rent claimed or payable is Rs. 500 or less, and in the court of the Civil Judge having territorial jurisdiction if it exceeds Rs. 500 provided that the court shall not vary the agreed rent unless it is satisfied that the transaction was unfair, and in the case of lease for fixed term made before April 1, 1942, that the term has expired."

(5) The present suit has been filed by the applicant, who claimed to be the tenant of the house. Assuming for the sake of argument that the applicant was a tenant, he could institute a suit for fixation of rent, under sub-section (4) of S. 5, Control of Rent and Eviction Act, on the ground that "the annual reasonable rent" of the house was excessive or that the "agreed rent" was higher than the annual reasonable rent. The applicant, in this case, no doubt stated the Municipal assessment and the monthly reasonable rent worked on its basis; but he did not contend that the reasonable rent so worked out was excessive; nor did he allege that there was any "agreed rent" or that it was higher than the said reasonable rent. In the absence of any such allegation, the present suit did not fall within the purview of S. 5(4) of the Act and as such it could not be maintained.

(6) The present suit was a pure and simple suit for settlement of rent as the opposite party was according to the applicant's allegations, not willing to accept the rent, which was being offered to him by the applicant. According to the provisions contained in the Control of Rent and Eviction Act, except as provided in S. 5 of the Act, the rent payable by a tenant "shall be such as may be agreed upon between the landlord and the tenant." Under sub-s. (2) of S. 5 of the Act where the rent has not been agreed upon or where the case of tenancies continuing from before October 1, 1946, the landlord wishes to enhance the rent agreed upon, he may, by notice in writing fix the annual rent at, or enhance it to, an amount not exceeding the reasonable annual rent, subject to certain provisos.

Sub-section (3) of S. 5 of the Act makes provision for payment of rent where any accommodation is let out without the rent being agreed upon or where the rent agreed upon is enhanced, but in that sub-section there is no provision for the filing of a suit like this. Then follows sub-s. (4) which provides for fixation of rent where the annual reasonable rent is said to be inadequate or excessive or where the agreed rent is higher than the annual reasonable rent and the transaction of rent is unfair. For determination of the reasonable rent in certain cases provision has been made in S. 3A of the Act; but the power to do so has been conferred upon the District Magistrate.

There is no provision in the Control of Rent and Eviction Act for the institution of a suit for settlement or fixation of rent by a Civil Court in cases where the rent has not been agreed upon or fixed or determined in the manner provided in Ss. 5 or 3A of the Act. The order of the City Magistrate ordering the

applicant to get the fair rent of the house fixed by the Civil Court was, therefore, clearly wrong; and the applicant was wrongly advised to file the present suit, which was clearly not maintainable under sub-section (4) of S. 5 of the Act.

(7) In my opinion, therefore, the present suit was wholly misconceived and it was liable to be dismissed as not maintainable. For the reasons stated above, I hold that the suit was rightly thrown out. The revision is summarily rejected.

B/V.R.B. Revision dismissed.

A. I. R. 1953 ALL. 735 (Vol. 40, C. N. 364)

MALIK C. J. AND V. BHARGAVA J.

Singh Engineering Works, Kanpur, Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

Misc. Case No. 300 of 1949, D/- 4-2-1953.

(a) Income-tax Act (1922), S. 31 (3) (b) — Order setting aside original assessment — Effect on evidence on record — Fresh notice not necessary.

Where the Appellate Assistant Commissioner sets aside the original assessment under S. 31 (3) (b), and directs the Income-tax Officer to make fresh assessment after proper enquiries, there is no reason why the other evidence which was properly admitted and placed on the record and to which no exception had been taken should be deemed to be non-existent. The Income-tax Officer is bound to proceed in accordance with the directions given by the Appellate Assistant Commissioner of Income-tax and any material on the record properly admitted and which had not been held to be inadmissible, can be taken into consideration in making the fresh assessment. (Para 4)

Further, the previous notice issued by the Income-tax Officer does not become inoperative and he is not bound to issue a fresh notice calling for a fresh explanation from the assessee, particularly when the assessee had already offered an explanation before and did not offer any other explanation afterwards. (Para 5)

Anno: Income-tax Act, S. 31 N. 4, 5.

(b) Income-tax Act (1922), S. 23 (4) — Assessment under — Principles — Interference by higher Courts.

Income-tax Officer has to come to an honest conclusion and the honest conclusion must be on some basis. There is a difference between the recording of a finding on a point on the evidence produced by the parties and a case where, in the absence of such evidence, the Income-tax Officer is left to make such enquiries as are open to him and to make an honest and reasonable assessment. AIR 1937 PC 133 and 5 I T C 352 (Rang.) (FB), Rel. on; AIR 1939 Mad 371 (SB), Distinguished. (Para 13)

The exercise of the best judgment depends on application of judicial discretion by the Income-tax Officer and there should be no interference with his order unless it is shown to the satisfaction of the Appellate Court that the discretion has been exercised mala fide or arbitrarily or capriciously. The burden of satisfying the appellate Court in this respect must rest on the party challenging the exercise of the best judgment by the Income-tax Officer. AIR 1917 PC 116 and (1882) 8 QBD 664, Ref. (Para 14)

Anno: Income-tax Act, S. 23 N. 4, 6.

G. S. Pathak, for Applicant; J. Swarup, for Respondent.

CASES CITED:

(A) (1948) 30 Tax Cas 1

(B) ('31) 5 ITC 352 (Rang) (FB)

(C) (1903-06) 49 Sc LR 979: 6 Tax Cas 107

(D) ('37) AIR 1937 PC 133: 1937-5 ITR 170 (PC)

(E) ('39) AIR 1939 Mad 371: 1939-7 ITR 21 (SB)

(F) ('17) AIR 1917 PC 116: 45 Ind App 61 (PC)

(G) (1882) 51 LJQB 348: 8 QBD 664

MALIK C. J. : This is a reference under S. 66 (1) of the Income-tax Act. The following three questions have been referred to this Court for our decision :

"Q. 1. Whether effect of an order passed by the Appellate Assistant Commissioner under sub-cl. (b) of sub-s. (3) of S. 31 of the I. T. Act setting aside the original assessment is to set aside the entire assessment proceedings that had taken place before the Income-tax Officer and when the Income-tax Officer re-starts the assessment, he is bound to start afresh all the proceedings under the Income-tax Act from the stage of filing of the return and to treat all the evidence existing on the original assessment as non-existent?

Q. 2. Whether, in the circumstances set forth in question No. 1, the notice issued by the Income-tax Officer in the first assessment proceedings calling upon the appellant to explain certain cash credits in his accounts ceases to be operative for the re-assessment which has been decided to be made and the Income-tax Officer is bound to issue a fresh notice in that respect and to call for a fresh explanation from the assessee?

Q.3. Whether there was any material before the Tribunal to justify the finding that the cash credits in question represented the assessee's income liable to assessment?"

The first two questions are not very happily worded. As a matter of fact, the questions suggested by the assessee were clearer.

(2) The assessee is a Hindu undivided family carrying on the business of the manufacture and sale of iron bars strips etc. in Kanpur. The assessee has income from house property as also from business carried on in the name of Singh Engineering Works and Singh Plate Mills etc. Usual notices under S. 22 of the Income-tax Act were issued, requiring the assessee to produce its account books for the relevant account period, i.e. 1-4-1941 to 31st March, 1942. The assessee, however, produced account books only from 12-9-1941, that is, the accounts from 1-4-1941 to 11-9-1941, were not produced. The assessee gave some explanation that the account books had been taken away by one Amar Singh, an employee, but that explanation was not accepted. Notice to produce those books was issued and ultimately, on failure to comply with the notice, the Income-tax Officer proceeded to make assessment under S. 23(4) of the Income-tax Act. The assessee had filed a return showing an income of Rs. 2,625/- from house property and Rs. 72,725/-

from business. The Income-tax Officer, however, made a best judgment assessment under S. 23 (4) of the Act on the basis of an income of Rs. 4,65,150/-. Deducting Rs. 2,59,361/- for purposes of excess profits tax liability, the net assessable income, according to the Income-tax Officer, was Rs. 2,05,789/-. This order is dated 29-3-1944. There was an appeal filed in the Court of the Appellate Assistant Commissioner of Income-tax &, on 27-3-1945, the Appellate Assistant Commissioner set aside the order of the Income-tax officer and directed the latter "to make a fresh assessment after proper enquiries." The Income-tax officer proceeded thereafter to make fresh enquiries in accorddance with the directions given by the Appellate Assistant Commissioner of Income-tax and came to the conclusion that the total profits came to Rs. 3,33,981/- and deducting therefrom Rs. 1,71,915/- for excess profits tax liability, the assessable profits were held to be Rs. 1,62,066. An appeal was filed, against the order, before the Appellate Assistant Commissioner of Income-tax and then before the Income-tax Appellate Tribunal but the assessment order of the Income-tax Officer was affirmed.

(3) Shri Pathak on behalf of the assessee has however, explained that it was not his contention that the Income-tax Officer did not make any fresh enquiries as directed by the Appellate Assistant Commissioner, or, that his client was deprived of any opportunity to place before the Income-tax Officer such material as he might have considered relevant. He contended that his arguments were based on a pure question of law that, after the Appellate Assistant Commissioner of Income-tax had set aside the assessment order and has sent the case back to the Income-tax officer, the entire proceedings subsequent to the filing of the return under S. 22 of the Income-tax Act should be deemed to have been set aside and fresh proceedings should have been started. Our attention has been drawn to S. 31 (3) (b) of the Income-tax Act, the relevant portion of which runs as follows:

"31(3) — In disposing of an appeal, the Appellate Assistant Commissioner may, in the case of an order of assessment.

(a) X X X X

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment."

(4) In the case before us, the only direction given by the Appellate Assistant Commissioner of Income-tax was that the Income-tax Officer shall make a fresh assessment after proper enquiries. As we have already said, it is not suggested that proper enquiries were not made and the learned counsel has not been able to explain on what basis he urges that the material which was on the record at the time when the assessment, which had been set aside, was made must be treated as non-existent and must not be taken into consideration. The Appellate Assistant Commissioner had pointed out that certain photographic impressions, on which the Income-tax Officer had relied, were not admissible in evidence for want of proof. The Income-tax Officer was,no doubt not entitled to utilise that material without further proof and it is not suggested that he did.There is no reason why the other evidence which was properly admitted and placed on the record and to which no exception had been taken "should be deemed to be non-existent". Therefore, our answer to the first question is that the Income-tax Officer is bound to proceed in accordance with the directions given by the Appellate Assistant Commissioner of Income-tax and any material on the record properly admitted and which had not been held to be inadmissible, can be taken into consideration in making the fresh assessment.

(5) As regards the second question, it is not suggested that the assessee had no opportunity or was denied the opportunity to give any explanation. What is urged is that fresh notice should have been given and a fresh explanation called for. We do not think that any such duty was imposed on the Income-tax Officer under the order of the Appellate Assistant Commissioner. The assessee knew of the proceedings before the Income-tax Officer, the assessee had been asked to explain the absence of the account books for a part of the period, the assessee had furnished an explanation, the assessee knew that the explanation furnished had been rejected, the assessee no doubt could again press for its acceptance and, if the assessee wished to furnish any further explanation there was nothing to prevent the assessee from doing so. It is not suggested that the Income-tax Officer refused to take into consideration any explanation offered by the assessee. We see no reason for holding that the Income-tax Officer was bound to issue a fresh notice calling for a fresh explanation when the assessee had already offered an explanation before and did not offer any other explanation afterwards. Our answer to the second question is that the previous notice issued by the Income-tax Officer does not become inoperative and the Income-tax Officer is not bound to issue a fresh notice calling for a fresh explanation from the assessee.

(6) Coming to the third question, we have already said that the Income-tax Officer had made the assessment under S. 23(4) of the Income-tax Act. The Income-tax Officer had set out the basis on which he had made the best judgment assessment. The matter was taken up before the Appellate Assistant Commissioner of Income-tax who, in a very well considered order, gave reasons for upholding the conclusions arrived at by the Income-tax Officer. The reasons given by him are mentioned in the third paragraph of his order, dated 22-2-1947. In making his best judgment assessment, the Income-tax Officer had taken into account a sum of Rs. 50,000/- which was an unexplained deposit in the proprietor's account. A bank draft for Rs. 50,000/- drawn on the Central Bank of India, Kanpur, was sent from Amritsar and it was suggested by the assessee that this sum of Rs. 50,000/- was not really any trade receipt but was a part of the withdrawals made in the previous financial year which had remained unspent in its hands and which was transmitted from Amritsar to Kanpur. The Income-tax Officer and the Appellate Assistant Commissioner of

Income-tax, for reasons given by them, considered it reasonable that the amount should be considered taxable income of the assessee. The explanation given by the assessee was not accepted either by the Income-tax Officer or by the Appellate Assistant Commissioner.

(7) When the case came up before the Income-tax Appellate Tribunal the line taken by the learned counsel for the assessee was that he admitted and did not challenge the other items of income and thus conceded that the Income-tax Officer was right in his estimate that profits to the extent of Rs. 2,83, 981/- out of Rs. 3,33,981/- had been made but, as regards the sum of Rs. 40,000/-, he challenged the findings of the Income-tax Officer and the Appellate Assistant Commissioner and urged that the explanation given by the assessee should have been accepted. The Tribunal rejected this contention for practically the same reasons for which the Appellate Assistant Commissioner had rejected it. Those reasons, if we might say, were very cogent. The assessee had pointed out that, in the previous account year, a sum of Rs. 1,13,746/- had been withdrawn in the course of that year against deposits amounting to Rs. 6,093/-. The balance, according to the assessee, was left in its hands and, out of that balance, it had transmitted from Amritsar to Kanpur the sum of Rs. 50,000/- on 14-2-1942. It, however, appears that, out of Rs. 1,13,746/- withdrawn in the previous year, sum of Rs. 81,875/- had been withdrawn on 26-3-1941. The assessee had suggested that the assessee wanted to buy a house in Mussoorie but, as the transaction fell through, the amount remained in assessee's hands and, ultimately, the assessee decided to build a house at Amritsar &, after having constructed that house, out of the balance left over, a sum of Rs. 50,000/- was transmitted to Kanpur. The Income-tax Appellate Tribunal pointed out that, if the assessee had this large sum of money in hand, there was no reason why the assessee should have withdrawn smaller sums of money between the dates, 26-3-1941, and 14-2-1942. The Tribunal has further pointed out that, during that period, the assessee purchased a house in Mussoorie for Rs. 40,000/- and withdrew that amount for that purpose and that no accounts had been furnished about the construction of any house at Amritsar. For these and other reasons given by the Tribunal, it rejected the explanation of the assessee. After having rejected the explanation, the Tribunal said:

> "The fact, therefore, remains that the onus which lay on the appellant of proving the source of the cash credits and connecting them with the withdrawal has not been discharged by him. We, therefore, hold that he had failed to account for the cash credits of Rs. 50,000/- appearing in his account. It follows as a presumption of fact that they represent the profits outside his book of account. We, therefore, agree with the Income-tax authorities in the addition of this amount for the purpose of computation of the assessable income of the appellant."

In deciding the case in the manner in which it did, the Tribunal followed the same line as was followed by the Court of Appeal in — 'Stoneleigh Products, Ltd. v. Dodd', (1948) 30 Tax Cas 1 (A), where the assessee company showed in its books of account an amount of £1,392-12s.-7d. standing to the credit of "Director's Current Account", the director in question being Mr. Alfred Lee, who explained how he came by that money which, he said, he had advanced to the company. His explanation was found to be false and the learned Judge (Atkinson, J.) observed as follows:

> "The Commissioners, therefore, had the relevant contentions before them, and said: We do not believe Mr. Lee, and we considered the Appellant Company had not discharged the onus that lay upon it of displacing the assessment. I am bound to take the view — I cannot escape from it — that they must have directed their attention to the two issues which had been raised by the Appellant Company. They must have considered whether these sums were lent to the Company, or whether they were not, and I am quite satisfied that they came to the conclusion that the alleged loans were wholly fictitious. They considered the whole story was untrue, and that the £1,300 was really part of the taxable profits of the Company."

The learned Judge held that there was no basis for disagreeing with the conclusion arrived at by the Commissioners. When the matter went up before the Court of Appeal, the Court of Appeal treated it as a pure question of fact and held that, on the evidence of Alfred Lee having been rejected, it having been believed that Mr. Lee was not in a position to advance the money, no conclusion other than that arrived at by the Commissioners was possible.

(8) We may note here that, in the statement of the case, it was overlooked that this was a decision by the Income-tax Officer under S. 23(4) of the Income-tax Act. It does not appear from the appellate order of the Tribunal that it was called upon to decide that the material, on the basis of which the Appellate Assistant Commissioner had decided the appeal before him, was or was not sufficient for the conclusion arrived at by him. The only argument, that seems to have been advanced before the Tribunal, was whether the explanation given by the assessee should or should not have been accepted. After having rejected that explanation, the Tribunal held that the onus lay on the appellant, that is, the assessee of proving the source of the cash credits and connecting them with the withdrawal, but the assessee had not discharged that onus.

(9) Arguments have been advanced at some length on the question of onus. We may, however, point out that the question whether the onus lay on the assessee of proving the source of the cash credits or whether it was for the Income-tax Officer to establish, on the materials before him, that this was taxable income has not been referred to us for decision. The Tribunal has referred to us a question which, so far as we can see, does not arise at all from the appellate order in a case where the assessment was made under S. 23 (4). The question is:

> "Q. Whether there was any material before the Tribunal to justify the finding that the cash credits in question represented the assessee's income liable to assessment?"

The proper question, to our minds, which can arise in an assessment under S. 23(4) is:

> "Q. Whether, in the circumstances of the case, the Income-tax Officer had made a fair esti-

mate of the assessable income and whether his decision was reasonable?"

(10) Shri Pathak on behalf of the assessee has urged that there is no material difference between an assessment under S. 23(3) and an assessment u/s. 23(4) of the Income-tax Act and that in both cases the Income-tax Officer must have sufficient material on which he can base his finding. The point is, however, covered by high authority and we need only cite the following cases in which the difference has been clearly pointed out:

(11) In — 'Abdul Baree v. Commr. of Income-tax, Burma', 5 ITC 352 (Rang) (FB) (B), a Full Bench of the Rangoon High Court presided over by the learned Chief Justice, Sir Arthur Page, pointed out:

" 'Ex hypothesi' an assessment under S. 23(4) must be made upon inadequate materials. It is a mere estimate, and if it is made by the Income-tax Officer 'bona fide' and 'to the best of his judgment' (which only means as best as he can in the circumstances) the assessee who has 'not chosen to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made' upon him by the Crown."

The learned Chief Justice relied on the judgment of the Lord President in —'Macpherson and Co. v. Moore', (1903-06) 6 Tax Cas 107 at p. 114 (C) and held as follows:

"When it is said that a tribunal is invested with a 'judicial discretion' what is meant is that in certain proved or admitted circumstances it has been given the power to act or not to act in a particular way. Such a discretion, no doubt, 'must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself."

(12) In — 'Commissioner of income-tax U. P. and C. P. v. Laxminarayan Badridas', AIR 1937 P C 133 (D) their Lordships of the Judicial Committee approved of the above decision. Dealing with the matter of assessment under S. 23(4) of the Act, their Lordships pointed out that, in the case before them, as the assessee did not produce his account books, the Income-tax Officer took into consideration the local repute that the respondent's money-lending business was extensive and included the purchasing of debts at large profit to himself and that, as a result of local enquiries, the Income-tax Officer had found that the assessee had fluid resources amounting to ten lacs of rupees and was reputed to be the richest man in the district. In answering the question No. (v) which was as follows:

"(v) Is their evidence to substantiate the Income-tax Officer's reasoning in the last paragraph of the order saying that legal enquiries prove that the assessee made in the account year taxable income of a lakh of rupees?"

their Lordships said:

"As to (v) no evidence was necessary. The Officer had merely to estimate as best he might the income for purposes of assessment. If any reasons were given, as in the present case, it was merely to show that the estimate was not arbitrary."

At page 138 of the judgment their Lordships made the well-known observations which are now deemed to be decisive of this point and which run as follows:

"The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work, in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary."

(13) Reference has also been made to a Full Bench decision of the Madras High Court in —'Gunda Subbayya v. Commr. of Income-tax, Madras', AIR 1939 Mad 371 (E) and on the strength of that decision it is urged that there is no real difference between an assessment under S. 23(3) and that made under S. 23(4) of the Income-tax Act and both have to be justified on the ground of materials available on the record. The point did not really arise in that case. The only point that was raised was whether, when an Income-tax Officer sits down to make an assessment under S. 23(3) and finds that the evidence produced before him is not satisfactory, he can make a best judgment assessment under S. 23(4). In the course of the judgment, however, the learned Chief Justice pointed out:

"The assessment must be to the best of his judgment and the word 'judgment' itself implied consideration of something. Here it must be the consideration of facts relating to the income of the assessee."

The learned Chief Justice held that even in a best judgment assessment under S. 23(4) there must be some material for the conclusions arrived at by the Income-tax Officer and the only difference, according to him, between an assessment under sub-s. (3) and an assessment under sub-s. (4) of S. 23 was that under S. 23(4) a more summary method was contemplated by the Act as the assessee had been guilty of deliberate default. We do not think there is any real difference between the decision of their Lordships of the Judicial Committee and the observations made by the learned Chief Justice of Madras. As a matter of fact, the observations of their Lordships of the Judicial Committee were binding on the Madras Court & the Madras Court could not have gone against the decision of the Judicial Committee. The Judicial Committee did not lay down that there need be no material. They pointed out that the Income-tax Officer has to come to an honest conclusion and the honest conclusion must be on some basis. There is a difference between the recording of a finding on a point on the evidence produced by the parties and a case where, in the absence of such evidence, the Income-tax Officer is left to make such enquiries as are open to him and to make an honest and reasonable assessment. At the time

when their Lordships of the Judicial Committee decided the case of —'AIR 1937 PC 133 (D)', an order under S. 23(4) was not appealable and it was, therefore, not necessary for the Income-tax Officer to give any reasons for his conclusions. Now that the section has been amended and the order has been made appealable, probably, it would be necessary for the Income-tax Officer to indicate how his mind had worked and on what basis he had made the assessment but, in such an appeal, the burden must be on the assessee to show that the Income-tax Officer had either acted mala fide, or, that his order was not reasonable and was capricious.

(14) Interference by the appellate or other higher courts with the exercise of the best judgment by an Income-tax Officer must, in our opinion, be on the same principles on which appellate courts usually interfere with the exercise of discretion by a trial court. Their Lordships of the Judicial Committee, in —'Rehmatunnissa Begum v. Price', AIR 1917 PC 116 (F), held :

> "The Appellate Bench decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an Appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted.....It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion....."

In —'Ormerod v. Todmorden Joint-stock Mill Co.', (1882) 8 QBD 664 (G), Brett, L. J., said:

> "This Court lays down for itself the rule, which I think is the right one, that it will not exercise its own discretion unless it thinks the case is perfectly clear."

Holker, L. J., in the same case, remarked :

> "Assuming, as I do now, that there may be an appeal, when ought an appeal to be allowed? It ought to be allowed in a very strong case, that is where otherwise, according to James, L. J., injustice would be done."

The exercise of the best judgment depends on application of judicial discretion by the Income-tax Officer and there should be no interference with his order unless it is shown to the satisfaction of the appellate court that the discretion has been exercised mala fide or arbitrarily or capriciously. The burden of satisfying the appellate Court in this respect must rest on the party challenging the exercise of the best judgment by the Income-tax Officer. There was no suggestion in the case before us that the order of the Income-tax Officer was either mala fide, capricious, arbitrary or unreasonable. If the question referred to us had been whether the Income-tax Officer could have reasonably come to the conclusion in a best judgment assessment under S. 23(4) that the income of the assessee was as computed by him, we would have had no hesitation in answering the question in the affirmative.

(15) Shri Jagdish Swarup, learned counsel for the Department, at one time pressed that we should ask for a fresh statement of the case under S. 66(4) of the Income-tax Act so that we may have before us facts or circumstances on which the Income-tax Officer and the Appellate Assistant Commissioner of Income-tax had acted, but, in that case, we would have to ask for a reference on a question not raised by the assessee before the Appellate Tribunal. Having read the order of the Income-tax Officer and the Appellate Assistant Commissioner, we do not feel disposed to ask for any further reference. Question No. 3 as framed, to our minds, does not arise out of the appellate order and we need not, therefore, give any answer to it.

(16) Our answers to the first two questions are, therefore, in the negative and, as we have already said, the third question does not arise out of the appellate order.

(17) The assessee must pay costs to the Department which we assess at Rs. 400/-.

B/D.R.R. Reference answered.

A.I.R. 1953 ALL. 739 (Vol. 40, C. N. 365)

MOOTHAM AND SAPRU JJ.

Mohammad Bux, Applicant v. Govt. of State of Uttar Pradesh and another, Opposite Party.

Writ Applns. Nos. 7373 to 7375 of 1951, D/-, 5-11-1951.

(a) Constitution of India, Art. 226 — Procedure — Affidavit.

Per Mootham J.: Where the application of one of applicants is accompanied by an affidavit of a considerable length but the other applications are accompanied by short affidavits in which the applicants state that they rely upon the facts set forth in the affidavit of the first applicant, it is an unsatisfactory practice as it is likely to result in one or more of the deponents deposing to matters not within his or their personal knowledge. The better course is for a joint affidavit to be filed. (Para 1)

(b) Constitution of India, Art. 226 — Administrative and quasi-judicial order.

Per Sapru J.: The distinction between an administrative and judicial or quasi-judicial act turns upon the question whether the duty of the authority was to act judicially or not. Though the decision of the Government under S. 40 of the U.P. Municipalities Act as to whether a member has or has not acted in such a manner as to render him unfit to be a member of the Board is subjective, the process by which it arrives at the decision involves a judicial act for, in arriving at it, Government must not take into consideration any factor which is not a judicial factor. In other words, it is, on an honest application of its mind to the 'pros' and 'cons' of the case, against the Municipal Commissioner concerned that it must arrive at its decision. It is obvious that in declaring a person unfit to be a Municipal Commissioner, Government is passing an order which would deprive him not only of an office to which he has been elected by the electorate but also automatically disqualify him under Section 40(2) for a period of four years from seeking election to that office. This is a serious thing to do. Obviously, therefore, in exercising it, the Government must be deemed to have acted quasi-judicially. Case law Rel. on. (Paras 12, 13)

(c) Constitution of India, Art. 226 — Another remedy open.

Per Sapru J.: The fact that the procedure of a civil suit is a somewhat dilatory one, on account of congestion of work in the civil suit, is no ground to invoke the jurisdiction of the High Court under Article 226: AIR 1951 All 1 (FB), Rel. on. (Para 19)

(d) Constitution of India, Art. 226 — Laches.

Per Sapru J.: The High Court should not exercise its discretion in issuing writs in favour of applicants who did not raise any objection at the time when the charges under S. 40 of the U.P. Municipalities Act were forwarded to them by the U.P. State Government, that there was any ambiguity about the charges and that they were framed in such a manner as not to enable them to know the exact nature of the case against them and who went on, even after the order of removal had been passed, making representations to Government without protesting against the vague, ambiguous or defective nature of the charges and did not choose to come to the High Court until after the lapse of a year of the passing of the final order by Government. The applicants have an alternative remedy, i.e., they could go to a civil court and challenge the order passed against them on the ground that it was arbitrary, capricious, wanton and that the action in removing them was not bona fide. (Para 20)

(e) Constitution of India, Art. 226 — Exercise of discretion.

Per Mootham J.: In exercising its discretion the Court must have regard to the general rule that the Court will normally require the applicant to have recourse to his ordinary remedies: 62 Cal 1011; AIR 1942 Mad 348; AIR 1947 Bom 46, Rel. on. (Para 4)

(f) Constitution of India, Art. 226 — Alternative remedy — Balance of convenience.

Per Mootham J.: It is not the balance of convenience at the time of the application which has to be considered, but the balance of convenience — in cases in which the matter is material — at the time the applicants first had the choice of pursuing alternative remedies. (Para 6)

A. P. Pandey and M. H. Beg, for Applicant; Gopalji Mehrotra, Senior Standing Counsel, for Opposite Party.

CASES CITED:

(A) ('51) AIR 1951 All 746: 1951 All LJ 576 (FB)
(B) (1940) 109 LJ KB 584: 1940-2 KB 33
(C) (1894) 63 LJ KB 474: (1894) 1 QB 552
(D) (1927) 96 LJ KB 77: (1927) 1 KB 491
(E) ('35) 62 Cal 1011
(F) ('42) AIR 1942 Mad 348: 203 Ind Cas 607
(G) ('47) AIR 1947 Bom 46: ILR (1946) Bom 940
(H) ('27) AIR 1927 PC 242: 25 All LJ 964
(I) (1905) 74 LJ PC 77: 1905 AC 369
(J) ('50) AIR 1950 SC 222: 1950 SCR 621 (SC)
(K) (1924) 93 LJ KB 390: (1924) 1 KB 171
(L) (1931) 100 LJ KB 760: (1931) 2 KB 215
(M) ('50) 54 Cal WN 883 (PC)
(N) (1928) 97 LJ KB 222: (1928) 1 KB 411
(O) ('48) AIR 1948 All 179: ILR (1948) All 91
(P) Writ Appln. No. 169 of 1950, D/- 31-10-1950 (All)
(Q) ('51) AIR 1951 All 1: 1950 All L J 767 (FB)

MOOTHAM J.: These three applications can conveniently be dealt with in one order. The three applicants were members of the Municipal Board of Kasganj in the district of Etah. On or about the 25th March, 1949, each of them was served with a notice requiring him, under sub-s. (4) of S. 40 of the Uttar Pradesh Municipalities Act, 1916, to furnish an explanation of certain acts specified in the notice which it was alleged constituted a flagrant abuse of his position as a member of the Board. Each of them submitted an explanation, but by an order dated the 24th November, 1949, they were informed that the Governor had come to the conclusion that their continuance as members of the Municipal Board was detrimental to the public interest and that he had ordered their removal forthwith from membership of the Kasganj Municipal Board. The applicants made representations to the Government against the order of removal, but their representations were rejected on the 14th December, 1950, and on the 24th February, 1951, they filed the present applications in which, — in the lax way in which such applications are sometimes presented to this Court, — the applicants ask for "a writ, order or direction in the nature of 'certiorari' or prohibition or 'mandamus' or any order" that the order of removal may be set aside.

Learned counsel has however stated that the relief which the applicants in fact seek is the issue of a writ in the nature of 'certiorari' and the quashing of the order of the 24th November, 1949. The application of Mohammad Baksh is accompanied by an affidavit of considerable length which contains a good deal of irrelevant matter. Each of the other two applications is accompanied by a very short affidavit in which the applicant states that he relies upon the facts set forth in the affidavit of Mohammad Baksh. This is an unsatisfactory practice as it is likely to result in one or more of the deponents deposing to matters not within his or their personal knowledge; the better course is for a joint affidavit to be filed.

(2) Sub-sections (3) and (4) of S. 40 of the Uttar Pradesh Municipalities Act, 1916, are in the following terms:

"(3) The Provincial Government may remove from the board a member who in its opinion has so flagrantly abused in any manner his position as a member of the board as to render his continuance as a member detrimental to the public interest:

(4) Provided that when either the Provincial Government or the prescribed Authority, as the case may be, proposes to take action under the foregoing provisos of this section, an opportunity of explanation shall be given to the member concerned, and when such action is taken, the reasons therefor shall be placed on record."

(3) It is the applicants' case that the Provincial Government had no jurisdiction to make the order of which they complain because they were not afforded an adequate "opportunity of explanation" which is a condition precedent to the exercise of the power of removal; it is also their case that the order in question is an unreasonable and arbitrary order. They concede that they have a remedy by way of suit against the Government, — and indeed, if the allegations be correct this is not in doubt — and counsel for the State contends that in these circumstances the Court will not issue a writ in the nature of 'certiorari'. He

has further argued that the order which is now challenged is an administrative order, that the provisions of sub-s. (4) were complied with and that the Court has no power under Art. 226 to quash an order made prior to the date upon which the Constitution came into force.

(4) In the recent case of — 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (A), it was laid down by a Full Bench of this Court that

> "there can be no doubt that Article 226 of the Constitution makes the issue of directions, orders or writs discretionary and it cannot be argued that any party has a right to any form of order as a matter of course. The discretion is a judicial discretion to be exercised according to judicial principles."

That view appears to be substantially the same as that now taken in England where, in — 'King v. Stafford Justices; ex parte Stafford Corporation', (1940) 2 KB 33 (B), the Court of Appeal held that the issue of a writ of 'certiorari', save where it goes as of course, is discretionary, even in those cases in which there being a clear excess of jurisdiction an aggrieved person is said to be entitled to the writ 'ex debito justitiae'; that is in those cases in which, as was said in — 'Farquharson v. Morgan', (1894) 1 Q B 552 (C), the want of jurisdiction was patent and not latent and dependent on the evidence, or, in the words of Atkin, L. J., in — 'King v. North; Ex parte Oakey', (1927) 1 KB 491 (D), is based upon the breach of a fundamental principle of justice.

In every case, the Court is entitled to enquire into the circumstances of the case and the conduct of the petitioner — that is why the relief is a discretionary one — but as the Master of the Rolls pointed out in the first mentioned case,

> "in all discretionary remedies it is well known and settled that in certain circumstances....the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way."

Subject to that consideration, I am of the opinion that in exercising its discretion the Court must have regard to the general rule that the Court will normally require the applicant to have recourse to his ordinary remedies: — 'In re Ramjidas Mahaliram', 62 Cal 1011 at p. 1135 (E); — T. Sudara Rao v. Commissioner Corporation of Madras', AIR 1942 Mad 348 (F); — 'Khurshed Mody v. Rent Controller, Bombay', AIR 1947 Bom 46 (G).

(5) The applicants contend that they were given no adequate opportunity of explanation because the charges they were called upon to answer were so vague that they did not know the nature of the allegations made against them. They were however asked for an explanation; each of them submitted an explanation and in none of those explanations was it contended or even suggested that the charges were not understood. I am anxious not to express an opinion as to whether the charges were stated in terms sufficiently clear to enable the applicants to comprehend fully the case they had to meet; that they were not stated with that precision which is desirable is clear, but the applicants were municipal councillors and it may be the case (I do not of course say that it is) that the charges related to alleged malpractices by the applicants as councillors the loose wording of the charges was not in fact a handicap to them in preparing their explanations.

In other words, the alleged defect is latent and depends on evidence; and the question whether there has been a contravention of sub-s. (4) of S. 40 is one which can, in my judgment, be more satisfactorily and more appropriately determined in a suit than on the scanty materials before us.

(6) The applicants have allowed thirteen months to elapse before filing these applications. They say that if they are compelled to resort to a suit the vacancies on the Municipal Board will be filled by a bye-election before the suit can be determined. I understand however that that bye-election has already been held, and, in my opinion, it is not the balance of convenience at the present time which has to be considered, but the balance of convenience—in cases in which the matter is material—at the time the applicants first had the choice of pursuing alternative remedies. If as a result of a suit filed by the applicants the order for their removal is declared null and void they will be deemed to have continued in office as municipal councillors, and there will in consequence have been no vacancies to be filled by a bye-election.

(7) Taking all the circumstances into consideration I am of opinion that the petitioner have failed to make out a case for the issue of a writ of 'certiorari', that the appropriate remedy for them is by way of suit, and that this Court should, therefore, refuse to issue a writ. The application must accordingly be dismissed, but as the principles on which writs of 'Certiorari' are issued are not as yet well understood we make no order as to costs.

(8) SAPRU J.: These are three separate applications by three different applicants who were Municipal Commissioners and who seek to have the order of their removal from the office of the Municipal Commissioner by the Government of Uttar Pradesh set aside by this Court. The applicants have come under Art. 226 of the Constitution and their prayer is that a writ order or direction in the nature of 'certiorari or 'prohibition' or 'mandamus' or all or any of them may be issued or such other order or directions may be passed by this Court as it may deem fit so that the order of their removal from the office of the Municipal Commissioner by the Government of Uttar Pradesh may be set aside. There is a prayer that for the purpose of doing justice in this case this Court may be pleased to send for the record relating to the removal of the applicants.

(9) It will be convenient to deal with the three cases in one judgment. The applicants are Shri Mohammad Bux, Shri Gauri Shanker and Shri Babu Lal Chole. They were elected members of the Municipal Board of Hathras (Kasganj?) but were removed by an order, dated the 24th of November 1949 under section 40(3) of the U. P. Municipalities Act, on the ground that they had so flagrantly abused their position as members of the Board as to render their continuance as members detrimental to the public interest. Each of the applicants appears to have presented two applications to the Government for reconsideration but they were turned down on the 14th of December 1950.

The applicants have left unspecified in their application the particular writ or order they seek from this Court but in the course of argument it was made clear to us that what they were asking us to do was, in effect, to invoke us to exercise our powers of 'certiorari' under Art. 226 of the Constitution. The main ground on which they seek the intervention of this Court under Art. 226 is that the provisions of section 40 (3) and (4) of the U. P. Municipalities Act of 1916 have not been complied with inasmuch as no opportunity such as is contemplated by that section was given to them for offering any explanation before their removal.

(10) It will be seen that the order which is sought to be impugned was passed before the coming into force of the Constitution on January 26, 1950. The question, in these circumstances, naturally arises whether Art. 226 of the Constitution is retrospective in its effect and, if so, in what sense. This is a difficult question on which we allowed full argument to be addressed to us but, after giving my careful consideration to all the aspects of the case, I have come to the conclusion that it is unnecessary to base our decision on our view in regard to it as, in the view we are taking, the question does not arise.

I may, however, point out that the position in English law is, as pointed out by Maxwell in his "Interpretation of Statutes", 9th Edition, p. 221, that

> "no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."
>
> "No rule of construction", observes Sir Maxwell, 'is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.....
>
> A statute is not to be construed to have a greater retrospective operation than its language renders necessary."

(11) I may be further permitted to quote the following observation of their Lordships of the Privy Council in the case of the — 'Delhi Cloth and General Mills Co., Ltd. v. Income-Tax Commissioner, Delhi', AIR 1927 PC 242 at p. 244 (H):

> "The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the — 'Colonial Sugar Refining Co. v. Irving', (1905) AC 369 (I), where it is, in effect, laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

Mr. Beg's argument is that notwithstanding the fact that the order was passed before the Constitution had come into force and become final, the order of Government has not ceased to be operative for the reason that one effect of it is that under section 41(3) the applicants who have been removed under sub-section (3) of section 40 of the Act are not eligible for further election or nomination for a period of three years from the date of the removal. He has further contended that the effect of giving retrospective operation to Art. 226 will be neither to impair any existing right or obligation nor to touch a right in existence at the passing of the statute. I consider it unnecessary to notice this and other arguments as, in the view that we are taking, the questions raised do not arise. Suffice it to say that without expressing any final opinion on the points raised I do not feel impressed with the line of argument referred to above.

(12) I may also briefly indicate that I am not prepared to accept the argument of the learned Standing counsel that the order of removal, which is being sought to be impugned in this case, is an administrative order which it could not have been competent for us to consider even had there been no question of its having been passed before the Constitution came into force. The distinction between what may be called an administrative and 'quasi' judicial acts by an administrative authority is a subtle one and has been the subject-matter of much case law. It would be correct to say that in a sense there is no administrative or executive act which has no judicial element in it. Even in arriving at an administrative decision, the executive Government has to weigh the 'pros' and 'cons' of the issues involved and it is by this process that it arrives at some conclusion. Now, there is no doubt that both judicial and quasi-judicial functions presuppose the existence of a dispute between the parties and that is this feature which distinguishes them from an administrative function.

The distinction between an administrative and judicial or quasi judicial act, therefore, turns upon the question whether the duty of the authority was to act judicially or not. On this point, I may be permitted to quote the observations of Das, J. — 'Province of Bombay v. Khushaldas', AIR 1950 SC 222 at p. 257 (J). They run as follows:

> "In this connection the term judicial does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for purposes of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting rights, and if there be a body empowered by law to enquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

I would also refer to the observations of Atkin L. J. as he then was in — 'Rex v. Electricity Commissioners', (1924) 1 KB 171 (K). They run as follows:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The above observations of Lord Atkins have become classical and were accepted as correctly laying down the law in — 'Rex v. London County Council', (1931) 2 KB 215 (L), and by many other learned Judges in subsequent cases including the Supreme Court and the latest decision of their Lordships of the Judicial Committee in — 'Nakkuda Ali v. M. F. Des Jayaratne', 54 Cal WN 883 (PC) (M).

The conclusion to be drawn, therefore, is that the real test which distinguishes a 'quasi'-judicial act from an administrative act is as observed by Atkin L. J.'s definition, namely, the duty to act judicially. The law has been well put by Lord Hewart C. J. in — 'R. v. Legislative Committee of the Church Assembly', (1928) 1 KB 411 at p. 415 (N) that:

> "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

(13) Now it strikes me that in this particular case there can be no doubt that though the decision of the Government as to whether a member has or has not acted in such a manner as to

render him unfit to be a member of the Board is subjective, the process by which it arrives at the decision involves a judicial act for, in arriving at it, Government must not take into consideration any factor which is not a judicial factor. In other words, it is, on an honest application of its mind to the 'pros' and 'cons' of the case, against the municipal commissioner concerned that it must arrive at its decision. It is obvious that in declaring a person unfit to be a municipal commissioner, Government is passing an order which would deprive him not only of an office to which he has been elected by the electorate but also automatically disqualify him under S. 40 (2) for a period of 'four' years from seeking election to that office. This is a serious thing to do. Obviously, therefore, in exercising it the Government must be deemed to have acted 'quasi'-judicially.

(14) I should like to remark that one of the requirements of an order u/s. 40 (3) is that it should be recorded in writing. I do not understand it to lay down that it must be communicated to the applicants. I indicated to the learned Standing Counsel that I wanted to know whether any such order had or had not been recorded. I understand that reasons were put on the record. The requirement above referred to merely goes to strengthen the view that the act was a 'quasi'-judicial, and not administrative one.

(15) It is obvious that it was only after an opportunity had been given to the member concerned to explain that action could be taken against him. Clearly, by an opportunity to explain a reasonable opportunity is intended. Where, for example, the charges framed are so vague or indefinite as to make it impossible for the applicant to tender his explanation, it cannot be said that a reasonable opportunity has been given. The further requirement that reasons must be recorded makes it clear that though not necessarily communicated to the person concerned the act was considered to be of a 'quasi'-judicial nature. One of the principal complaints against the members appears to be that they somehow misused their position as members in the matter of the allotment of electrical power.

It would appear that by a Government Notification, dated the 25th of July 1947, the Chairman of the Municipal Board was allowed to allot electrical power to members of the public to the extent of a total of 30 Kilowats. It was contended by the applicants that applications were made by a member or members to the Chairman for the allotment of electrical powers and that these applications were disposed of in strict order of priority. Among the applicants for electrical power, there were three members of the Board, Shri Babulal Chola, Chaudhary Mohammad Bux and Shri Ram Prakash. They were also allotted electrical powers on payment of the usual charges. There were some complaints against the allotment and thereafter the U. P. Government decided to depute one Shri H. L. Kashyap, Electrical Inspector, to go and enquire into the grievances.

This officer reported that there was no ground for any complaint or grievance. On his report, the matter appears to have been produced by the U. P. Government in 1947. Thereafter, the matter was revived and charges were framed against the members concerned and they were required to answer them. The charges against each of the members were as follows:

Shri Mohammad Bux: That he misappropriated for his own use 10 Horse Power out of the quota of 40 Horse Power of electric power which was granted to the Kasganj Municipal Board for public use.

Shri Gauri Shankar: That in 1946, he purchased a nazul plot of land near the railway station in Kasganj for Rs. 265/- only in the name of his cousin, Shri Piarelal. The plot was worth more than Rs. 10,000/- and it is clear that he made the purchase with the help of some of the Board's staff and thus caused a heavy loss to the Board.

That he again tried to purchase a piece of land near the female dispensary in the name of his friends and relatives thus abusing his position as a member. Had not the present Executive Officer intervened in the proposed sale, the Board would again have been put to loss.

That he misappropriated some of the 40 Horse Power electric energy given to the Board for public use though outwardly it was done in the name of his father-in-law.

Shri Babulal Chola: That he along with Shri Girja Shankar tried to purchase a piece of land near the female dispensary in the name of his friends and relations at a low price thus abusing his position as a member.

That he misappropriated to himself 10 Horse Power out of the 40 Horse Power quota of electric energy granted to the Board for public use.

(16) Ten days time from the date of the receipt of orders was given to each of the applicants to submit their explanations to Government through the Commissioner who was directed by the order to make his comments and recommendations thereon as early as possible.

(17) No objection was raised by the applicants or any of them to the effect that the charges framed against them were not intelligible and required elucidation and clarification. The applicants seem to have proceeded upon the assumption that what they were called upon to answer was what had already been explained by them in the enquiry previously held against them by Shri H. L. Kashyap. Their answers were presumably not found satisfactory by the Government for I find that on the 24th of November 1949 intimation was sent to them that the Governor had arrived at the conclusion that their continuance as members of the Municipal Board was detrimental to the public interest, and that they could not consequently be allowed to remain as members of the Board.

Upon its receipt, the applicants made representations against the Government's order of removal but Government did not consider that there was any case for reconsideration and rejected them on the 14th of December, 1950. On the 24th of February 1951, that is to say, some two months and ten days after their representation had been rejected, the applicants filed the present application, the precise nature of which has not been indicated clearly in the affidavit.

(18) Now on these facts it is clear to me that the applicants had an alternative remedy, i.e., they could go to a civil Court and challenge the order passed against them on the ground that it was arbitrary, capricious, wanton and that the action in removing them was not 'bona fide'. In — 'U. P. Government, Lucknow v. Radhey Lal', AIR 1948 All 179 (O), it was remarked by Bind Basni Prasad J. that:

> "Where the statute provides that the sole judge of a certain fact will be a certain authority, no suit can lie to question the decision of such authority in respect of such matter."

It was further laid down that:

"The phrase "in its opinion" which occurs in sub-s. (3) of S. 40, U. P. Municipalities Act, has the effect of making the Provincial Government the sole judge of the fact whether a member has flagrantly abused his position so as to render his continuance in the Board detrimental to public interest. Where the Provincial Government has properly exercised the powers conferred upon it by the Act and the action taken by it in removing a member from a Board is 'bona fide' and not capricious, wanton and arbitrary, the civil Court will not allow it to be challenged."

As I read this case which arose out of a suit instituted for a declaration that the applicant had been illegally removed and that he was, therefore, not subject to the disability or non-eligibility for election in accordance with the provisions of sub-s. (3) of S. 40 of the said Act, the position is that though the Governor in Council is the sole judge of the question whether the acts by the Commissioners concerned justified their removal or not, the jurisdiction of the civil Court would not be ousted, if the applicant was able to show that the authority vested with the power to remove him had exercised its discretion in a capricious, wanton and arbitrary manner and in an unreasonable way. I may be permitted to refer to the observations of Malik J. (Now Malik C. J.) in the case mentioned above. I quote them below:

"It is not alleged by the plaintiff that the Provincial Government had not followed the procedure laid by the statute or had not acted strictly within the limits of its authority, nor is there any charge of malice or want of good faith. The Provincial Government having acted in accordance with the procedure laid down and having in good faith considered that the plaintiff had so flagrantly abused his position as a member of the Board as to render its continuance as such detrimental to the public interest, the civil Courts cannot substitute their own opinion for the opinion of the Provincial Government."

In other words, Malik J. would have been prepared to interfere with the order of Government had the applicant either shown: (a) that the Provincial Government had failed to observe the procedure laid down by the statute, or (b) had not acted within the limits of its authority. or (c) had acted with malice or want of good faith. Having regard to the law, as laid down in this ruling, it cannot be said that, on the grounds alleged by the applicants, the alternative remedy of a civil suit was not available. This being so, the question naturally arises whether we should allow the applicants the relief under Art. 226 of the Constitution. It is urged that the remedy of a civil suit is not an expeditious one, that the matter is, from the point of view of the applicants, urgent, that there is a penalty attached to the removal inasmuch as under S. 40 (3) a member removed under sub-s.. (3) under the Act is not eligible for a period of three years from the date of his removal and that this Court should, in view of the above circumstances, exercise its powers under Art. 226. It is further alleged that no suit under S. 80 of the Code of Civil Procedure can be filed against the Government, unless two months' notice thereof is given and this involves delay. It has been held by a Bench of this Court that this is an immaterial circumstance, vide: case of — 'Dharni Dhar Sharma v. Thakur Pershad', Writ Appln. 169 of 1950, D/- 31-10-1950 (All) (P).

(19) As regards the other considerations to which attention has been invited by the learned counsel, the answer is that had the matter from the point of the applicants' view been really urgent, they would have come to this Court much earlier i.e., immediately after this Court became vested with the power of issuing writs under the Constitution on the 26th of January 1950. It is to be noticed that the writ application was not filed until the 24th of February 1951. During the interval that elapsed between the date on which the order was passed and the application to this Court was made, it was possible for the applicants to go to the civil Courts and seek a relief. The fact that this procedure of a civil suit is a somewhat dilatory one, on account of congestion of work in the civil suit, is no ground to invoke the jurisdiction of this Court under Art. 226 of the Constitution.

I may be permitted in this connection to refer to the observations of the Full Bench in the case of the — 'Indian Sugar Mills Association v. Secretary to Government, U. P.', AIR 1951 All 1 at p. 3 (FB) (Q):

"We feel that the time has come when we may point out that Art. 226 of the Constitution was not intended to provide an alternative method of redress to the normal process of a decision in an action brought in the usual Courts established by law. The powers under this Article should be sparingly used and only in those clear cases where the rights of a person have been seriously infringed and he has no other adequate remedy available to him."

These observations were made in a case in which the writ asked for was in the nature of a mandamus and were limited to the facts to that case.

(20) I should also like to refer to the observations of the Full Bench of which I was a member in — 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (FB) (A):

"Though the historical background of these various orders in the nature of writs have to be borne in mind in considering whether a writ should or should not issue, there can be no doubt that Article 226 of the Constitution makes the issue of directions, orders or writs discretionary and it cannot be urged that any party has a right to any form of order as a matter of course. The discretion is a judicial discretion to be exercised according to judicial principles."

In this case the writ principally asked for was a 'certiorari' or prohibition. The question in these circumstances is whether we should exercise our discretion in issuing writs in favour of applicants who did not raise any objection at the time when the charges were forwarded to them by the U. P. State Government, that there was any ambiguity about the charges and that they were framed in such a manner as not to enable them to know the exact nature of the case against them and who went on, even after the order had been passed, making representations to Government without protesting against the vague, ambiguous or defective nature of the charges and did not choose to come to this Court until after the lapse of a year of the passing of the final order by Government.

Important as the right to vote is, speaking from the point of view of a citizen living under a democratic system of Government, this Court will not assist a party who fails to come to it at the earliest possible opportunity. All this, of course, presupposes that there is a power under Art. 226 to issue writs or direction or orders affecting the rights of parties in respect of matters which were

disposed of finally before the Constitution came into force. On that point I consider it unnecessary, however, to express any final opinion, as properly speaking, in the view that I am taking, it does not arise in this case.

(21) For the reasons given above, I would refuse the writ but it is open to the applicants, if they so desire, to prosecute any remedy that they may have in the civil Courts and it will be for the civil Court to go into the question of fact which was raised in the supplementary affidavits which were sought to be filed by the learned counsel for the applicants.

(22) After giving the matter my anxious consideration I have come to the conclusion that, in the circumstances of the case, no costs should be awarded. In all the circumstances of this case, the proper order to pass will be to make the parties bear their own costs. This application should be accordingly dismissed but no order should be made as to costs.

B/D.H. Application dismissed.

A.I.R. 1953 ALL. 745 (Vol. 40, C. N. 366)

BIND BASNI PRASAD J.

Behari Lal, Applicant v. Radhye Shyam Plaintiff, Opposite Party.

Civil Revn. No. 29 of 1950, D/- 23-11-1951.

Contract Act (1872), S. 8 — Landlord accepting payment of rent after deducting amount spent by tenant over repairs without objection — He cannot afterwards say that he accepted payment in part satisfaction.

Having regard to the provisions of S. 8 of the Contract Act where a party accepts a payment in satisfaction of his claim without any objection, it should be deemed that he has accepted it on the condition on which it was offered and, it is not open to him to say subsequently that he accepted the payment in part satisfaction of his claim. (Para 6)

Where a tenant sends a cheque for the amount of rent for certain period after deducting the expenses incurred for repairs, and along with it sends also a covering letter giving the account of the amount spent, and the landlord accepts the payment without any objection and without any time informing the tenant that he was accepting the amount in part payment, he cannot afterwards be heard to say that he accepted the payment only in part satisfaction, or dispute the account. AIR 1927 All 407, F. A. No. 444 of 1942, D/- 3-8-48 (All), Rel. on. (Para 7)

Anno: Contract Act, S. 8 N. 1.

Hiralal Kapoor, for Applicant; Radha Krishna, for Opposite Party.

CASES CITED:

(A) ('27) AIR 1927 All 407: 49 All 674
(B) ('48) F. A. No. 444 of 1942, D/- 3-8-1948 (All)
(C) ('22) AIR 1922 PC 26: 48 Cal 839

ORDER: The defendant-applicant is a tenant of the plaintiff opposite party in bungalow No. 15, Clive Road, Allahabad, on a rent of Rs. 50/- per month and a conservancy charge of -/12/- per month. The plaintiff brought a suit against him for the recovery of Rs. 477-1-9 being the arrears of rent for the period commencing from the 1st April 1947, and ending with February 20, 1949. The total rent for this period amounted to Rs. 1,167/4/- and it was admitted by the plaintiff that the defendant had paid Rs. 690/2/3.

(2) The defendant contended that the plaintiff was utterly negligent about the repairs of the bungalow and he (the defendant) was compelled to incur an expenditure of Rs. 477/1/9 to keep the bungalow in reasonable repairs. He claimed that he was entitled under the law to a credit of this amount towards the rent due from him. On this ground, he pleaded that the suit should be dismissed.

(3) Learned Judge of the Small Causes came to the conclusion that the plaintiff was negligent in keeping the house in repairs, but the defendant should not have spent a sum of Rs. 477/1/9. In the opinion of the learned Judge, the defendant should have spent an amount of Rs. 100/- every year on the repairs. No reasons are given in the judgment as to how he arrived at this figure. Probably he thought that not more than two months' rent in a year should be spent by a tenant in repairs. He therefore, gave a credit of Rs. 200/- to the defendant and decreed the claim for a sum of Rs. 277/1/9.

(4) The defendant comes up in revision and contends that no part of the claim should have been decreed. It appears that when the plaintiff did not carry out the repairs at the defendant's request he used to have the repairs made. Every time that he did so, he sent the accounts to the plaintiff and after deducting the amount spent in repairs, he sent a cheque for the balance. For example, I may refer to the letter of February 3, 1949, sent by the defendant to the plaintiff. It runs as follows:

"I have to pay you 8 months rent till December 1948, viz., May to December, 48.

Having my demand for repairs of roof sent to you on 11th May last, ignored as usual I had to do them. This has saved you a lot of money and me a good deal of danger. The roof of one room was ready to fall down on my head. I have had very necessary repairs done.

After the heavy monsoon, requires whitewashing which has not been done by you, as you have done to the contiguous houses belonging to you. I have to get whitewashing done unless you take up the work forthwith.

The account of room repairs is as follows:

Bamboos & cartage	Rs. 53-2-3
Badh	Rs. 5-2-0
Labour charges	Rs. 66-12-0
Total	Rs. 125-0-3
Postage for this	Rs. 0-7-6
	Rs. 125-7-9
Eight months rent due	Rs. 400-0-0
Deduct repairing charges	Rs. 125-7-9
Balance	Rs. 274-8-3

For which a cheque is enclosed herewith."

(5) Letters like this, were sent by the defendant tenant to the plaintiff landlord whenever he sent a cheque after deducting the cost of repairs. The plaintiff accepted these cheques without any objection and did not at any time inform the defendant that he was accepting them in part payment.

(6) It is argued on behalf of the applicant that having regard to the provisions of S. 8

of the Contract Act and the decided cases, where a party accepts a payment in these circumstances, it should be deemed that he has accepted it on the condition on which it was offered and it is not open to him to say subsequently that he accepted the payment in part satisfaction of his claim. Section 8 of the Contract Act provides:

"Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

The word 'proposal' is defined in clause (a) of Section 2 as follows:

"When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

(7) According to clause (b) of Section 2 when a proposal is accepted, it becomes a promise and according to clause (f):

"Promises which form the consideration or part of the consideration for each other are called reciprocal promises."

Now, in the present case, the proposal which the defendant made to the plaintiff by his letter with which he sent a cheque was that he was offering the money under the cheque to the plaintiff in full satisfaction of the rent for the period and on the condition that the plaintiff gave him a credit for the sum which according to him was spent in the repairs of the bungalow. I have not been referred to any document on the record to show that the plaintiff raised any objection to the amount spent by the defendant on the repairs of the bungalow. It should, therefore, be deemed that he accepted the correctness of the sum which the defendant stated he had spent towards the repairs. Having accepted the correctness of the account for repairs given by the defendant and having accepted the cheque sent by him in payment of rent, it is not open now for the plaintiff to turn round and say that he accepted the cheque in part satisfaction and that he disputed the amount spent by the plaintiff on repairs. The acceptance of the cheque was the acceptance of a consideration within the meaning of section 8. The reciprocal promises in the present case were:

1. the promise on the part of the defendant to pay the amount under the cheque on the condition that the account of repairs submitted by him is accepted by the plaintiff and the amount of the cheque is accepted in full satisfaction of the rent for the period in question, and
2. the implied promise on the part of the plaintiff to accept the condition at once.

(8) There are two decided cases which support the view taken above.

(9) The first one is — 'Gaddar Mal v. Tata Industrial Bank Ltd., Bombay', AIR 1927 All 407 (A). In that case, the Bank agreed to advance certain sums of money to the plaintiff on the security of cotton bales at Rs. 8/8/- per cent. per annum. There was a provision in the agreement for the variation of the rate of interest by agreement between the parties. Later, the Bank sent a notice to the plaintiff that in future the interest would be 9 per cent. per annum. The plaintiff sent no reply to it and took further advances. This conduct on his part was treated as an acceptance of the proposal made by the Bank that the interest after the date of the notice would be 9 per cent. per annum.

(10) There is also an unreported decision of this Court, — 'Pt. Ram Kirpal v. Shiromani Sugar Mills', F. A. No. 444 of 1942, D/- 3-8-1948 (All) (B). In that case Ram Kirpal was an engineer of the sugar mills and he claimed a sum of Rs. 11,797/15/2. The Mill contended that a sum of Rs. 4930/2/3 only was due to the plaintiff and sent a cross cheque for the same in full satisfaction of the plaintiff's claim. The plaintiff accepted the cross cheque, but only in part satisfaction of his claim. The Sugar Mills then wrote a letter that as the plaintiff was not accepting the cheque in full satisfaction he was bound to return it, but before the receipt of this letter, the plaintiff had cashed the cheque. The plaintiff then sued for the recovery of the balance. Their Lordships, Malik C. J. and Bhargava J. observed:

"..... We are satisfied that the plaintiff cannot after having accepted the cheque claim the rest of the amount. The cheque was sent to the plaintiff in full satisfaction of plaintiff's claim. That was the condition attached to the payment. The plaintiff could not accept the payment and repudiate the condition. He had no right to write on the 4th of May 1940 that he was accepting the cheque, but only in part satisfaction. Learned counsel for the plaintiff has urged that the decision of their Lordships of the Judicial Committee in — 'Nemi Chand v. Radha Kishen', AIR 1922 PC 26 (C) is distinguishable as that was a case of appropriation under S. 59, Contract Act. The observations of their Lordships are, however, general enough to cover a case of the kind that is before us. Their Lordships have said in their judgment that:

"A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or the cheque by which the money is proffered. If he accepts it he would then be bound by the appropriation proposed by the debtor."

If the plaintiff was not willing to accept on the terms proposed by the defendants he should have returned the cheque. He cannot keep the money, go back on the condition imposed and claim that he would keep the money on his own terms."

This decision is almost on all fours with the present case. I hold that the plaintiff by his conduct accepted the condition which the defendant imposed when sending the cheques towards the payment of the rent and it is not open to the plaintiff now to go back upon those conditions and claim the same for which he had sued.

(11) The revision is allowed, the decree of the lower court is set aside and the suit is dismissed with costs throughout.

B/R.G.D. Revision allowed.

A.I.R. 1953 ALL. 747 (Vol. 40, C. N. 367)
(LUCKNOW BENCH)
(FULL BENCH)
KIDWAI, CHATURVEDI AND RANDHIR SINGH JJ.

Bankey Lal, Applicant v. Babu and others, Opposite Parties.

Revision Applns. Nos. 5 of 1949 and 180 of 1951, D/- 29-4-1953.

(a) Tenancy Laws — U.P. Tenancy Act (17 of 1939), Sch. IV, Group F, Serial No. 7, Cl. (5) — 'Date of final decree', meaning of — (Civil P. C. (1908), O. 41, R. 5(1)) — 1943 Oudh WN 501: AIR 1944 Oudh 90: 216 Ind Cas 2, Overruled.

The words "the date of the final decree in the case" in column 5 against serial No. 7 of Schedule IV, Group F, U.P. Tenancy Act, cannot be read as forbidding an earlier application for execution from proceeding. All that they mean is that an application for execution will not be barred by time till after the expiry of one year from the date of the decree finally passed in the case. The words "the date of the final decree" would mean the date of the decree which has become final. If no appeal has been instituted the decree would become final after the period of limitation prescribed for an appeal has expired, but will continue to bear the date on which it was passed. If, however, there is an appeal or revision, the original decree would merge in the appellate or revisional decree and the date of the final decree would be the date of the decree passed in appeal or revision. An application for execution, however, would not be premature if it is made before the decree becomes final in the above sense. 1943 Oudh WN 501: AIR 1944 Oudh 90: 216 Ind Cas 2, Overruled. (Para 13)

A decree-holder is entitled to put his decree, even, if appealed against, into execution unless the execution is stayed by the appellate Court under O. 41, R. 5(1). (Para 14)

Anno: C. P. C., O. 41, R. 5 N. 2.

(b) Limitation Act (1908), Pre. — Rules of limitation, object.

Rules of limitation are, 'prima facie', rules of procedure and do not create any rights in favour of any person nor do they define or create causes of action but simply prescribe that the remedy could be exercised only up to a certain period and not subsequently. (Para 12)

Anno: Lim. Act, Pre. N. 3, 4.

(c) Precedents — Duty of subordinate Courts.

Subordinate Courts are bound to follow bench decisions of their High Court even if they do not agree with it. (Para 15)

Anno: C. P. C., Pre. N. 15.

S. N. Srivastava, for Applicant; H. D. Srivastava, for Opposite Parties (Nos. 1 and 2).

CASES CITED:
(A) ('44) AIR 1944 Oudh 90: 1943 Oudh WN 501
(B) ('46) AIR 1946 Cal 500: ILR (1946) 2 Cal 552 (FB)

RANDHIR SINGH J.: These two applications in revision have been heard together as they arise out of execution proceedings in respect of the same decree. Application No. 5 of 1949, came up for hearing before a learned Judge of this Court who found that the question involved was of some importance and doubted the soundness of the decision of a Division Bench in — 'Durga Baksh Singh v. Umanath Baksh Singh', AIR 1944 Oudh 90 (A). He, therefore, directed that the application may be placed before a Full Bench for hearing. The other application for revision, No. 180 of 1951, was also subsequently ordered to be put up along with revision application No. 5 of 1949.

(2) One Mulhay obtained a decree under Section 183 of the U. P. Tenancy Act against Mathura and others on 11-9-1946. As Mathura was in doubt as to whether an appeal lay to the Commissioner or to the District Judge he instituted two appeals — one in the Court of the Commissioner and another in the Court of the District Judge.

(3) Both these were dismissed. The appeal to the Commissioner was dismissed on 14-4-1947, on the ground that no appeal lay to him while the appeal instituted in the Court of the District Judge was dismissed on merits. An appeal against this appellate order of the District Judge is now pending in this Court.

(4) An application for execution of the decree was made by the decree-holder on 28-4-1947. In this application it was mentioned that there had been an appeal to the Court of the Commissioner which had been dismissed. Execution was, however, stayed by the District Judge in view of the appeal pending before him, and it appears that this application was subsequently consigned to the record room and there was an end of it.

(5) The second application for execution was made on 19-4-1948, in the Revenue Court. The Revenue Court ordered execution to issue on 2-6-1948, holding, that, since the judgment-debtor's appeal had been decided by the District Judge on 9-8-1947, the decree had become final. Apparently he was not aware that a further appeal had been filed in the Chief Court which is still pending. Dissatisfied with this order the judgment-debtor went in appeal to the District Judge. The appeal was transferred to the Civil Judge, Sitapur, before whom it was agreed that a second appeal was pending in this Court. He felt, therefore, that the question whether the application for execution was premature required determination. He accordingly set aside the order of the Revenue Court and remanded the case with the direction that an issue should be framed to try that question and the Revenue Court should then proceed to determine it according to law.

(6) The Revenue Court passed an order on 30-9-1950, staying execution on the ground that the execution was premature. An appeal was then instituted in the Court of the District Judge and was heard by a Civil Judge. The learned Civil Judge dismissed the appeal and held that the order of the Assistant Collector holding that the application was premature was correct. The decree-holder has now come up in revision and his revision is No. 180 of 1951.

(7) A third application for execution was made by the decree-holder on 9-6-1948. He seems to have ignored the earlier application for execution made by him on 19-4-1948. It was mentioned in this application that the appeal to the Commissioner had been dismissed and the decree-holder was therefore entitled to put his decree into execution. Objection was taken to the execution by the judgment-debtor on the ground that the application for execution was premature and this

objection was decided by the Assistant Collector on 31-12-1948. He held that possession could not be given as the decree was in appeal. The order of the Assistant Collector is very briefly worded and all that can be inferred from it is that he held that the execution of the decree at that stage was premature in view of the fact that it was still then in appeal. An appeal was then instituted against this order of the Assistant Collector to the District Judge and was transferred to the Civil Judge for disposal. The Civil Judge allowed the appeal on 1-12-1949, and directed the Assistant Collector to proceed with the execution.

(8) There were thus two conflicting orders passed by the Court of the District Judge in the two appeals. In one of the appeals it was held that the execution application was premature, while in the other appeal the learned Judge held that the execution should be proceeded with. The decree-holder dissatisfied with the order in appeal, in which it was held that the execution was premature, has come up in revision, while the judgment-debtor has come up in revision against the order passed in appeal on 1-12-1949, directing the Assistant Collector to proceed with the execution.

(9) In the order passed by the Assistant Collector, dated 30-9-1950, and in the appeal decided on 2-6-1951, reliance has been placed on a Division Bench ruling of this Court in which it was held that an application for execution would be premature unless the decree had become final either by reason of the fact that limitation for filing an appeal had expired or because appeals up to the final Court of appeal had been dismissed; vide — 'AIR 1944 Oudh 90 (A)'.

(10) Limitation for suits and applications has been prescribed in the U. P. Tenancy Act, and the Limitation Act does not apply to suits and proceedings under this Act unless a particular section has been made specifically applicable. Limitation for the execution of any decree, other than money decrees, is provided in the Fourth Schedule, Group F, item No. 7. The period of limitation is one year, and the time from which the period of limitation would begin to run is the date of the final decree in the case.

(11) The question of the interpretation of the words "final decree" came up before a Division Bench of this Court in the case referred to above and it was held that these words mean a decree which has become final; that is, so long as a decree is open to appeal, or so long as an appeal pending against the decree would not be deemed to be a "final decree"; & further that no application for execution could be made unless the decree became final in the matter expressed above. The learned Judge before whom the application for revision came up for hearing seems to have entertained a doubt about the correctness of this decision and therefore thought it fit that the point be decided by a Full Bench.

(12) Rules of limitation are, 'prima facie', rules of procedure and do not create any rights in favour of any person nor do they define or create causes of action but simply prescribe that the remedy could be exercised only up to a certain period and not subsequently. In — 'Ranglal Agarwalla v. Shyamlal Tamuli', AIR 1946 Cal 500 at p. 505 (F. B.) (B) a similar question came up for decision and it was observed by Chakravartti J. that substantive rights of parties under a bond or a decree could not be derived from or sought for in the Limitation Act. The Limitation Act does not, therefore, confer any rights upon a decree-holder. The right has to be looked for somewhere else, and it is found in the decree passed in his favour.

(13) The provisions of the Code of Civil Procedure have been made applicable to proceedings under the U. P. Tenancy Act by Section 243 of the Tenancy Act. The whole of Schedule I of the Code of Civil Procedure is applicable to suits and proceedings under the Tenancy Act. Order 41 Rule 5 (1), Civil P. C. lays down that

> "an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree".

This clearly indicates that the institution of an appeal against a decree does not operate as a stay of execution and a decree-holder is entitled to put his decree into execution unless the execution is stayed by the appellate Court. The words "the date of the final decree in the case" in column 5 against serial No. 7 of Schedule IV, Group F., U.P. Tenancy Act, only indicate the date after the expiry of which no application for execution would lie and cannot be read as forbidding an earlier application for execution from proceeding. All that they mean is that an application for execution will not be barred by time till after the expiry of one year from the date of the decree finally passed in the case. The entry is not indicative of the fact that the decree-holder shall or shall not be entitled to put his decree into execution, nor is it the purpose of the Limitation Act to indicate such rights. It only prescribes the time after which a suit or proceedings could not be taken in a Court of law.

A similar provision exists in the Limitation Act, Article 182, where in column 3 it is provided that the limitation for the execution of a decree would commence from the date of the decree or order, and where there has been appeal, the date of the final decree or order of the appellate Court. The words "the date of the decree or order" which are to be found in the provisions of Article 182 of the Limitation Act, no doubt, do not appear in the analogous provisions of the Tenancy Act, Schedule IV, Group F; but it cannot be inferred that it was the intention of the Legislature to deprive the decree-holder of his lawful rights to execute his decree after it was passed. I, therefore, find myself unable, with great respect, to endorse the view taken by the Division Bench in the case referred to above — 'AIR 1944 Oudh 90 (A)'. The words "the date of the final decree" would mean the date of the decree which has become final. If no appeal has been instituted the decree would become final after the period of limitation prescribed for an appeal has expired, but will continue to bear the date on which it was passed. If, however, there is an appeal or revision, the original decree would merge in the appellate or revisional decree and the date of the final decree would be the date of the decree passed in appeal or revision. An application for execution, however, would not be premature if it is made before the decree becomes final in the sense which has been indicated earlier.

(14) In the view taken by me above it appears to me that the decree-holder in this case was entitled to put his decree into execution even though an appeal was pending against the decree I would, therefore, allow the application for revision No. 180 of 1951 and set aside the order of the learned Assistant Collector dated 30-9-1950, and of the Civil Judge, dated 2-6-1951, and dismiss application No. 5 of 1949.

(15) Before taking leave of this case I would, however, like to point out that the learned Civil

Judge who decided the case to which revision application No. 5 of 1949 relates should have followed the decision of the Bench of the Chief Court of Avadh even though he did not agree with its correctness.

(16) KIDWAI J.: I agree.

(17) CHATURVEDI J.: I agree.

A/K.S.B. Revision allowed.

A.I.R. 1953 ALL. 749 (Vol. 40, C. N. 368)

BRIJ MOHAN LALL J.

Maiku and others, (Convicts) Appellants v. The State.

Criminal Appeal No. 523 of 1950, D/- 19-8-52.

(a) Penal Code (1860), Ss. 435 and 436 — Arson.

Arson does not cease to be arson if the chappar is first pulled down and then set fire to. It makes no difference whether the chappar is lighted while it is still resting on poles or it is set fire to after being pulled down to the ground. (Para 4)

Anno: Penal Code, S. 435 N. 1; S. 436 N. 1.

(b) Penal Code (1860), S. 141 — Object.

Object of assembly to loot house of a person and cause damage to property — Assembly is unlawful assembly. (Para 7)

Anno: Penal Code, S. 141 N. 5.

(c) Penal Code (1860), Ss. 146 and 349 — Damage to property.

To constitute offence of rioting there should be either "force" or "violence" — Force must be against human being and not against inanimate object — Motion caused to inanimate object without affecting human being — There is no force within meaning of S. 349 — "Violence" however is not confined to human being — Damage caused to property by unlawful assembly without any harm to any person — It is violence and rioting. AIR 1923 Mad 606; 40 Cal 367, Rel. on. (Paras 8, 10)

Anno: Penal Code, S. 146 N. 2; S. 349 N. 1.

(d) Penal Code (1860), S. 71 — Scope.

Section 71 prohibits punishment for and not conviction under two offences — Sentences made to run concurrently — There is no double punishment. (Para 14)

Anno: Penal Code, S. 71 N. 1.

C. S. Saran and Vishwa Mitra, for Appellants; H. N. Seth, for the State.

CASES CITED:

(A) ('13) 17 Ind Cas 565: 40 Cal 367: 13 Cri LJ 821

(B) ('23) AIR 1923 Mad 606: 25 Cri LJ 139

JUDGMENT: This is an appeal by six persons, viz., Maiku, Pusa, Mata Din, Sobha Ram, Nand Kishore and Hari Shankar, who have been convicted by the learned Additional Sessions Judge of Farrukhabad under Ss. 147 and 426/149, Penal Code. Under the former section every one of them has been sentenced to undergo one year's rigorous imprisonment and under the latter to undergo three months' rigorous imprisonment. The sentences are to run concurrently.

(2) Mata Din (appellant 3) is a Patwari, while Nand Kishore (appellant 5) is his brother, Sobha Ram and Hari Shankar (appellants 4 and 6 respectively) are their nephews. All of them are Brahmins. The remaining two appellants are Chamars by caste.

(3) The prosecution case is that the appellants along with a large number of persons who are said to have numbered one thousand approximately, formed an unlawful assembly and that, in prosecution of the common object of the said assembly, they cut Pokhpal's crop and also pulled down the chhappar of one Genda Chamar, burnt the chhappar and certain skins of dead carcasses which Genda had stored in his house. It may be pointed out at this stage that Mahtab Singh zamindar is said to have been interested in getting Pokhpal's crop cut. The charge levelled against the appellants was confined to their activities against Genda only. The cutting of Pokhpal's crop was not the subject matter of charge because it appears that Mahtab had obtained through Court possession over Pokhpal's land together with the standing crop and therefore his act in cutting that crop was not supposed to be illegal. Anything done to Pokhpal's crop is, therefore, to be ignored for the purposes of the present litigation.

(4) The learned Additional Sessions Judge held that the appellants and other members of the unlawful assembly did pull down Genda's chhappar, set fire to it and also burnt the hides which were stored in his house. But strangely enough he came to the conclusion that since the chhappar was not set fire to while it was still standing on the poles, no offence under S. 435 or S. 436, Penal Code had been made out. He was of the opinion that if a chhappar was pulled down and then set fire to, it was an offence punishable under S. 426, Penal Code, but if it was set fire to while it was still resting on poles, the offence would be punishable under S. 435 or S. 436, Penal Code. In my opinion, there is no justification for drawing this distinction. Arson does not cease to be arson if the chhappar is first pulled down and then set fire to. It makes no difference whether the chhappar is lighted while it is still resting on poles or it is set fire to after being pulled down to the ground.

(5) It appears that Genda is in the army and, after discharge, he assumed some importance in his village. His opponent was one Rajendra Singh Ahir. Both of them were rival candidates in the Panchayat elections. Rajendra Singh's party became successful. Genda sent a petition to the District Magistrate. It is alleged that Mata Din Patwari wanted him to withdraw the petition which Genda did not do. Thus there was tension between the two parties. It is also pointed out that the Chamars, under the leadership of Genda, refused to do 'begar' on the occasion of Holi. Mata Din ordered that no Chamar would be permitted to throw Akhat in the Holi bonfire. This direction issued by Mata Din was disobeyed by the Chamars to the great annoyance of Mata Din. The latter is said to have held out a threat to Genda and his companions. One day before the occurrence Genda sent a telegram to the Superintendent of Police, Farrukhabad, informing him that Mata Din and his companions were threatening to loot his property. This threat came out true and the incident took place on the day following the despatch of the telegram.

(6) The participation of the appellants in the said assembly has not been seriously disputed before me. It is proved beyond doubt by the depositions of Genda (P. W. 2), Jwala (P. W. 5), Kunwar Bahadur (P. W. 6), Ajrail Singh (P. W. 7) and Natthu (P. W. 10) that the appellants

were members of the unlawful assembly. I see no reason to disbelieve these witnesses.

(7) Since the object of the assembly was to loot Genda's house and to cause damage to his property the assembly certainly amounted to an unlawful assembly.

(8) The learned counsel for the appellants has argued two points of law. In the first place, it is contended by him that since no injury was caused to any person, the offence of rioting was not made out. Rioting is defined in S. 146, Penal Code as follows:

"Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

It is clear from the aforesaid definition that to constitute rioting there should be the use of either "force" or "violence". Force is defined in S. 349, Penal Code as follows:

"A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing, or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described: First—by his own bodily power, Secondly—by disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person. Thirdly, by inducing any animal to move, to change its motion, or to cease to move."

It is apparent from this definition that force must necessarily be used against a human being and not against an inanimate object. If any motion, change of motion, or cessation of motion is caused to any property without affecting a human being, there is no "force" within the meaning of the term as used in S. 349, Penal Code.

(9) But the word "violence" is not necessarily confined to violence used against a human being. The term "violence" has not been defined in the Indian Penal Code and must therefore be given its ordinary dictionary meaning. If damage is caused by an unlawful assembly to any property without any harm being caused to any person, it can legitimately be argued that violence has been used. Reference may, in this connection, be made to the case of — 'Samaruddin v. Emperor', 40 Cal 367 at pp. 373-374 (A) where it was held that:

"In the second place, it is argued that the learned Judge's explanation of S. 147, Penal Code is faulty, and that 'violence' cannot mean violence against inanimate objects. No authority has been cited for such a proposition, and we see no reason for restricting the meaning of the word 'violence' in the manner stated. It could hardly be said that, if an unlawful assembly came together for the purpose say, of pulling down a man's house, and they proceeded to carry out the object, they could not be said to have used 'violence'."

(10) This view was followed in — 'In re Marimuthu Naidu', AIR 1923 Mad 606 (B). In that case a toddy shop was pulled down and damage was caused to toddy trees but no human being was injured. It was held that there was violence within the meaning of the term as used in S. 146, Penal Code and that the persons guilty of causing violence could be convicted under S. 147, Penal Code.

(11) With the above decisions I respectfully agree. It will therefore follow that in pulling down the chhappar, and setting fire to it and to hides, the members of the unlawful assembly did use "violence" within the meaning of the term as used in S. 146, Penal Code and were consequently guilty of rioting under S. 147. Penal Code.

(12) It is next argued that the only act proved against the appellants was participation in the unlawful assembly and for that single act they could not be convicted, on the one hand, under S. 147, Penal Code and, on the other, under S. 426/149, Penal Code. The very basis of this argument does not appear to be correct because there is enough evidence on the record to prove individual acts of violence by the appellants.

(13) (After referring to the evidence his Lordship proceeded): It is thus obvious that individual acts are proved against the appellants and they can be found guilty of mischief because of their individual acts and they can be held guilty of rioting because the unlawful assembly of which they were the members had been guilty of committing the acts of violence. Therefore there is no legal bar to their conviction under both sections.

(14) It may also be pointed out that S. 71, Penal Code on which reliance could possibly be placed prohibits punishment for, and not conviction under, two offences. And since the sentences have been made to run concurrently, there is no double punishment in this case either.

(15) The appellants examined witnesses in defence. Some of them proved enmity between the appellants' party and the Ahir group. Others attempted to prove that Genda had no house. This version has been disbelieved by the learned Additional Sessions Judge, and his finding on this point has not been challenged before me. The burnt chhappar and the house were seen by the Sub-Inspector who reached the place of occurrence shortly after the incident. Needless to say that the defence evidence is worthless.

(16) I am, therefore, of the opinion that the guilt has been brought home to the appellants and there is no force in this appeal.

(17) The sentences are, by no means, severe. I see no reason to reduce them.

(18) The appeal is dismissed. The appellants are on bail. They shall surrender themselves at once and undergo the rest of the imprisonment.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 ALL. 750 (Vol. 40, C. N. 369)

BRIJ MOHAN LALL J.

Vijayaram Raj Maharaja of Vizianagram, Applicant v. Dr. Vijaya Anand Gajpati Raj Bahadur and others, Opposite Party.

Civil Misc. No. 49 of 1953, D/- 5-5-1953.

Civil P. C. (1908), S. 22 — Notice to the other parties.

Notice given to plaintiff but not to co-defendants — Application under S. 22 cannot be entertained. (Para 3)

Anno: C. P. C., S. 22 N. 3.

C. B. Varma, for Applicant; A. P. Pandey, for Opposite Party.

ORDER: This is an application by a defendant under Ss. 22 and 23(3), Civil P. C. for the transfer of a civil suit pending in the Court of the Civil Judge, Banaras, to the Court of the Subordinate Judge, Visakhapatanam, or to the original side of the Madras High Court.

(2) Section 22, Civil P. C., runs as follows:

"Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed."

(3) It will thus appear that a condition precedent to the maintainability of an application under S. 22, C. P. C. is that a notice should be given by the applicant to the "other parties." The applicant had, before moving this application, served a notice on the plaintiff but has not to this day served notice on the other two persons, viz. Rani Vidyavati Devi and Rajkumar Vishweshwar, who are arrayed as opposite parties 2 and 3 respectively in this Court and who were co-defendants with the applicant in the Court below. The phrase "other parties" does not mean persons arrayed as opposite parties qua the applicant. It means all other persons impleaded as parties to the suit. Every one who is impleaded in the suit, whether as a plaintiff or as a defendant, is interested in the venue of the trial. If the case is to go to a different district or a different State, he may be vitally affected and his interest may suffer. It is, therefore, the intention of law that nobody should be permitted to move an application under S. 22, C. P. C. unless previous notice of such intention is given to all other parties to the suit.

(4) Since this preliminary requirement has not been complied with by the applicant, this application cannot be entertained. It is hereby rejected. Opposite party 1 shall get his costs from the applicant.

B/D.H.Z. Application dismissed.

A.I.R. 1953 ALL. 751 (Vol. 40, C. N. 370)
(LUCKNOW BENCH)

BEG J.

Ayodhya Nath and others, Applicants v. Ganga Prasad and others, Opposite Parties.

Criminal Reference No. 12 of 1952, D/- 20-4-1953.

(a) Criminal P. C. (1898), S. 146 — "Unable to satisfy himself as to which of them was then in possession."

In proceedings under S. 145, Criminal P. C., the Magistrate should first make every attempt to come to a conclusion on the merits of the case with a view to ascertain which of the contesting parties is actually in possession. It is only when he finds the evidence equally balanced, and is unable to make up his mind, that he is absolved of the responsibility of coming to a definite conclusion in the matter. The order itself need not be long, but, it should contain sufficient material to indicate to the revisional Court that the Court of enquiry had applied its mind to the case, and had made a genuine attempt to give a decision in the matter, and, in spite of it, had found itself unable to come to any definite conclusion in favour of either party, and hence it was taking action under S. 146. (Para 5)

Anno: Cr. P. C., S. 146 N. 5.

(b) Criminal P. C. (1898), S. 146 — Revision.

Where a magistrate passes a cryptic order under S. 146 without even referring to the voluminous evidence on record which shows that he had not applied his mind to the facts of the case the order will be set aside in revision. AIR 1923 Cal 483 (1), Ref. (Paras 5a, 6)

Anno: Criminal P. C., S. 146 N. 17.

K. N. Tandan, for Applicants 1 to 10; S. D. Misra, for Opposite Parties.

CASE CITED:
(A) ('23) AIR 1923 Cal 483 (1): 24 Cri LJ 575

ORDER: This criminal reference arises out of an application under S. 145, Criminal P. C. given by two persons, namely, Ganga Prasad & Sham Behari who were the first parties in the case. The second parties in the case were Lala Ajodhia Nath, Tiloki Nath, Shambhu, Jogai, Dularey Kori, Nanha Kumar and Ashraf. The application related to a large area of land not less than 58 bighas and 13 biswas situate in village Barwalia in the district of Lucknow. The allegations of the applicants were that the land in question was a pasture land, a lease for which had been taken by their ancestors for a nominal rent of Re. 1/- from the landlord.

(2) The opposite parties nos. 1 and 2 were the landlords. They alleged that they were the owners of the said land and had been in rightful possession of the same. They had given portions of it for cultivation to other parties. There were, however, certain proprietary groves of theirs on this land in which grass used to grow, and the applicants used to graze their cattle in the said groves.

(3) After the parties were summoned in the case, written statements were filed by them, and a large amount of evidence was adduced on behalf of both of them. After the conclusion of the entire evidence, the learned Magistrate passed a short order on 16-5-1951, to the following effect:-

"From the evidence on the record I am unable to satisfy myself as to which of the party was in possession of the subject of dispute when order of attachment and notice u/s. 145, Cr. P. C. was ordered. The subject of dispute shall, therefore remain attached until a competent Court has determined this question of possession between the two parties. The attached property shall remain in the custody of present supurdar till a receiver is appointed by the competent Court."

It may be mentioned that he had appointed the applicants as supurdars of the said property.

(4) The second parties went up in revision against the said order, and the learned Sessions

Judge of Lucknow has recommended that the order in question be set aside.

(5)Having heard the learned Counsel appearing for the parties, I am of opinion that this reference must be accepted. A perusal of the record indicates that the parties had adduced voluminous evidence in the case. The parties had produced not only oral evidence but also documentary evidence in support of their cases. The order of the Magistrate is too cryptic. It does not indicate that he had made any serious attempt to apply his mind to the facts of the case. In proceedings under S. 145, Criminal P. C., the Court should first make every attempt to come to a conclusion on the merits of the case with a view to ascertain which of the contesting parties is actually in possession. It is only when he finds the evidence equally balanced, and is unable to make up his mind, that he is absolved of the responsibility of coming to a definite conclusion in the matter. There is nothing in the order of the Magistrate to indicate that he found the evidence equally balanced. In fact, there is no reference to any evidence whatsoever in the order of the Magistrate. There should be some reasons in the order of the Magistrate to indicate the grounds as to why he found it impossible to come to any definite conclusion in the matter. Such grounds are clearly wanting in the impugned order. The order itself need not be long, but it should contain sufficient material to indicate to the revisional court that the Court of enquiry had applied its mind to the case, and had made a genuine attempt to give a decision in the matter, and, in spite of it, had found itself unable to come to any definite conclusion in favour of either party, and hence it was taking action under S. 146, Cr. P. C.

(5a) The only case cited by the learned Counsel for the first parties which can have an application to the facts of the present case is that reported in — 'Kanai Lal v. Hyder Ali Khan', A. I. R. 1923 Cal 483 (1) (A). In that case, their Lordships of the Calcutta High Court held that it was impossible to lay down a hard and fast rule when a High Court should interfere on the grounds of the brevity of an order passed in a proceeding under S. 146, Criminal P. C. I am in entire agreement with the proposition of law laid down therein. I am, however, of opinion that this was not a case in which a brief order of the type passed by the Magistrate would be a proper order. The case was a highly contested one, & a good deal of evidence both documentary and oral was adduced by the parties. In such a case the order should contain some reasons to indicate that the Magistrate had applied his mind to it, and had not shirked his responsibility in the matter.

(6) I accordingly accept this reference and set aside the order passed by the learned Magistrate. The file of the case should be sent to the District Magistrate concerned to be forwarded to any Magistrate competent in law to dispose of the same.

B/K.S.B. Reference accepted

A.I.R. 1953 ALL. 752 (Vol. 40, C. N. 371)
DESAI J.

Chhedi, Applicant v. The State.

Criminal Reference No. 352 of 1952, D/- 17-4-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 52(1)(a) — "Value of stolen property".

The words 'with reference to an offence under S. 411, Penal Code' mean the value of property recovered from accused and not the value of the total property stolen. Such property of less than Rs. 50 in value — Panchayati Adalat has exclusive jurisdiction to try the case. (Para 2)

(b) Penal Code (1860), S. 411 — Stolen property.

Accused can be said to have committed offence under section in respect of only the property recovered from him. In a case under the section Court is not concerned with rest of property stolen and which has not been recovered from the accused. (Para 2)

Anno: Pen. Code, S. 411 N. 4.

ORDER: This is a reference by the Sessions Judge of Allahabad, who recommends that the order of a Magistrate transferring the case to a Panchayati Adalat be set aside and that he be directed to try the case himself. After hearing the case the learned Magistrate came to the conclusion that the offence made out against the accused was punishable only under S. 411, Penal Code and that the value of the stolen property said to have been recovered from his possession was less than Rs. 50. He, therefore, thought that the offence was within the exclusive jurisdiction of a Panchayati Adalat and accordingly transferred it to the Panchayati Adalat having jurisdiction.

(2) Property worth more than Rs. 50/- was stolen though only property worth less than Rs. 50/- has been recovered. The learned Sessions Judge is of opinion that the value within the meaning of S. 52(1)(a), Panchayat Raj Act is the value of the property stolen and not that of the property recovered. If the case is of theft, then certainly the value of the total property stolen is the criterion; if it does not exceed Rs. 50/- the case must be tried by a Panchayati Adalat. But the case is of S. 411, Penal Code the value of the recovered property (i.e. the property that was found in possession of the accused) is the criterion and not the value of the total property stolen. In S. 411, Penal Code the Court is only concerned with the property that has been recovered; it is only in respect of that property that the accused is said to have committed an offence. The Court is not at all concerned with the rest of the property which has not been recovered. The Court has nothing to do with the offence of theft; it is not making any enquiry into the theft at all; it is only making an enquiry into the possession of stolen property. Therefore, the words "the value of stolen property" mean, with reference to an offence under S. 411, Penal Code, the value of the stolen property in respect of which the offence under S. 411, Penal Code is said to have been committed. As the value of the property said to have been recovered from the possession of the accused was less than Rs. 50/- the learned Magistrate rightly held that the case was exclusively triable by a Panchayati Adalat. His order is, therefore, correct and the reference is rejected.

C/M.K.S. Reference rejected.

A. I. R. 1953 ALL. 753 (Vol. 40, C. N. 372)

MALIK C. J. AND AGARWALA J.

Jit Bahadur Singh, Applicant v. The State.

Criminal Revn. No. 976 of 1951, D/- 14-7-53.

† (a) **Criminal P. C. (1898), Ss. 110, 118 and 123 — Order under — Applicability of Art. 22, Constitution of India — (Constitution of India, Art. 22).**

The detention to which the clauses of Art. 22 apply is made otherwise than by an order of a Court. Article 22 has therefore no application to an order made under Ss. 110, 118 and 123, Criminal P. C. and the said sections have not been rendered void by Art. 22. (Paras 4 and 7)

Anno: Criminal P. C., S. 110 N. 2; S. 118 N. 1; S. 123 N. 2.

(b) Criminal P. C. (1898), Ss. 110, 118 and 123 — Magistrate ordering that person concerned should furnish security and execute bond or, in alternative, go to jail for one year — Order is not bad in law. (Paras 8 and 9)

Anno: Criminal P. C., S. 118 N. 1; S. 123 N. 5.

P. C. Chaturvedi, for Applicant; Advocate General, for the State.

CASES CITED:

(A) ('51) AIR 1951 All 718: 52 Cri LJ 1251
(B) ('53) AIR 1953 SC 10: 1953 Cri LJ 180 (SC)
(C) ('50) AIR 1950 All 562: 52 Cri LJ 1282

AGARWALA J.: This is an application in revision against an order directing the applicant Jit Bahadur Singh to furnish two sureties in Rs. 200/- with a personal bond in the like amount and to be of good behaviour for one year and to undergo one year's rigorous imprisonment in the event of his failure to execute the bond and to furnish the sureties. The applicant was tried under S. 110, Criminal P. C. on the ground that he possessed a bad reputation in the vicinity of his village and had no ostensible means of livelihood. Notice under S. 110 read with S. 112, Criminal P. C., was issued to the applicant. A large number of witnesses were examined on behalf of the prosecution. They deposed that the applicant was by habit a thief and a house-breaker and was known as such in his locality. He was suspected and named in several crimes. The accused also examined a large number of witnesses, but the learned Magistrate preferring the prosecution evidence to the defence evidence passed the order set out above against the applicant. The applicant appealed to the learned Sessions Judge but was unsuccessful.

(2) In this revision application two points have been urged before us. In the first place, it has been urged that Ss. 110, 118 and 123, Criminal P. C., under which action has been taken against the applicant have become void as they are contrary to the provisions of Cls. (4) to (7) of Art. 22 of the Constitution. Section 110 enables a Magistrate mentioned in that section, who has received information that any person within the local limits of his jurisdiction is by habit a robber, house-breaker, thief or forger etc. to require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

Section 118 directs that if, upon such inquiry, it is proved that it is necessary for maintaining good behaviour that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly. Section 123 provides that if any person ordered to give security under S. 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall be committed to prison..... until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

The applicant's contention is that when the applicant is detained for not providing the necessary sureties and for not executing the necessary bond which he is called upon to do under S. 118, he is, in effect, undergoing preventive detention, and since such preventive detention may be for one year or even up to three years, it is in violation of Art. 22 (4) of the Constitution which provides for detention not exceeding three months except in certain cases with which we are not concerned. Further, the Court acting under Ss. 110, 118 and 123 does not comply with the formalities prescribed by that Article in regard to preventive detentions. In support of his contention Mr. P. C. Chaturvedi, learned counsel for the applicant, has relied upon the judgment of our brother Desai J. in the case of — 'Deodat Rai v. State', AIR 1951 All 718 (A) decided by a bench of this Court, in which the learned Judge expressed an opinion that detention in the circumstances similar to those described above, is preventive detention.

(3) Article 22 deals with the arrest and detention of a person. Clause (1) of Art. 22 lays down that after a person is arrested, he must immediately be informed of the grounds of his arrest and that he should not be denied the right to consult, and to be defended by a legal practitioner of his choice. Clearly the arrest and detention of a person contemplated by the clause must be before he is tried in a Court of law. The same implication is contained in Cl. (2)—a person who is arrested and detained in custody is required to be produced within twenty-four hours of his arrest before the nearest Magistrate. Clause (3) is an exception to clauses (1) and (2). One of the exceptions is in the case of a person who is arrested or detained under any law providing for preventive detention. Therefore preventive detention spoken of here is arrest and detention before being produced before a Magistrate or tried in a Court of law.

Then follow clauses (4), (5), (6) and (7) laying down the basic law for preventive detention. Clause (4) lays down that the preventive detention shall not be for a period longer than three months, except in two cases, first when an Advisory Board consisting of persons who are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention, and second when a law made by Parliament authorises the detention beyond a period of three months. Clause (5) provides that the grounds of detention shall be communicated to the detenu and an opportunity of making a representation against the order of detention shall be given to him as soon as possible. Clause (6) provides that the authority making the order of detention need not disclose facts which he considers to be against the public interest to disclose.

Both these clauses clearly indicate that preventive detention there spoken of is detention otherwise than by order of Court without any judicial enquiry. Preventive detention of the kind mentioned in Art. 22 is quite different and distinct from measures which may be ordered by way of prevention of crimes under Chapter VIII, Criminal P. C. These measures consist of (a) taking security for keeping the peace when a person is convicted of a crime—S. 106, (b) taking security for keeping the peace when there has been no conviction—S. 107 and (c) taking security for good behaviour — S. 108. This may be from three different kinds of persons: (1) persons disseminating seditious matter—S. 108, (2) vagrants and suspected persons—S. 109, and (3) habitual offenders — S. 110.

All these provisions deal with cases in which an order has to be made by a Magistrate for sufficient reasons which are proved to his satisfaction upon an enquiry duly held by him as a Court of law. Indeed the provisions of Chapter VIII, Criminal P. C. do not contemplate detention in the first instance. In the first instance security for keeping the peace of being of good behaviour is demanded and detention is ordered only when security is not furnished. It is true that an order for furnishing security may be passed before an order for arrest and preventive detention governed by Art. 22 of the Constitution is made, and the mere fact that security is first demanded and detention is ordered only when it is not furnished will not make the order of detention anything other than an order of preventive detention to which Art. 22 will apply.

But the main distinction, as we have already observed, between the preventive detention under Art. 22 and the preventive detention which is ordered on the failure of furnishing security under Chapter VIII, Criminal P. C., lies in this that the order in the latter case is made after full investigation by a Magistrate sitting as a Court of law in which full opportunity is offered to the person concerned to appear and defend himself by counsel and prove his case.

(4) This view finds support from a recent decision of the Supreme Court in — 'the State of Punjab v. Ajaib Singh', AIR 1953 SC 10 (B). This was a case under the Abducted Persons (Recovery and Restoration) Act, 1949 and the Court had to consider the nature of detention under Article 22. It was held that the detention dealt with in clauses (1) and (2) of Art. 22 does not refer to detention pursuant to a warrant issued by a Court of law. We are of opinion that the detention to which the other clauses of Art. 22 apply is also made otherwise than by an order of a Court.

(5) In — 'AIR 1951 All 718' (A) an order for furnishing security to be of good behaviour was passed against a person under the provisions of S. 3 (1) (a) (i) of the U. P. Prevention of Crimes (Special Powers) (Temporary) Act, No. 5 of 1949. The provisions of the Act were analogous to S. 110, Criminal P. C., but more drastic in their nature.

(6) The argument on behalf of the Crown in that case was that it was punitive detention because the order of detention was made on disobedience of the order to furnish security, but Desai J. repelled this contention and held that the order was not by way of punitive detention but was by way of preventive detention. In this respect he differed from the opinion of Dayal J. expressed by him in — 'Harpal Singh v. State', AIR 1950 All 562 (C) that the detention under S. 123-A, Criminal P. C. was punitive and not preventive.

(7) It may be that the detention ordered as a result of failure to furnish security under S. 123, Criminal P. C., may be described as preventive detention rather than punitive detention. This does not, however, conclude the matter and it does not follow that the preventive detention ordered under S. 123, Cr. P. C., is of the same nature as preventive detention to which Art. 22 applies. We are, therefore, of opinion that Art. 22 of the Constitution has no application to an order made under Ss. 110, 118 and 123, Criminal P. C., and the said sections have not been rendered void by Art. 22.

(8) The second point raised by the learned counsel for the applicant is that the order of the learned Magistrate that the applicant should either furnish the security and execute the bond or, in the alternative, go to jail for one year is bad in law.

(9) His contention is that such an order, framed in the alternative, cannot be passed under the provisions of Section 110, Cr. P. C. According to him an order for commitment to prison can only be passed at a later stage and in a separate proceeding by the Magistrate under the provisions of S. 123 of the Code of Criminal Procedure. We see no force in this contention either. When security is not furnished as directed by the Magistrate, the order of detention is made without any further enquiry. Therefore if the Magistrate in his order demanding security adds that if security is not furnished the person concerned will have to be sent to prison, he is merely issuing a warning to him which does not prejudice him at all. Before he is taken into custody on his failure to furnish security, the Magistrate will no doubt pass a fresh order under S. 123.

(10) In the result the application is dismissed.

A/V.R.B. Application dismissed.

A. I. R. 1953 ALL. 754 (Vol. 40, C. N. 373)

ASTHANA J.

Hari Ram, Appellant v. The State.

Criminal Appeal No. 1089 of 1950, D/- 3-5-1953.

Criminal P. C. (1898), Ss. 234 and 235 — Applicability.

Where the accused committed two offences under S. 436, Penal Code, by setting fire to houses of two different persons shortly one after the other, he can be tried jointly for the two offences either under S. 234 or under S. 235, Criminal P. C. (Para 2)

Anno: Cr. P. C., S. 234 N. 6, 7 and 8; S. 235 N. 2.

B. S. Darbari, for Appellant; A. G. A., for the State.

JUDGMENT: Hari Ram appellant was tried separately for two distinct offences under S. 436, Penal Code, for setting fire to the houses of Niroti and Mawasi on 13-1-1950, at about 4 A.M. in village Lakhanpur, police station Hari Parbat, district Agra. He was sentenced for these offences by the learned Additional Sessions Judge of Agra to five years' rigorous imprisonment and a fine of

Rs. 500/- and, in default of payment of fine, to one year's further rigorous imprisonment. The sentences of imprisonment in both the cases were made concurrent.

(2) Before dealing with these two appeals, I would like to point out that the observation of the learned Sessions Judge that the two offences, which appeared to have been committed during the same course of transaction according to the prosecution case, could not be tried together is not correct. According to S. 234, Criminal P. C., when a person was accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences he could be charged with and tried at one trial for any number of such offences not exceeding three in number. There can be no doubt that, in this case, the two offences of arson were committed shortly one after the other and, in view of the above provision, both of them could be tried at one trial. Section 235, Criminal P. C. provides:

"235(1) — If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for every such offence."

Even, according to this provision, the appellant could have been tried for both the offences at one trial and two separate trials were not necessary.

(3) As the evidence in both these cases is common, I propose to decide both the appeals together by one judgment.

(4) It appears that Hari Ram appellant and one Bhanwar Singh had joint cultivation in village Lakhanpur and there was some dispute between them on 12-1-1950, at about sunset over the division of 'gur', but this dispute was settled at that time on the intervention of some people. At about 9 P.M. the same day, the appellant went to the house of Niroti who is the uncle of Bhanwar Singh and beat him, his wife and Bhanwar Singh with lathis. Ram Chandra and Mawasi intervened in this fight and thereupon the appellant threatened Mawasi and Niroti with setting fire to their houses. Next morning at about 4 the appellant first went to the house of Niroti and set fire to his 'Chappar' with a match stick. Niroti was, at that time, sleeping in the room behind the Chhappar. He woke and saw the appellant setting fire to his chappar with a match stick. He raised an alarm and several persons reached there and extinguished the fire. The appellant ran away but was given a chase and was ultimately caught. It is further alleged that while he was running away, he set fire to the chappar of Mawasi. After being arrested, he was taken to the police station Hari Parbat which is at a distance of seven miles from the place of occurrence & there he was handed over to the police & a report was made by Niroti about the occurrence. After the report, the police went to the place of occurrence and saw that the 'chhappars' of Niroti and Mawasi were burnt.

(5) The defence of the accused was that he had been falsely implicated in the case on account of a dispute between him and Bhanwar Singh over the payment of the price of his share of the produce. He denied that he set fire to the 'chappars' of Niroti and Mawasi, as alleged by the prosecution.

(6) It was contended on behalf of the appellant that there was great delay in making the First Information Report and this fact indicated that it had been made after deliberation and consultation. As already stated above, the report was made at 2 P.M. on 13-1-1950 about ten hours after the occurrence. It was suggested on behalf of the prosecution that this delay was due to the fact that the appellant made resistance while he was being taken to the 'thana'. Considering the fact that the 'thana' was only seven miles from the place of occurrence and that the occurrence took place at 4 in the morning, there can be no doubt that there has been great delay in making the First Information Report. I am not satisfied that the explanation offered for the delay is reasonable. It is somewhat improbable that when the accused was being taken to the 'thana' by 3 or 4 persons, he was in a position to offer resistance to them.

(7) It was next contended that the prosecution case was somewhat improbable. (After discussion of the entire evidence his Lordship concluded as follows:)

(8) Considering the entire evidence on the record, it appears that the prosecution have not been able to make out any motive for the appellant to set fire to the 'chhappars' of Niroti and Mawasi. The prosecution evidence is full of irregularities and the prosecution witnesses, who have deposed to about the burning of the chhappars, are only chance witnesses. In my opinion, the prosecution case has not been satisfactorily proved against the appellant.

(9) As a result, I allow these appeals and set aside the conviction and sentence of Hari Ram appellant. He need not surrender to his bail. His baid bonds are discharged.

C/K.S.B. Appeal allowed.

A. I. R. 1953 ALL. 755 (Vol. 40, C. N. 374)
(LUCKNOW BENCH)

MISRA J.

Dayal Das, Applicant v. Smt. Sushila Devi, Opposite Party.

Appln. No. 232 of 1950, D/- 20-2-1951.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (III (3) of 1947), S. 7B(5) — Failure to make deposit within time — Effect.

Failure to make the deposit of the amount mentioned in the notice renders a tenant's objections unentertainable and that being so, sub-s. (5) comes into operation. There is no provision either in the Act or elsewhere which would justify an order for affording another opportunity to the tenant to make the deposit in order to have his objections heard. The Court has no jurisdiction to grant extension of time for payment of the deposit beyond the period specified in the notice and further in view of sub-s. (5) the Court must make an order for payment by the tenant of the costs of the application and its omission to do so is unwarranted. (Para 3)

R. B. Bisaria, for Applicant; S. D. Misra and P. S. Duvedi, for Opposite Party.

ORDER: These two revision applications are directed against an order passed by the learned Munsif, North Lucknow, under section 7-B, U. P. (Temporary) Control of Rent and Eviction Act (III of 1947). The order relates to a house situate on No. 1, Jagat Narain Road and occupied by Dayal Das, a refugee from Sind. The house was allotted to the aforesaid tenant on 29-4-1949, under S. 7(1)(a) of the Act. On 30-9-1950, Srimati Sushila Devi, purporting to act as a landlord applied to the learned Munsif for issue of notice to the

tenant under sub-s. 3 of section 7-B calling upon him to pay arrears of rent amounting to Rs. 1625/- at the rate of Rs. 125/- p.m. from 29-8-1949, till 29-9-1950. The application contained the particulars enjoined by sub-section (2)(a). It was verified in the ordinary way and the learned Munsif issued the notice prayed for. The rent was not deposited within the time specified.

The tenant, however, attempted to file objections regarding the maintainability of the application by Sushila Devi and the rate of rent claimed by her but, in view of the proviso to sub-section (7) which says:

"That the tenant shall not be permitted to file any objections unless he has deposited in Court the amount mentioned in the notice"

the learned Munsif refused to consider them. He, nevertheless, satisfied himself by reference to the municipal assessment list that Sushila Devi is the real landlord and was, therefore, entitled to the aid of S. 7-B of the Act. But instead of ordering the tenant's eviction and directing him to pay the costs of the application as he should have done in view of sub-section (5) the learned Munsif gave the tenant ten days from the date of his order for paying the sum of Rs. 1625/- if he desired his objections to be entertained and ordered that if the tenant failed to deposit the amount within the period stated, the application would be treated as unopposed and an order for the eviction of the tenant would be issued under S. 7-B, sub-section (5). Both the tenant and the landlord are dissatisfied with the aforesaid order and they have come up to this Court by way of revision under S. 115, C. P. C.

(2) On behalf of Dayal Das, an attempt is made by his learned counsel to persuade me to look into the grounds of objection and to determine whether or not the rate of rent claimed is the proper rent and further whether Sushila Devi is the real landlord. It has already been stated that the condition upon which the tenant's objections against the notice could be entertained has not been complied with inasmuch as the sum of Rs. 1625/- was not deposited by him. It is, therefore, not possible to consider the objections on merits.

(3) On behalf of the landlord it is contended that the learned Munsif had no jurisdiction to grant extension of time for payment of Rs. 1625/- beyond the period specified in the notice and further in view of sub-section (5) which mandatorily enjoins that on the failure of the tenant to make the deposit or to file objections, the Court must make an order for payment by the tenant of the costs of the application his omission to do so is unwarranted. The argument, in my opinion, is sound. Failure to make the deposit of the amount mentioned in the notice renders a tenant's objections unentertainable and that being so, it must be held that sub-section (5) came into operation.

That sub-section provides:

"Where the tenant has been duly served with the notice under sub-section (3) but has failed to deposit the amount mentioned within the time allowed therein, and he does not file any objection, the Munsif shall, notwithstanding anything in the Transfer of Property Act, 1882, make an order directing that the tenant be evicted from the accommodation and pay the costs of the application."

There is no provision either in the Act or elsewhere which would justify an order for affording another opportunity to the tenant to make the deposit in order to have his objections heard. The order passed by the Court below is, therefore, set aside.

(4) The result is that S. 115-Application No. 38 of 1951 is allowed and S. 115-Application No. 232 of 1950 is dismissed. Dayal Das shall be evicted from the accommodation and he shall pay the costs of the application to the landlord. Having regard to the circumstances of this case, the costs of this Court shall be borne by the parties themselves. The stay order dated 15th November, 1950, is discharged and Civil Miscellaneous Application No. 1418 of 1950, is dismissed.

B/D.H. Order accordingly.

A. I. R. 1953 ALL. 756 (Vol. 40, C. N. 375)

AGARWALA AND CHATURVEDI JJ.

Sujan Singh and others, Appellants v. Lochan Singh and others, Respondents.

First Appeal No. 545 of 1944, D/- 15-7-1953.

(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11 (2) — Scope.

Section 11 (2) does not say that the claimant must have a right on the date on which a notice under S. 9 is published in the official Gazette. All that the section requires is that the claim to be made before the Special Judge must be filed within a period of three months from the date of the publication of the notice. (Para 1)

(b) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11 (2) — Object.

The object of S. 11 (2) is that the Special Judge may determine what properties belonging to the landlord-applicant are available for the satisfaction of the claims against him. (Para 1)

J. Swarup, for Appellants; Dr. N. P. Asthana and K. B. Asthana, for Respondents.

AGARWALA J.: An application under S. 4, Encumbered Estates Act was made by Thakur Sujan Singh and his sons on 17-4-1936, and a written statement was filed by them before the Special Judge on 16-8-1936. In this written statement they claimed the property in dispute in the present proceedings to belong to them. In due course notices under S. 9 were published on 23-12-1936. A claim under S. 11 of the Act was filed by Srimati Dhan Kunwar in respect of the property in dispute on the allegation that the property originally belonged to Kehri Singh, her husband, that upon his death it was inherited by her as a Hindu widow, that it was sold in execution of a decree against her and purchased 'benami' by Girwar Singh, father of Sujan Singh, appellant, that she paid the auction price and that she had been throughout in possession of the property.

Before the objection could be decided Smt. Dhan Kunwar died on 12-10-1940, leaving Lochan Singh, a reversioner of Kehri Singh. On 26-10-1940, Lochan Singh filed a claim before the Special Judge and his case was that in addition to the ground taken by Smt. Dhan Kunwar that the property was purchased 'benami' by Girwar Singh, there was another ground on which his claim should be decreed, namely, that Smt. Dhan Kunwar was merely a life estate holder, and even if Girwar Singh purchased anything, he purchased merely the life estate of Dhan Kunwar, and his right came to an end on the death of Smt. Dhan Kunwar and the property reverted to the reversioner of Kehri Singh, that is, Lochan Singh claimant.

Sujan Singh and his sons' reply was that Smt. Dhan Kunwar had become unchaste during the lifetime of her husband, and, therefore, did not inherit the property under the Hindu law, but

that since she remained in possession of the property for over 12 years, she acquired an absolute interest therein and in execution sale against her the absolute interest in the property was purchased by Girwar Singh. Sujan Singh also pleaded that Lochan Singh, in any case, had no 'locus standi' to come in and file an objection under S. 11, Encumbered Estates Act, because he had no title to the property on the date of publication in the gazette under S. 9. It may be mentioned that Lochan Singh's claim having been made more than three months after the notice had been published in the Gazette under S. 9, he made an application for the extension of time on the ground that he could not have made the objection earlier. This application was allowed by the learned Special Judge.

Ultimately he also allowed the claim of Lochan Singh and declared that the property in dispute was not liable to be attached and sold in satisfaction of the claims against Sujan Singh and others—landlord-appellants before us. Sujan Singh and others have now come up in appeal against his order and the only question raised by the learned counsel for the appellants is that Lochan Singh could not maintain an independent claim in the Court below. The contention of the learned counsel is that in order to maintain a claim under S. 11 the claimant must be entitled to the property on the date of the publication of the notice under S. 9, and that any person who was not so entitled cannot file an objection under S. 11, though he may file a separate suit to establish his right to the property. Section 11 runs as follows:

> "11 (2) Any person having any claim to the property mentioned in such notice shall within a period of three months, from the date of the publication of the notice in the official gazette make an application to the Special Judge stating his claim and the Special Judge shall determine whether the property specified in the claim, or any part thereof, is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant."

Learned counsel says that the words "within a period of three months" is a period of limitation and shows that the objector must have a subsisting claim on the date when the period of limitation commences to run, and that, therefore, any person who had no such right on that date, is not entitled to maintain an objection under that section. In our opinion, this contention is not sound. The section does not say that the claimant must have a right on the date on which a notice under S. 9 is published in the official gazette. All that the section requires is that the claim to be made before the Special Judge must be filed within a period of three months from the date of the publication of the notice. There is neither reason nor authority for reading into the section something that is not there.

The object of the section is that the Special Judge may determine what properties belonging to the landlord-applicant are available for the satisfaction of the claims against him. If the landlord-applicant had a claim to a particular property on the date on which his application under S. 4 of the Act is transferred to the Special Judge, but his title is lost before the Special Judge makes a declaration under S. 11, it is obvious that the property ceases to be available for the satisfaction of the claims against him.

No doubt, the landlord-applicant's title to any property which belonged to him on the date on which his application under S. 4 of the Act was transferred by the Collector to the Special Judge cannot cease by transfer 'inter vivos' because that is prohibited under S. 7. But his title to the property may cease in other ways. For instance, if his title was not absolute but limited in duration of time, or was subject to defeasance upon the happening of a contingency, the time may well expire, or the contingency may happen after the aforesaid date. It is conceded that the person who thus obtains title to the property may file a suit for the declaration of his title and the property will then not be available for the satisfaction of the claims against the landlord-applicant. There is no reason why the simpler and more expeditious remedy provided by S. 11 be not available to the claimant.

(2) There is no force in this appeal. It is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 ALL. 757 (Vol. 40, C. N. 376)

MALIK C. J. AND V. BHARGAVA J.

Bishambhar Nath Niranjanlal, Applicant v. Commr. of Income-tax, U. P., Lucknow, Respondent.

Misc. Case No. 7 of 1950, D/- 8-1-1953.

Income-tax Act (1922), S. 10 (1) — Profits from sale of property.

A, a money-lender, advancing B certain loan for constructing bungalow—B mortgaging the bungalow to A as security — Subsequent sale by B to A of the bungalow for principal amount Rs. 38,000/- only — Immediately after sale A engaging a broker and selling bungalow to C for Rs. 55,000/- — Difference Rs. 15,000 excluding brokerage held assessable as profits from money-lending business. (Para 3)

Anno: Income-tax Act, S. 10 N. 2.

G. P. Bhargava, for Applicant; S. C. Das, for Respondent.

CASE CITED:

(A) ('41) AIR 1941 All 135: 1941-9 ITR 9

MALIK C. J.: In this reference under S. 66 (1), Indian Income-tax Act, the question referred to us for decision reads as follows:

> "Q. Whether, in the circumstances of the case, the profits resulting from sale of the bungalow in question to Nirwani Akhara, which was acquired in the carrying on of the money-lending business, was assessable to tax?"

(2) The assessee, Messrs. Bishambhar Nath Niranjan Lal, carried on money-lending business and, in the course of that business, had lent to one Brij Mohan Vyas certain sums of money for construction of a bungalow. The bungalow was mortgaged to the assessee for Rs. 30,000/- as security for the loans advanced to Brij Mohan Vyas. Further loans were advanced after that mortgage and, on 25-2-1942, it was found that the total sum advanced to Brij Mohan Vyas amounted to Rs. 38,675/-. A sum of about Rs. 10,000/- was found due as interest on the amount advanced as loan. On that very date, i.e., 25-2-1942, Brij Mohan Vyas sold the bungalow to the assessee and the sale-deed

purported to be only for Rs. 38,675/-, the capital sum advanced, and the claim for payment of interest was relinquished. The loan account of Brij Mohan Vyas was thus squared up. Soon after the purchase of the bungalow, the assessee employed a broker to sell the bungalow. On 19-4-1942, the Nirwani Akhara of Allahabad entered into an agreement with the assessee for purchase of the bungalow and paid the earnest money. On 4-5-1942, the sale-deed in respect of this bungalow was executed in favour of Nirwani Akhara for Rs. 55,000/-. The assessee paid Rs. 1,109/- as brokerage and sale expenses to the broker engaged by him. After deducting the capital amount of Rs. 38,675/- and the brokerage etc. amounting to Rs. 1,109/-, the Income-tax Officer treated the balance of Rs. 15,216/- as profits and added it to the return made by the assessee, thus making the total taxable income amount to Rs. 18,333/-. The assessee's contention was that this sum of Rs. 15,216/- was not income made by him in the course of business but was in the nature of a windfall and was thus not taxable. He went up in appeal before the Appellate Assistant Commissioner of Income-tax who, after reducing the taxable profits by about Rs. 2,000/-, maintained the order of the Income-tax Officer in other respects. In appeal, the Income-tax Appellate Tribunal set out, in some detail, the contentions of the assessee and the Income-tax Department and, after referring to four cases, held that the last case of — 'Beharilal v. Commr. of Income-tax, C. P. and U. P.', AIR 1941 All 135 (A), referred to by them, was on all fours with the present case. They were, therefore, inclined to accept the contention of the Department that

"the profits ultimately resulting from the sale of the bungalow to the Akhara were made as a result of a scheme of profit making, arising out of the money-lending business and as such were assessable to tax."

(3) None of the cases referred to in para. 5 of the appellate order of the Tribunal has much relevancy to the question for decision before us and it would have been much more satisfactory if the Income-tax Appellate Tribunal had set out in detail the findings of fact on which their conclusion was based. By reason of this defect in the appellate order and by reason of further defect in the statement of the case, in which again the findings of fact were not clearly stated, learned counsel for the assessee argued, at some length, that there were no materials on the record on which the conclusion could be based and pressed for further statement of the case. We do not, however, feel disposed to accept this request as, in spite of the defective nature of the appellate order of the Tribunal, the following facts clearly emerge therefrom:

(1) That the assessee used to carry on money-lending business and, in the course of that business, had lent money to Brij Mohan Vyas.

(2) That the bungalow, which was under construction and for which Brij Mohan Vyas had borrowed money, was given in security.

(3) That the amount of loan went on mounting up and reached the figure of Rs. 38,675/- which, according to the assessee himself, was more than the price of the bungalow and, on this sum of Rs. 38,675/-, a further sum of Rs. 10,000/- had accumulated as interest.

(4) That Brij Mohan Vyas transferred the bungalow in satisfaction of his total liability.

(5) That the assessee immediately on acquisition of the property attempted to sell it to the best advantage, and engaged a broker for that purpose; and

(6) that it was not the contention of the assessee that he had purchased the bungalow by way of an investment of his capital.

From these facts and from the further fact that no explanation whatsoever was given why, if the assessee had intended to invest his money in the bungalow, it was necessary for him to sell it off so soon after the purchase, the income-tax authorities were justified in coming to the conclusion that the bungalow was acquired in the course of the money-lending business with the object of its being transferred at the best price available in the market so that the assessee might not lose on the loan transaction entered into with Brij Mohan Vyas and that, for the short period that he kept it, it was held by him as his stock-in-trade.

(4) We are, therefore, of the opinion that the answer to the question referred to us for decision must be in the affirmative. The assessee must pay costs to the Department which we assess at Rs. 300/-.

B/D.R.R. Reference answered.

A. I. R. 1953 ALL. 758 (Vol. 40, C. N. 377)

BRIJ MOHAN LALL J.

Jagdish Prasad and others, Applicants v. Mahadeo, Opposite Party.

Civil Revn. No. 219 of 1953, D/- 15-7-1953.

Provincial Small Cause Courts Act (1887), S. 17 (1), Proviso — Security bond presented beyond 30 days of 'ex parte' decree.

If the security is furnished within 30 days of the 'ex parte' decree, the application for setting aside the decree, though in fact presented earlier, may also be deemed to have been presented on that day and both may be deemed to be within time. But if the security bond is presented after the expiry of 30 days the application must be rejected for non-compliance with the proviso. (Paras 3 and 4)

Anno: Provincial Small Cause Courts Act, S. 17 N. 3.

J. J. Chatterji, for Applicants.

ORDER: This is an application in revision by the defendants under S. 25, Small Cause Courts Act.

(2) An ex parte decree was passed against the applicants on 24-10-52. On 7-11-52 they presented an application under Order 9, Rule 13, C. P. C. for setting aside the said decree. On the same day, they presented an application seeking the court's permission to file security of an immovable property. Permission was given to them to file a security bond hypothecating immovable property. On 21-11-52 they presented an unregistered security bond. They asked for one month's extension so that they might get the bond registered. The bond was returned to them on 24-11-52 and they presented the bond, duly registered, on 8-12-52.

(3) When the application for setting aside the 'ex parte' decree came up for hearing before the learned Judge the decree-holder raised a contention that the requirements of S. 17 of the Provincial Small Cause Courts Act had not been compiled with. This section requires that before presenting an application for setting aside an 'ex parte' decree the applicant should seek the direction of the court as to the nature

of security he has to furnish and the security prescribed by the Court should accompany the application for setting aside the ex parte decree. There was no compliance with this provision of law. Putting strict interpretation on the language of this section the application for setting aside the ex parte decree could be rejected on the ground that it was accompanied neither by cash deposit nor by the security bond.

But I am alive to the fact that in certain reported cases a lenient view has been taken and it has been held that if security is furnished within 30 days from the date of the ex parte decree, the aforesaid defect may be condoned. This view is based on a fiction, viz., that the application for setting aside the ex parte decree should be deemed to be presented on the day on which the security of the nature prescribed by the court is actually furnished. If the security is furnished within 30 days of the ex parte decree the application, though in fact presented earlier, may also be deemed to have been presented on that day and both may be within time.

But unfortunately in this case the security bond was presented, duly executed on 8-12-52. By that date the period of 30 days had expired. The unregistered bond as filed on 21-11-52 was a worthless paper. If the application is treated as having been presented on 8-12-52 it was beyond time. It is admitted to have been presented on the day on which it was actually filed or any subsequent day within 30 days of the decree it remained unaccompanied by the security bond. In the former case there would be the bar of limitation and in the latter case the provisions of S. 17, Small Cause Courts Act, would remain uncomplied with. In either case the application must be rejected. The Court had no power to either extend the time of presenting the application or of filing the security bond.

(4) The learned counsel for the applicants has referred to S. 47, Registration Act, which says that when a document is registered the registration takes effect from the date of execution. In accordance with this principle the registration may date back to 21-11-52. But the question still remains whether the applicants did, at any stage, present before the court a duly executed bond within the period of limitation. Surely they did not do so. In the circumstances they did not comply with the requirements of S. 17, Small Cause Courts Act. The learned Judge was perfectly right in rejecting this application on the ground that the requirements of the proviso to S. 17 (1), Provincial Small Cause Courts Act, had not been complied with.

(5) I see no force in this revision. It is hereby rejected.

B/V.R.B. Revision rejected.

A. I. R. 1953 ALL. 759 (Vol. 40, C. N. 378)

(LUCKNOW BENCH)

V. BHARGAVA J.

Nakchhed Singh and others, Plaintiffs-Appellants v. Bijai Bahadur Singh and another, Defendants-Respondents.

Second Appeal No. 290 of 1947, D/- 17-4-1953.

Hindu Law — Succession — Heirs of murderer.

Where persons are claiming the right to the property of the murdered person not as heirs of the murderers but as being the nearest reversioners of the murdered person they are clearly entitled to succeed to his property. The mere act of their father having committed the murder and having thus become disentitled to succeed to the property of the murdered person would not take away their right which they had acquired by birth. AIR 1924 PC 209, Foll.; AIR 1942 Mad 277, Rel. on. (Para 4)

R. B. Chaudhri and Sri Ram, for Appellants; M. L. Trivedi, for Respondents.

CASES CITED:

(A) ('24) AIR 1924 PC 209: 48 Bom 569
(B) ('08) 10 Bom LR 149: 32 Bom 275
(C) ('42) AIR 1942 Mad 277: 201 Ind Cas 207

JUDGMENT: This is a plaintiffs' appeal arising out of a suit for possession of certain property mentioned in the plaint. The facts that are either admitted or which have been found by the lower Court and are no longer questioned in this appeal are that the property in suit belonged to one Ram Harakh Singh. In the year 1916 Ram Harakh Singh was murdered by Ram Anand Singh and Ram Narain Singh, against whom the suit was brought by the appellants impleading them as defendants. Ram Anand Singh and Ram Narain Singh both died during the pendency of this appeal in this Court. In their place Bijai Bahadur Singh and Ram Pal Singh sons of Ram Anand Singh have been substituted as legal representatives. They were impleaded as legal representatives of Ram Anand Singh and Ram Narain Singh. These two respondents, Bijai Bahadur Singh and Ram Pal Singh were also impleaded as claiming in their own right. When Ram Harakh Singh died in the year 1916, he left his widow, Abhairaji but no issues. Abhairaji, therefore, succeeded to this property as widow's estate and held it until 1933 when she died. On her death one claimant to the property in suit was Menda a daughter of Ram Harakh Singh and Abhairaji but it has been held that under the custom prevailing in this family, daughters are not entitled to the succession of the property of their father and, consequently, Menda's claim to the property was negatived.

(2) Thereafter the nearest heirs of Ram Harakh Singh were the defendants, Ram Anand Singh and Ram Narain Singh who had murdered him. It has also been found that in case Ram Anand Singh and Ram Narain Singh be excluded from succession to the property of Ram Harakh Singh the nearest heirs claiming under the Hindu Law would be the present respondents, Bijai Bahadur Singh and Ram Pal Singh and thereafter would come the appellants who are more distantly related to Ram Harakh Singh than Bijai Bahadur Singh or Ram Pal Singh. Since I am concerned only with these findings and these findings are not challenged in this Court nor can they be challenged, it is unnecessary to give the exact relationship of the respondents or the appellants with Ram Harakh Singh. The plaintiffs-appellants claim that, since Ram Harakh Singh had been murdered by Ram Anand Singh and Ram Narain Singh not only Ram Anand Singh and Ram Narain Singh are excluded from succeeding to the property of Ram Harakh Singh but even the sons of Ram Anand Singh, who are the present respondents, cannot claim to succeed to that property. This plea of the

appellant has been rejected by both the lower Courts. The appellants have come up to this Court only to challenge this view taken by the lower Courts on this plea.

(3) The learned Judge of the lower Court has quoted extensively from the texts of the ancient writers on Hindu Law and has tried to deduce a principle therefrom in order to apply it to this case. In my opinion, it was wholly unnecessary to enter into any such learned discussion of the texts of Hindu Law. Even the learned Judge himself ultimately had to base the decision on the interpretation of the principle laid down by their Lordships of the Privy Council in — 'Kenchawa v. Girimallappa', AIR 1924 PC 209 (A). In that case, their Lordships of the Privy Council considered the argument that Hindu Law makes no provision for disqualifying a murderer from succeeding to the estate of his victim and held that it was unnecessary to go into this question. They laid down that the principles of equity, justice and good conscience would exclude a murderer from succeeding to the property of the murdered person. The exclusion of various classes of heirs such as an impotent person, an outcast, a mad man and an idiot under the text of Hindu Law is not necessarily based on the principles of justice, equity and good conscience. In most cases the exclusion is due to some disability where the exponents of the Hindu Law felt that it would be unjustified to allow the property to pass into the hands of such a person. In a case where the exclusion is sought on the basis of equity, justice and good conscience, the principles applied in Hindu Law to those other cases would afford no comparison. The decision of this case depends almost entirely on the interpretation to be put on the view expressed by their Lordships of the Privy Council in the case cited above.

(4) Their Lordships when giving their decision enunciate the principle in the following words:

> "The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent."

The argument before me and, it appears, in others Courts also where similar cases have arisen, has centred round the interpretation of the words "who forms the stock for a fresh line of descent." It has been argued that, if there is a direct descendant of the murderer, he must be treated as belonging to the stock of the murderer in his line of descent and, consequently, the language used by their Lordships of the Privy Council would exclude such person from succeeding to the property of the murderer person. This interpretation of the words does not appear to me to be justified. When their Lordships used the words "the stock for a fresh line of descent", I believe, they meant that the property which is the subject-matter of dispute for succession should not be treated as belonging to a nucleus formed by the murdered person and should not pass to those persons who would claim succession as descendants of that nucleus. This might be put in another way also viz. that the property itself should not be treated as stock belonging to the murdered person so as to pass on in the line of descent of that murderer person. The interpretation in either way only means that their Lordships intended to exclude from succession those persons who claimed their title through a murderer, and who would have no title at all unless at one time the property in suit became the property of the murderer.

Learned counsel's argument that the sons, who are descended from the murderer in his line of descent should be excluded from succession even though they might be entitled to claim the property without any assertion that the property at one time had vested in their father who was the murderer, cannot be accepted as giving the correct interpretation. All that their Lordships meant in that case was that the property was not to pass to the descendants of the murderer if they claimed the property as the heirs of the murderer. There was no intention of excluding a person who, though he might be the descendant of the murderer, did not claim through the murderer after treating the property as having once belonged to the murderer. This interpretation of the words used by their Lordships of the Privy Council is the only one that appears to be consistent with the further view expressed by them in the next paragraph in which the decision of the Bombay High Court in — 'Gangu v. Chandrabhagabai', 32 Bom 275 (B) was considered by their Lordships. That was a case where the wife of a murderer was held entitled to succeed to the estate of the murdered man. Their Lordships did not disapprove that case and it was not overruled. That case was merely distinguished on the ground that the wife did not deduce her title through her husband but got a title because of the principle of Hindu family law that a wife becomes a member of her husband's gotra, an actual relation of her husband's relations in her own right or as it is called in Hindu Law, as a gotraja-sapinda. The wife gets her status in the family of her husband simply on account of marriage. It is only by virtue of the marriage that she acquires the gotra of the husband and the principle laid down by their Lordships of the Privy Council in approving the decision of the Bombay High Court in that case shows that, even if the husband becomes a murderer and the wife is not entitled to claim any right to the property as if the property had once belonged to her husband, she does not lose her status as a gotraja-sapinda of her husband and she can succeed to the property of the murdered person in the capacity of a gotraja-sapinda.

The case of the sons of a murderer would be no different from the case of the wife of a murderer. The wife becomes a gotraja-sapinda by virtue of her marriage with the murderer and the fact that the murderer becomes non-existent for the purposes of deciding the succession to the estate of the murdered person does not affect the status of the wife as a gotraja-sapinda. Similarly the sons of the murderer become gotraja-sapindas by virtue of their birth as sons of the murderer and in case the wife does not lose her status as a gotraja-sapinda, there is no reason why the sons should lose that status either. In the case before me Bijai Bahadur Singh and Ram Pal Singh are claiming the right to the property of Ram Harakh Singh not as heirs of the murderers, Ram Anand Singh and Ram Narain Singh, but as being the nearest reversioners of Ram Harakh Singh. They are clearly entitled to succeed to his property and there is nothing at all which would exclude them from such succession. The mere act of their father, Ram Anand Singh having committed the murder and having thus become disentitled

to succeed to the property of Ram Harakh Singh, would not take away their right which they had acquired by birth and which did not depend upon the right which Ram Anand Singh and Ram Narain Singh lost by committing the murder.

This view that has been taken by me is clearly in line with the view taken by a learned single Judge of the Madras High Court in — 'Stanumurthiayya v. Ramappa', AIR 1942 Mad 277 (C). In that case also the same interpretation was placed upon the words used by their Lordships of the Privy Council in the case cited above. No case has been cited before me in which any different interpretation might have been put on these words. I must, therefore, hold in this case also that Bijai Bahadur Singh and Ram Pal Singh were entitled to succeed to the property of Ram Harakh Singh and, consequently, the plaintiffs appellants who were more distant reversioners of Ram Harakh Singh could not claim any right in the property. Their suit has been rightly dismissed and the appeal is also dismissed with costs. Leave to appeal to a Bench is granted.

B/D.H.Z. Appeal dismissed.

A. I. R. 1953 ALL. 761 (Vol. 40, C. N. 379)

MALIK C. J. AND V. BHARGAVA J.

Nokhey Lal, Defendant-Appellant v. Pt. Swarup Narain and another, Plaintiffs-Respondents.

Letters Patent Appeal No. 40 of 1949, D/- 1-5-1953, from judgment of Bhargava J. in S. A. No. 1305 of 1946, D/- 22-2-1949.

Limitation Act (1908), Art. 75 — Applicability and scope.

Article 75 applies to a case where the promissory note or bond is so worded that, on a default made in payment of one instalment, the creditor has to claim the whole amount or to a case where the creditor relies on the default clause and bases his claim on that cause of action. But where the creditor, completely ignored the default clause and, though no instalments were ever paid, he did not enforce the default clause, and claimed merely the instalments due to him and recoverable at the time when the suit was filed there was no reason to apply Art. 75 and the mere fact that he claimed all the instalments that had fallen due and were not time-barred, did not make any difference. AIR 1952 All 900 (FB), Foll. (Paras 3, 4)

Anno: Limitation Act, Art. 75 N. 2.

K. C. Saksena, for Appellant; Babu Ram Awasthi, for Respondents.

CASE CITED:

(A) ('52) AIR 1952 All 900: 1952 All LJ 583 (FB)

MALIK C. J.: This is a defendant's appeal filed against a judgment of a learned Single Judge of this Court.

(2) The suit for recovery of money due on a bond, dated 15-5-1938, was filed on 4-12-1944. The amount of the bond was payable in thirteen instalments of Rs. 100/- each and a fourteenth instalment of Rs. 64/-. No instalment was, however, paid and the suit was brought for the recovery of the last eight instalments, the first six having become time-barred. The defence was that the whole claim had become due under the default clause in the bond. The clause relied upon is in these terms:

"In the event of default in payment of any instalment ('basurat kisi kisht khilafi ke), the creditor will have the right ('daen ko ikhtiar hoga') to recover his whole money in a lump sum ('apna kul rupya ek musht') with interest at Re. 1/- per cent per mensem."

This clause clearly meant that the amount of the bond was payable by instalments but if the defendant was not regular in his payments, the creditor, if he so desired, could claim the whole amount in a lump sum at a particular rate of interest. The creditor did not choose to avail himself of the default clause and treated the bond as a pure instalment bond and brought the suit for recovery of the last seven instalments. The question is whether the creditor was bound to claim the whole amount on the first default made by the debtor. Evidently, from the language of the bond, it is clear that no such obligation was cast on the creditor.

(3) Reliance is placed by learned counsel on the language of Art. 75, Limitation Act. Learned counsel urged that the question, whether, under the contract, the creditor was or was not bound to claim the amount within three years of the first default, was not relevant and, by reason of the provisions of Art. 75, the suit had to be brought within three years and not thereafter. Article 75 provides that on a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole amount shall become due, the period of limitation would be three years from the date when the default was made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver. The language of the Article makes it clear that it applies to a case where the promissory note or bond is so worded that, on a default made in payment of one instalment, the creditor has to claim the whole amount or to a case where the creditor relies on the default clause and bases his claim on that cause of action. In a Full Bench decision of this Court in — 'Sheo Lal v. L. Devi Das', AIR 1952 All 900 (A), a similar question was considered with reference to an instalment decree and it was pointed out that the decree providing for the payment of the amount by instalments is for the benefit of the judgment-debtor, and the clause giving the decree-holder a right, if he so desired, to claim the whole amount is for the benefit of the decree-holder, and a right given to him under the decree should not be treated as an obligation compelling him to take action at the risk of getting his decree time-barred. It was also pointed out that if there is more than one cause of action available to a creditor and the document is so worded that on the happening of a contingency he is not compelled to rely on only one of them, there is no reason why the period of limitation appropriate to the cause of action on which the claim is based should not be applied to determine the question whether the claim is within time. Though the Full Bench decision was under Art. 181, Limitation Act, it was pointed out that the same principles, which govern the case of an instal-

ment bond, govern the case of an instalment decree also.

(4) If the creditor had relied on the default clause and brought his suit on the basis thereof, the default being the cause of action for the suit, no doubt, he would have to bring his suit within three years of the first default as provided for in Art. 75, Limitation Act, unless that default had been waived. The creditor, however, in the case before us, completely ignored the default clause and, though no instalments were ever paid, he did not enforce the default clause, and claimed merely the instalments due to him and recoverable at the time when the suit was filed. In the circumstances of this case, there was no reason to apply Article 75. If after the first six defaults the plaintiff had brought a suit claiming merely the 7th and 8th instalments it could not be urged that he had relied on the default clause and had not waived it. The mere fact that he claimed all the instalments that had fallen due and were not time-barred should not make any difference. The case was, to our minds, correctly decided.

(5) The appeal has no force and is dismissed with costs.

C/H.G.P. Appeal dismissed.

A. I. R. 1953 ALL. 762 (Vol. 40, C. N. 380)

MALIK C. J. AND V. BHARGAVA J.

L. Jeewanlal, Applicant v. Commr. of Income-tax United Provinces, Lucknow, Respondent.

Misc. Case No. 45 of 1951, D/- 5-5-1953.

(a) Excess Profits Tax Act (1940), S. 2 (5) — Income from salary or business.

The definition of "business' in the Excess Profits Tax Act is very wide, and it includes in its scope not only work which is considered normally to be business, i.e., trade, commerce and manufacture, but also includes within its scope profession and vocation. (Para 16)

The question whether a particular income is 'salary' or is 'income from business' is not always free from difficulty. At times, the line between 'business' and 'employment' becomes rather thin, and the question has to be determined on such material as may be available, whether the relationship between the assessee and the person from whom the money was received is that of a servant and master or that of two independent contracting parties. (Note: Several tests have been indicated to help in the decision of the question). (1920) 1 KB 51; (1920) 2 KB 677; (1943) 29 Tax Cas 120 and 1952-22 ITR 108, Ref. (Para 10)

The assessee acted as broker for the Mills. He used to secure orders for the Mills and was being paid brokerage at the rate of 4 annas per cent. He used also to advise the Mills as to the type of cloth that would find a ready market, for which act he was not getting any separate remuneration. Later on, the assessee agreed to be responsible for any bad debts on orders secured through him and the commission payable to him was increased from 4 annas per cent. to one rupee per cent. The Mills continued to pay the commission of 4 annas per cent in cash as before and the balance of 12 annas per cent was credited to the account of the assessee for meeting bad debts. In the assessment year 1946-47 the assessee returned an income of Rs. 1,27,147 from the aforesaid Mills and claimed that it was 'salary' while the Excess Profits Tax Officer claimed that it was 'income from business' and was liable to Excess Profits Tax:

Held that as regards the brokerage of 4 annas per cent the assessee was doing the work of securing contracts and giving advice and was being paid remuneration therefor. In the absence of any finding that he had been employed for that purpose, it should be held as income from business. Further, as regards the remuneration of 12 annas per cent for guaranteeing bad debts it could not be held to be salary. For, this was a venture in the nature of trade which might end in profit or in loss and not work done for an employer where the remuneration being fixed on a commission basis it might be more or less according to the work done. (Paras 20, 21, 22)

Anno: E.P.T. Act, S. 2 (5) N. 1.

(b) Income-tax Act (1922), S. 66 — Nature of jurisdiction.

The High Court can under S. 66 (4) ask the Tribunal for a better and fuller statement of the case. Under S. 66, however, the High Court has to decide questions of law which arise out of the Appellate Order and the Tribunal has to act in accordance with that decision. It is doubtful whether to give an opinion on a question of law arising out of the Appellate Order the High Court can ask the Tribunal, before deciding the reference, to take further evidence and then add to or amend the Appellate Order. (Para 19)

Anno: I. T. Act, S. 66 N. 18 and 20.

G. S. Pathak and P. N. Katju, for Applicant; S. C. Das, for Respondent.

CASES CITED:

(A) (1920) 1920-1 KB 51
(B) (1920) 89 LJKB 579: 1920-2 KB 677
(C) (1943) 1943-1 All ER 199: 29 Tax Cas 120
(D) (1952) AIR 1952 All 706: 1952-22 ITR 108

MALIK C. J.: In this reference under S. 21, Excess Profits Tax Act, read with S. 66 (1), Income-tax Act, the following question has been referred to this Court for decision:

"Whether on the facts and in the circumstances of the case mentioned wholly or partly income from Laxmi Ratan Cotton Mills Ltd., could be held to be profits from business within the meaning of S. 2 (5) of the E.P.T. Act?"

(2) The assessee is Lala Jeewan Lal Dalal of Generalganj, Kanpur, who is being assessed in the status of an individual. The relevant assessment year is 1946-47 and the chargeable account period is from 1-4-1945 to 31-3-1946. The assessee apart from other income showed in his return an amount of Rs. 1,27,147/- as remuneration from Laxmi Ratan Cotton Mills Ltd., Kanpur, at 1 per cent on sales and claimed it under the head 'salary'. The Excess Profits Tax Officer, on the other hand, claimed that the amount was income from business for which Excess Profits Tax was payable.

(3) The question referred to us relates to this sum of Rs. 1,27,147/- and we have been asked

to decide whether on the facts and in the circumstances of the case it would be held to be profits from business as defined in S. 2 (5), Excess Profits Tax Act.

(4) Before we come to the definition, it would be convenient to give the facts so far as they appear from the Statement of the Case and the Appellate Order. The assessee acted as broker for Laxmi Ratan Cotton Mills Ltd. Kanpur (hereafter called the 'mills') i.e., he used to secure orders for the Mills and was being paid brokerage at the rate of 4 annas per cent. It appears that he used also to advise the Mills as to the type of cloth that would find a ready market, for which act he was not getting any separate remuneration. In the assessment year, 1939-40 the income under this head, i.e., brokerage from the Mills, was Rs. 3,643/-, and the assessee showed it in his return under the head 'income from business'. In 1941-42 the income from this source went up to Rs. 22,741/-. It was during the assessment year, 1941-42 that the assessee agreed to be responsible for any bad debts on orders secured through him and the commission payable to him was increased from 4 annas per cent. to one rupee per cent. The Mills continued to pay the commission of 4 annas per cent in cash as before and the balance of 12 annas per cent was credited to the account of the assessee for meeting bad debts. In the assessment years, 1942-43, 1943-44 and 1944-45 the assessee continued to show the income from the Mills under the head 'business' and the amount was assessed as such.

(5) During the assessment year 1945-46, for the first time, the assessee claimed that the income which had mounted up to Rs. 1,28,329/- was 'salary' and showed it as such in the return. The Income-tax Officer, however, again assessed the income under the head 'business'. In the assessment year, 1946-47 the assessee returned an income of Rs. 1,27,147/- from the aforesaid Mills and again claimed that it was 'salary'. while the Excess Profits Tax Officer claimed that it was 'income from business' and was liable to Excess Profits Tax. The question is whether the Excess Profits Tax Officer was justified in doing so.

(6) The facts found in the order of the Appellate Tribunal and the Statement of the case are as follows: (1) that the assessee used to secure orders for the Mills and advise them as to the type of cloth which was likely to find a ready market and was getting as his remuneration 4 annas per cent on the value of contracts secured; (2) that the assessee's remuneration was increased from 4 annas per cent to Re. 1/- per cent and for this extra remuneration he agreed to reimburse the Mills if any of the persons to whom the goods were sold through him failed to pay the amount due; (3) that the remuneration of 4 annas per cent was paid to the assessee in cash; (4) that the remuneration of 12 annas per cent was credited to the account of the assessee for meeting bad debts; (5) that up to the assessment year 1944-45 the assessee had been showing this income as 'income from business.' These are all the facts that appear to have been established.

(7) The assessee made a statement which is marked Annexure 'A' in which he claimed that he was the Sales Manager of the Mills, that he used to get the goods prepared and sold and for this he was getting 1 per cent as commission. He, however, admitted that there was no agreement with the Mills as to the capacity in which he would work. This statement of his that he was working as Sales Manager does not appear to have been accepted by the Appellate Tribunal as would appear from paragraph 4 of the Appellate Order.

(8) From the facts enumerated above which were established, the Tribunal in its Appellate Order has inferred (1) that the assessee was an adviser of a commercial nature to the Mills and used to give advice to the company as to the type of cloth that would find a ready market; (2) that he used to find a ready market for the goods through his own exertions; and (3) that he dealt with the goods quite independently of the company. This last inference is based on the fact that "if he was liable to reimburse the company for any bad debts incurred he would certainly be entitled to an independence in the matter of effecting the sales of the company's stuff."

(9) On these findings and inferences, as also the fact that the assessee had in the past been showing the income as income from business, the Tribunal observed:

> "That his position was that of guarantee broker remunerated on commission basis is further borne out by the supplementary agreement between him and the company which raised his remuneration from -/4/- per cent. to Re. 1 per cent. The mere fact that the payments made to him were described as his remuneration could not convert the character of his work into that of an employee. We are therefore of opinion that his receipts were on account of his work partly as a commercial adviser and partly as a guarantee broker and were evidently receipts from business."

(10) The question whether a particular income is 'salary' or is 'income from business' is not always free from difficulty. At times, the line between 'business' and 'employment' becomes rather thin, and the question has to be determined on such material as may be available, whether the relationship between the assessee and the person from whom the money was received is that of a servant and master or that of two independent contracting parties. Several tests have been laid down to help in the decision of the question. One such test is by ascertaining whether the assessee is doing his own work or is working for others. The assessee would be working for others if he has to work according to their directions for a remuneration either paid in cash or paid on a percentage basis for the work done, while if it is the assessee's own business then the discretion how it has to be carried on is primarily his and he is entitled to the profits and liable for the losses thereof. Though this may be true as a broad proposition, it may be pointed out that even a servant may be given a wide discretion and having given the discretion to the servant the master may have no right to control it. On the other hand, if it is the business of the assessee even then there might be to some extent a control by those who supply him with the goods with which to carry on his business, e.g., price for which it should be sold, quantity which should be sold to each customer, whether the goods should be sold for cash or on credit, if on credit at what terms, etc. These may all be controlled by agreement. To find out whether it is the assessee's own business or he is merely working as a servant, though the extent of the control exercised on him is a test, it would be necessary to find out whether it is the right of the assessee that is being controlled

by contract or a discretion conferred by others on a servant so that all his powers and authority flow from his master. In the case of a servant, it is not likely that he would be entitled to the profits of the business and liable for its losses, though he may be remunerated not in cash but on a percentage basis so that his income would vary according to the amount of business done by him for his master. The capacity in which he was carrying on the work is another test, e.g., a company may employ a broker to secure orders for it. In that case, it would be the duty of the broker to work to secure orders. We have cases of travelling agents and others who, though remunerated on a percentage basis, may be held to be servants. On the other hand, it is open to an assessee to take upon himself the work of securing orders and on such orders as he secures he might get a commission, the rate of commission varying according to the amount of orders secured by him, so that if he does not secure any order it would not be open to the company to claim that the assessee had not done the work for which he had been employed. In other words, it is left to the option of a broker unless he has undertaken to procure a certain minimum amount of business, if he is not a servant, to secure or not to secure an order according to his own convenience and pleasure. The question whether a person works whole time or only part time also gives some indication and if it is found that an assessee undertakes to do similar work for a number of persons, it indicates that the assessee is carrying on a business, though from the fact that he is doing the work only for one person it does not necessarily follow that the relationship between them is that of a master and servant. If the work is being done by a company or a firm, that again would be an indication that it is a business of that company or of that firm. This is so, as a company is floated or a firm is constituted for a purpose and if one of the aims and objects of the company or the firm is to do that type of work, it is the business of the company or the firm. Another test might well be as to the capacity in which the work was being done and whether the assessee is dealing with his own goods or the goods belong to some one else. This too, however, is not a sure test. If the goods belong to the assessee then it indicates that it is his independent business. If, on the other hand, the goods belong to some one else and he has merely to secure a contract for the sale thereof, he may be working as a servant or he may be carrying on the business of commission agency. In each case, the question whether the assessee is carrying on business or is working as a servant has to be decided on the materials available bearing in mind the relationship between the assessee and the person from whom he has received the income.

(11) The question has in most cases to be decided on the facts and circumstances of each case and not much assistance can be got from decisions in other cases where the facts and circumstances might have been totally different. The general principles guiding such decisions may, however, at times prove useful. We may, therefore, refer to the following cases which were placed before us during the course of arguments.

(12) In — 'Robbins v. Commissioners of Inland Revenue', (1920) 1 KB 51 (A) the assessee by an agreement made on 8-4-1913, at Chicago in the United States had been granted the exclusive right to sell comptometers in the United Kingdom for fourteen months; the Company agreed to furnish a working stock of comptometers to a quantity which they deemed desirable and necessary for the business; to pay all transportation charges to the territory on all comptometers shipped by them to the appellant, or on his order; to exercise their best endeavours to prevent any comptometers from being sold to parties in the territory without the appellant receiving his full commission thereon, to pay the rent of the main office in London, it being left to the Company to fix the size, location etc. of the office. The Company was also to pay for the heating, cleaning, lighting, office furniture, office supplies, telephone, rates and taxes, postage, printing stationery and advertising etc. and the amount of the expenditure was to be determined by the Company itself, but they were not liable to pay any travelling expenses and hotel bills. They were to pay commission at a fixed rate for each comptometer sold and they were to send to the appellant all letters of enquiry from prospective customers. The Company was to pay salary of one stenographer. The Company was to pay the employer's contribution for all sub-agents working for the assessee. The Company guaranteed an income of £ 50 per month until the expiration of the contract and if the assessee gave his whole time and sold during the period of the contract 350 comptometers or more then he was entitled to extension of the period of the contract. Rowlatt, J. held that the words 'trade and business' do not

> "include the occupation of a whole-time servant, which is not an independent occupation but simply that of working for one isolated employer"

and pointed out that

> "A business which is capable of being owned or carried on is in the ordinary sense of the word a business which is the adventure of the person who owns it or carries it on."

(13) In the Court of Appeal, — 'Robbins v. Commrs. of Inland Revenue', (1920) 2 KB 677 (B) it was held by Lord Sterndale, M. R. that the word 'trade' or 'business' does not include the work carried on by

> "a person who is remunerated for services either wholly or partly by commission or who may in one sense of the word be described as an agent, if he be merely rendering those services or acting as agent in that way as an assistant of a business of somebody else, a business which does not belong to him and of which he does not take the profits."

It was pointed out that the position of a salesman in a shop remunerated on a commission basis is not that of a man carrying on a business or a trade.

(14) In — 'Marsh v. Commissioners of Inland Revenue', (1943) 29 Tax Cas 120 (C) the question again arose whether the assessee was an employee or was carrying on business. After having considered the facts and circumstances of the case, the learned Judge was of the opinion that the assessee was not carrying on a business. The assessee in that case was a member of a staff of commercial travellers. The learned Judge observed that—

> "An individual in the whole time employment of a firm carrying on a trade or business, and precluded by the terms of his engagement from doing any work for any other firm, could not be said to be carrying on a business on his own account..... On the other hand,

an individual employed, whether as a commercial traveller or in some other activity, by a number of firms does, as it seems to me, carry on a trade or business. An accountant acting for a number of firms is a good illustration of that proposition."

(15) The question whether an assessee was working as a servant or was carrying on a business of his own arose for consideration before this Bench in — 'Inderchand Hari Ram v. Commissioner of Income-tax, U. P. and C. P.', AIR 1952 All 706 (D) and as regards the taking over of the sole selling agency of Messrs. Shankar Sugar Mills Ltd., we held that the assessee was a servant of the company, while as regards the work of managing agents of Messrs. Shankar Sugar Mills Ltd., we were of the opinion that the assessee was carrying on a business of his own. The reasons given by us in the judgment bring out the difference between the two capacities. As we pointed out, the question has to be determined on the basis of the relationship and on the facts and circumstances of each case.

(16) The definition of 'business' in section 2 (5) of the Excess Profits Tax Act is as follows:

"'business' includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation....."

It would thus appear that the definition of "business" in the Excess Profits Tax Act is very wide and it includes in its scope not only work which is considered normally to be business, i.e. trade, commerce and manufacture, but also includes within its scope profession and vocation. As regards profession, however, the section provides that, if the income from profession is mainly due to the skill and qualification of the person carrying on the profession, then it is not to be treated as 'business'. There is a further exception to it that this qualification does not apply to a profession, the main purpose of which is to secure contracts on behalf of other persons or give to other persons advice of a commercial nature in connection with the making of contracts.

(17) It is nobody's case that the income made by the assessee from the Mills was income from profession. We need not, therefore, consider that part of the definition. The question here is whether the assessee was carrying on a trade, commerce or vocation.

(18) In dealing with this matter we have to consider whether it is possible to divide the remuneration into two parts, 4 annas per cent. and 12 annas per cent., as they both arise under two different heads and are covered by two different contracts.

(19) The assessee was being paid 4 annas per cent as remuneration for advising the Mills as to the type of goods that would find a ready market and securing contracts for the sale thereof. How much of this 4 annas per cent was for one or the other, it is difficult to say. It does not appear from the Statement of the Case or even from the Appellate Order that the assessee had been employed by the Mills as a broker. All that we know is that the assessee used to do this work for which he was getting a commission and that for several years he had been treating it as his income from business. Mr. Pathak on behalf of the assessee, has strenously urged that we should ask the Tribunal to go further into the matter and to investigate the origin of the relationship between the assessee and the Mills. We find it very difficult to agree to this contention. We can under S. 66 (4) ask the Tribunal for a better and fuller statement of the case. Under S. 66, however, we have to decide questions of law which arise out of the Appellate Order and the Tribunal has to act in accordance with our decision. We doubt whether to give our opinion on a question of law arising out of the Appellate Order we can ask the Tribunal, before deciding the reference, to take further evidence and then add to or amend the Appellate Order. To further clarify the matter, we may say that as a result of our answers to the questions referred to us it may be necessary for the Appellate Tribunal to rehear the appeal and decide it afresh even after taking such further evidence as may be necessary, but that stage would arise only after we have answered the reference under S. 66.

(20) As regards the brokerage of 4 annas per cent all that we know is that the assessee was doing the work of securing contracts and giving advice and was being paid remuneration therefor. In the absence of any finding that he had been employed for that purpose it is difficult to say that the Appellate Tribunal was wrong in its view that this was not income from business (sic. salary?).

(21) As regards the remuneration of 12 annas per cent for guaranteeing bad debts we fail to see how it could be salary. Mr. Pathak has urged that this guarantee only means that the assessee was to do his work properly and secure contracts from those who were solvent enough to pay for them. The assessee's liability did not depend on the question whether at the time that the goods were sold the purchaser was or was not solvent. The guarantee included that, if for any reason, which might include a supervening cause which came into existence after the date of the contract, the customer was not able to, or did not pay, the assessee had to pay for him. The assessee took all the risk. If the goods were transferred to parties who were all good paymasters and paid their dues, the assessee would make a profit by getting 12 annas per cent. If on the other hand, any of the customers turned dishonest or was unfortunately placed in such a position that he was not able to meet the liability, the assessee had to pay for him and the amount thus payable by him might far exceed the remuneration that he was getting. That the sum of 12 annas per cent was treated differently from the sum of 4 annas per cent is evident from the fact that 4 annas per cent was paid in cash, while 12 annas per cent was kept in suspense account pending the final payment of the bills by customers to whom the goods had been sold.

(22) Mr. Pathak, learned counsel for the assessee, has strenuously urged that the commission of Re. 1/- per cent payable to the assessee should not be split up into 4 annas per cent and 12 annas per cent, but should be treated as a single payment. Even if that is done, we do not see how that would help the assessee. The facts and circumstances, as appear from the findings, would remain the same, that is, the assessee kept himself aware of the market trend and advised the Mills as to what type of cloth would find a ready market. He sold the cloth to his customers and made himself personally liable for the price of the goods sold and in return was remunerated on a commission basis of Re. 1/- per cent. So far as the Mills were concerned, they handed over the goods to

the assessee and were entitled to get the price thereof from him. It was the assessee's risk whether the transactions ended in profit or loss. If some of the persons to whom the goods had been sold did not pay, he would have to recompense the Mills for the price of the goods which amount might exceed the amount received by him by way of commission. This was clearly, therefore, a venture in the nature of trade which might end in profit or in loss and not work done for an employer where the remuneration being fixed on a commission basis it might be more or less according to the work done.

(23) Having, therefore, considered the matter in all its aspect, we are of the opinion that the answer to the question referred to us must be in the affirmative. The assessee must pay the costs which we assess at Rs. 500/-.

B/V.S.B. Answered affirmatively.

A. I. R. 1953 ALL. 766 (Vol. 40, C. N. 381)

MALIK C. J. AND MUSHTAQ AHMAD J.

Hukum Tej Pratap Singh, Plaintiff-Appellant v. Collector of Etah in charge of Estates of Rani Bhagwan Kuer, Defendant-Respondent.

First Appeal No. 46 of 1945, D/- 20-3-1950.

(a) Will — Construction — Matters that should be considered. **(Para 11)**

(b) Hindu Law — Adoption — Object.

Per Mushtaq Ahmad J.: The object of adopting a son in Hindu Law is both secular and spiritual. It is secular in so far as the testator desires the preservation of his estate by providing for its continuance in the family through a ceremony sanctioned by his personal law of vesting the same in an individual as if the latter was his own son, and thereby propagating his line with all its concomitant benefits in the material world. It is spiritual inasmuch as the testator appoints another to carry out the pious duty of "making those oblations and religious sacrifices which would permit the soul of the deceased passing from Hades into Paradise". (Para 34)

M. L. Chaturvedi, for Appellant; Standing Counsel, for Respondent.

CASES CITED:

(A) ('43) AIR 1943 PC 115: 1943 All LJ 307 (PC)
(B) ('19) AIR 1919 PC 75: 17 All LJ 1036
(C) ('14) 41 Ind App 51: 12 All LJ 315 (PC)
(D) ('88) 15 Ind App 127: 15 Cal 725 (PC)
(E) ('29) AIR 1929 All 963: 1929 All LJ 1233
(F) ('36) AIR 1936 Pat 527: 165 Ind Cas 298
(G) ('26) AIR 1926 Oudh 467: 95 Ind Cas 786
(H) ('15) AIR 1915 PC 7: 42 Ind App 135 (PC)
(I) (1855) 28 LJ Ch 110: 7 HLC 68
(J) ('35) AIR 1935 PC 187: 1935 All LJ 1133 (PC)
(K) ('49) AIR 1949 FC 64: 1948 FCR 239 (FC)

MALIK, C. J.: This is an appeal against an order of the learned Civil Judge of Etah dismissing the plaintiff's suit on the ground that the plaintiff's adoption was invalid inasmuch as the power to adopt given under a document dated 3-11-1909, gave that power only if Raja Sanwal Singh, the executant of the deed, had no son or daughter born to him and as Raja Sanwal Singh left a daughter his second widow could not adopt the plaintiff as she is alleged to have done on 27-4-1932.

(2) The property in suit is a valuable estate and is known as Rajhore Estate. The Rajas of Rajhore claim to be direct descendants of Raja Pirthviraj of historical fame and are Chauhan Rajputs. The property appertaining to the Raj is impartible property and during the last several generations has always descended to a single male heir. The last Raja of Rajhore was Raja Sanwal Singh who died on 7-9-1918. At the time of his death he left two wives—Rani Bhagwan Kuer, the elder and Rani Gulab Kual, the younger.

(3) Raja Sanwal Singh had a brother Dharam Singh. It was said that Dharam Singh was not quite right in his mind and about the year 1908 it was alleged that he had adopted a boy Kunwar Khiali Singh. He thereafter executed a deed of trust dated 22-8-1908, and that led to a dispute between him and Raja Sanwal Singh. It may be mentioned that at the time of the execution of this deed of trust Raja Sanwal Singh was a young man aged thirty-two and Dharam Singh was aged twenty-eight. Raja Sanwal Singh's wife had died, but he was contemplating a fresh marriage.

(4) The dispute between Raja Sanwal Singh, Dharam Singh, Khiali Singh, minor, and his father Lal Gokul Singh was settled by an agreement dated 2/4-11-1909. From that agreement it is clear that Raja Sanwal Singh was anxious that Dharam Singh should not succeed him. This might have been by reason of the fact that he believed that Dharam Singh was not quite normal in his mind. He did not want that Khiali Singh should succeed to the Rajhore Estate in any case. At the same time the Raja was anxious that a natural born son to him or to Dharam Singh must get the Rajhore Estate. That was natural in a man who belonged to this family and knew of its antecedents.

(5) This agreement provides that if male issues are born both to Raja Sanwal Singh and Kunwar Dharam Singh, the Raja's son will get the entire Rajhore Estate & Dharam Singh's son will inherit his father's property & in such a case Khiali Singh will get an annual maintenance allowance. If, on the other hand, no son is born to Raja Sanwal Singh but a son is born to Kunwar Dharam Singh then such a son will get the property both of the Raja as well as that of Dharam Singh. Similarly if no son is born to Kunwar Dharam Singh but the Raja leaves a son then that son will get the entire property both of the Raja as well as that of Dharam Singh. If on the other hand, neither of them begets a son then Khiali Singh would get Dharam Singh's property but he will not get Rajhore Raj.

(6) The deed provided that if Raja Sanwal Singh had no son he would have a right to adopt and Dharam Singh can have no objection to such an adoption. Along with that document was executed a deed, interpretation of which is now in question, which is called the deed of permission for adoption and is Ext. I, dated 3-11 1909. The deed has been translated by the Official translator of this Court and has also been translated by the learned Civil Judge. It may be more convenient to give the words of the learned Civil Judge as he has quoted words as in the original, the interpretation of which is the question for consideration in this appeal. The words are:

"I, Raja Sanwal Singh, one of the executants, have at this time no 'Aulad' male or female. Since life is unreliable, I, by way of precaution and with a view to make arrangement for the Raj, consider it meet (to provide) that if I leave no heir out of my 'Aulad Sulbi' my widow will be the owner thereof. But if Kuer Dharam Singh leaves 'Larka Sulbi' he will be the proprietor of the estate. But if none of us leaves 'Aulad Sulbi'

my wedded wife, whoever she may be, shall be competent and I give her this written authority to take any boy of her choice from my family after my death in adoption according to Shastric rites and to execute a deed of adoption in his favour."

(7) The question is what do the words "if none of us leaves 'aulad Sulbi' "mean. Was Raja Sanwal Singh restricting the right of his widow to adopt when no child, male or female, was born either to him or to his brother, or was this right of adoption being given and was to be exercised when no male child was born to either of them?

(8) In this connection it may be useful to mention that the word 'aulad' is plural of the word 'walad' which means a son, though the plural has come to include generally both son and daughter. We are asked by learned counsel for the respondent to confine ourselves to the word 'aulad', which has come to include both son and daughter, and to hold, as the lower court has done, that the intention was that the widow could adopt only if no son or daughter was born to Raja Sanwal Singh or to his brother. On the other hand, learned counsel for the appellant has asked us to consider the circumstances under which the document came to be executed, read the two documents executed about the same time together and to interpret them in the light of the surrounding circumstances and other materials available.

(9) As regards the argument of learned counsel that we should confine ourselves to the popular meaning of the word 'aulad' as including both a son and a daughter and ought not to look to the surrounding circumstances or to the whole of the document, it is sufficient to quote the observations of their Lordships of the Judicial Committee in —'Mohammad Saadat Ali Khan v. Wiquar Ali Beg'. AIR 1943 P. C. 115 at p. 119 (A) to the effect that:

"The whole document should be considered, and it is from the language used therein by the parties, and not from any preconceived notion of likelihood or unlikelihood that the intention of the parties is to be ascertained. It is wrong to start with an inspired assumption that it is unlikely that one party could or would have assented to a particular provision, and then to hold that because so unlikely a provision is not contained in the document in clear and express terms, it cannot have been intended to apply".

(10) In—'Bhagwant Koer v. Dhanukdhari Prasad', AIR 1919 P. C. 75 at p. 76 (B) their Lordships again considered the document as a whole and read the first two paragraphs subject to the third paragraph of the will.

(11) In—'Venkata Narasimha Appa Row v. Parthasarathy Appa Rao', 12 All LJ 315 at p. 325 (C) their Lordships observed that:

"In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i. e., to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure 'The Court is entitled to put itself into the testator's armchair'. Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other".

(12) Applying the above principle we have the fact that the testator was a Chauhan Rajput and the owner of an impartible estate in which daughters had no right of succession. The testator belonged to a family which was held in the high esteem on account of its decent from Raja Prithviraj and for generations the estate had decended to a single male heir. It must further be borne in mind that from the two documents, the agreement and the will, it is clear that the testator wanted to exclude from inheritance to the estate, Dharam Singh and his adopted son Khiali Singh.

(13) His intentions were that after his death his son, or, if he left no son, Dharam Singh's son should get the estate, and failing them, his widow. The question is whether he intended that if he or Dharam Singh left no son, his widow should have the power to adopt or this power of adoption was to be exercised only if he and his brother died leaving no son or daughter. No explanation is forthcoming why the power to adopt should not be exercisable in the case of the existence of a daughter to him, as she had no right to inherit the property, and there seems to be still less reason why the power to adopt should be restricted in the event of even his brother dying without leaving a daughter when that daughter had no shadow of a title to the estate.

(14) The word 'aulad', though commonly used to include both son and daughter, can also be used to mean a son only. That the word 'aulad' can be used to mean a son only and was used in that sense in the agreement, Ex. D., is clear from paras. 5 and 6 of the deed. Paragraph 5 is to the effect that if no male issues were born to Raja Sanwal Singh or to Kunwar Dharam Singh and they died childless, in that case, the property left by Kunwar Dharam Singh was to go to Khiali Singh, adopted son of Dharam Singh. It is clear that the words 'we die childless' in this paragraph must mean sonless. This is amply clear not only from this paragraph but also from the paragraphs which precede it. Paragraph 6 then provides that if Raja Sanwal Singh has no issue, he will have the right to adopt a son. The words used are "Aur bahalat lawaldi ham Raja Sanwal Singh ko yeh akhtiar hoga". Here again, the word 'lawaldi' must mean Raja Sanwal Singh dying sonless. There was no reason why Raja Sanwal Singh should have intended to restrict his power of adoption and should have agreed to his being able to make an adoption in case he had not only no son, but also no daughter. Under the Hindu law the presence of a daughter is no obstacle to adoption and it is clear that the word 'lawaldi' in this paragraph must mean without a son.

(15) In the deed of permission for adoption the word 'aulad' has been used in three places and not always in the same sense. In the first sentence a statement of fact is made that Raja Sanwal Singh has no 'aulad' meaning son or daughter. In the second sentence it is said that if he dies without leaving 'aulad sulbi' who is capable of inheriting his property, his widow will be the owner thereof. It is admitted by learned counsel for the respondent that the words 'who is capable of inheriting his property' restrict the meaning of the word 'aulad', and from the word 'aulad' here

a son was meant. As regards Kunwar Dharam Singh, the document proceeds that if he leaves a son, that son will be the owner of the estate. The next sentence is to the effect that if neither of them, that is Raja Sanwal Singh or Dharam Singh, leaves 'aulad sulbi' his widow will be entitled to adopt. The daughter being no heir and the document having provided for the inheritance by the Raja's son, by Dharam Singh's son and by the widow, the provision as regards adoption must relate to the contingency when there is no son. The daughter being no heir to the impartible estate and being also excluded by custom there was no reason why the power of adoption should be exercisable only if there was no daughter born either to the Raja or to Dharam Singh. If the Raja had intended that there should be no adoption, in case he or his brother left a daughter, it would be natural to expect that some provision would have been made either in the agreement or in this document giving the estate to such a daughter. The word 'aulad' here must be read subject to the context and it must mean a son born of Raja Sanwal Singh or of Kunwar Dharam Singh. The Raja knew that daughters had no right to succeed to the joint family impartible estate. His statement made a few months before, on 22-7-1909, clearly shows that. There being no provision made for the estate going to the Raja's daughter or to his brother's daughter, and the daughter being no heir to the estate, there appears to be no reason why the power to adopt should be exercisable only if there was no daughter. The agreement and the deed of permission read together make it amply clear that the Raja intended that the estate should first go to his own son, then to his brother's son, and failing them to his widow, and then to the adopted son, and it was on that account that he gave the widow the power to adopt. In the view that the lower Court has taken this object would be defeated and on the Raja dying without a son, or his brother dying without a son, but either of them leaving a daughter, his brother or Khiali Singh could get the property on the death of the widow. I have no doubt that the learned Judge misled himself by placing too great a reliance on the word 'aulad' and not considering the document as a whole in the light of the surrounding circumstances.

(16) In — 'Indar Kunwar v. Jaipal Kunwar', 15 Cal 725 (PC) (D), their Lordships pointed out at p. 749 that "the construction which bespeaks a reasonable and probable intention" should be accepted and that "which would indicate an intention unreasonable, capricious and inconsistent with the testator's views, as evidenced by his conduct and by the dispositions of his will which are not open to controversy" should be rejected.

(17) It is a pity that the learned Judge took upon himself the responsibility of dismissing the suit on this one point without recording any finding on the other issues that had been raised before him. The result has been unnecessary delay, but as the other issues were not decided the case must go back to the Court of the Civil Judge, who should now proceed to decide the other issues as expeditiously as possible.

(18) The appeal is allowed and the case is sent back to the Court below with the directions given above. The costs will be costs in the cause.

(19) As the case is remanded under O. 41, R. 23, C. P. C., the appellant is entitled to a refund of the court-fees.

(20) MUSHTAQ AHMAD J.: This is a plaintiff's appeal in a suit for possession over the estate known as the Rajhore Raj in district Etah. There was also an alternative prayer for a declaration that, if the widows of the late Raja were held entitled to any life estate, the plaintiff was entitled to recover the property after their deaths.

(21) The suit was dismissed by the learned Civil Judge on the solitary ground that the plaintiff's adoption by Rani Gulab Kuar, the second widow of the late Raja Sanwal Singh, was invalid, as the authority conferred by the Raja under a will on his widow was contingent on his not leaving any issue, son or daughter, and as he had actually left a daughter, Mst. Keshwar Kuar. This ground to negative the plaintiff's claim had actually not been taken by the defendants, although they had resisted the claim on a number of other pleas in their defence. The learned Judge, while recording a finding on one of those pleas, namely, that the plaintiff was a minor on the date of his alleged adoption, against the defendants, dismissed the suit on the new ground which I have just mentioned.

(22) Raja Sanwal Singh and Kunwar Dharam Singh were brothers. On 3-11-1909, the Raja executed a registered document of will by which he conferred a life estate on his widow, that there might be on his death, the same being terminable on her adopting a son to her deceased husband. It is with the interpretation of a particular passage in this will that we are concerned, the same affecting the right of the plaintiff to claim the estate as the adopted son of Raja Sanwal Singh. That passage was quoted by the learned Civil Judge in his judgment and it runs as follows:

> "I, Raja Sanwal Singh, one of the executants have at this time no 'Aulad' male or female. Since life is unreliable, I, by way of precaution and with a view to make arrangement for the Raj, consider it meet (to provide) that if I leave no heir out of my 'Aulad Sulbi' my widow will be the owner thereof. But if Kuer Dharam Singh leaves 'Larka Sulbi' he will be the proprietor of the estate. But if none of us leaves 'Aulad Sulbi' my wedded wife, whoever she may be, shall be competent and I give her this written authority to take any boy of her choice from my family after my death in adoption according to Shastric rites and to execute a deed of adoption in his favour."

(23) There is no question that the above is the correct rendering of the will which is in the Urdu language. The only dispute between the parties is with regard to the meaning of the word 'Aulad' at the various places in the above quotation. The plaintiff's case was that the word had reference only to sons, whereas the defendants contended that it also included daughters. Admittedly, Raja Sanwal Singh at the time of his death did leave a daughter, named Keshwar Kuar, in addition to his two widows, Rani Bhagwan Kuar, the senior, and Rani Gulab Kuar, the junior. The plaintiff contended that the Raja not having left a son, it was open to the Ranis, or either of them, to adopt a son. This was denied by the defendants, who stressed that the Raja having admittedly left Keshwar Kuar as his daughter, neither of his widows acquired any authority under the will to make an adoption. This means that, according to the defendants, the authority to adopt could be exercised only if the Raja had left neither a son nor a daughter and that, he having left a daughter, neither of his widows had any power to adopt the plaintiff.

(24) It may incidentally be mentioned that Raja Sanwal Singh, who died in 1918, had married Rani Bhagwan Kuar in 1911 and Rani Gulab Kuar in 1912 and that, on his death, the name of the former was mutated in respect of the Rajhore Estate as a successor to the Raja. The plaintiff

claimed that he had been adopted by Rani Gulab Kuar on 27-4-1932, and he brought the suit on the basis of that adoption.

(25) Defendant 1 was the Collector, Etah, in charge of the estate of Rani Bhagwan Kuar on behalf of the U. P. Court of Wards, which was in possession of that estate, and defendant 2 was Rani Gulab Kuar, who died during the pendency of the suit. While defendant 2 naturally supported the plaintiff's case of adoption, it was controverted by defendant 1. The number of pleas taken in defence covered rather a wide range, but, as I have mentioned, the learned Civil Judge proposed, in the first instance, to take up the question of the validity of the plaintiff's adoption, and finding it against him, dismissed the suit. This appeal is directed against that decree.

(26) The only question raised in the appeal is whether the alleged adoption was validly made by defendant 2, the same depending on the meaning of the word 'Aulad' in the context in which it was used in the will in question.

(27) Before I enter into this question of the interpretation of the will, I may mention a few events which took place in the family and which provide a background for the determination of that question. On 22-8-1908, Kunwar Dharam Singh, the brother of Raja Sanwal Singh, executed a deed of trust in regard to his own property in favour of a relation of his, Khiali Singh, and made himself and Lal Gokul Singh, father of Khiali Singh, trustees of that property. He earmarked Rs. 120/- as annual allowance to be paid out of the profits of that property to Khiali Singh, and, in the body of the document, provided that after his (Dharam Singh's) death Khiali Singh would be the owner of his entire movable and immovable properties. This led to a dispute between Dharam Singh and Raja Sanwal Singh, which appears to have been resolved by a deed of settlement being executed on the 2nd (4th) November, 1909 jointly by them and Lal Gokul Singh. It is not necessary to refer to the details of this settlement, and its only bearing on this case is that it provided an occasion for the Raja to authorise his widow or widows to make an adoption after his death. In para. 3 of the document, it was provided that, in case he and his brother Dharam Singh left each a son, the son would be entitled to the property of his own father but that, if either of them did not leave a son, and the other did, the latter's son would be entitled to the property of both the brothers. Paragraph 5 laid down that, if no 'Aulad Sulbi' were left by either of the brothers and they both died childless, Khiali Singh 'the adopted son of Kunwar Dharam Singh' would be the owner of the property of his adoptive father. Paragraph 6 of the document provided:

> "If I, Raja Sanwal Singh, have no issue, I shall have power to make any one whom I like out of my family, as my son and 'heir', and he alone shall be the owner of the property of me, Raja Sanwal Singh. I, Kunwar Dharam Singh, shall have no claim or objection to the same."

(28) This leaves no doubt that the Raja had provided for the contingency of adopting a son as his 'heir' in case he left no issue. The words 'have no issue' correspond in the original with the words 'ba halat la-waldi'. I would hereafter indicate the sense in which the Raja intended to use these words here, consistently with his desire to have a son by adoption who could be his 'heir' in respect of his property.

(29) Now coming to the will itself, the relevant paragraph of which I have already quoted earlier from its English translation in the judgment of the Court below. The words

> "Since life is unreliable, I, by way of precaution and with a view to make arrangement for the Raj, consider it meet (to provide) that if I leave no heir out of my 'Aulad Sulbi' my widow will be the owner thereof. But if Kunwar Dharam Singh leaves 'larka sulbi' he will be the proprietor of the estate,"

are very significant. The idea uppermost in the mind of the testator seems to be to provide for the management of the estate, and he declared his wish that the same should vest, in the first instance, in a son born to himself, his widow taking only if he left no such son, and he attached so much importance to the estate vesting in a male incumbent that he allowed even a son born to his brother, in case he himself had none, to succeed to the same, even to the exclusion of his own widow. In the sentence following:

> "But if none of us leaves 'Aulad Sulbi', my wedded wife, whoever she may be, shall be competent, and I give her this written authority, to take any boy of her choice from my family after my death in adoption according to Shastric rites and to execute a deed of adoption in his favour,"

provision was made for a contingency in which neither of the brothers left 'Aulad Sulbi', and it was recited that the widow could in that event adopt a boy from the Raja's family.

(30) In the first place, there seems to be no reason why the testator, when referring to Dharam Singh, should have intended to use the words 'Larka Sulbi' but when referring to him again along with himself, he should have intended to use the words 'Aulad Sulbi' in different senses. There being no ambiguity about the first expression none should be assigned to the second. Besides, if the latter expression, used in our opinion as synonymous with the former, were to be given its literal generic sense it will involve the absurdity that the Raja's widow could not adopt a son, even if Dharam Singh had left a daughter. Nothing could be farther from his mind as a normal being, anxious to provide for the management of his Raj by having an 'heir' to himself.

(31) Now the question is what was meant by the words 'Aulad Sulbi' in these clauses. For the plaintiff-appellant it was argued that the expression referred only to sons, while the defendant-respondent urged that it included both, sons and daughters, so that the Raja having left a daughter neither of his widows was entitled to make an adoption after his death. This is precisely the controversy which we have to decide in this appeal.

(32) The word 'Aulad' being the plural of the persian word 'Walad' literally means 'sons'. In the popular sense, however, it has come to mean 'issues', including sons and daughters, and its derivations such as 'la-walad' or 'be aulad' mean 'issueless' or 'childless' and not merely 'sonless'. This was pointed out in — 'Nirman Bahadur v. Fateh Bahadur', AIR 1929 All 963 at p. 969 (E); — 'Mst. Bibi Alimun-nisa v. Sh. Abdul Aziz', AIR 1936 Pat 527 (F) and — 'Bhaiya Ajodhya Baksh Singh v. Mst. Muna Kuar', AIR 1926 Oudh 467 (G). In the last case, it was nonetheless observed that:

> "It is a well-known fact that frequently in deeds and other documents the word 'Aulad' is confined to male issues and that in each instance it is a question of interpretation."

(33) If it was intended to lay down that the word meant only a 'male issue' whenever it occurred in a document, I should have much diffi-

culty in accepting this. But I entirely agree that in every case it is a question of interpretation which must be determined in the light of certain well-recognised rules, furnishing an aid in the discovery of the real intentions of the testator. We have to construe the word in the present case in accordance with those rules.

(34) It cannot be denied that the object of adopting a son in Hindu Law is both secular and spiritual. It is secular in so far as the testator desires the preservation of his estate by providing for its continuance in the family through a ceremony sanctioned by his personal law of vesting the same in an individual as if the latter was his own son, and thereby propagating his line with all its concomitant benefits of the material world. It is spiritual inasmuch as the testator appoints another to carry out the pious duty of "making those oblations and religious sacrifies which would permit the soul of the deceased passing from Hades into Paradise", as observed by Lord Shaw in — 'B. G. Tilak v. Shrinivas', AIR 1915 PC 7 (H).

(35) Now it is conceded by the learned counsel for the defendant-respondent that the estate of Rajhore which is the subject-matter of this litigation, is an impartible Raj. As such it is governed, in the matter of inheritance, by the law of primogeniture in the absence of a custom to the contrary. No such custom was suggested to exist in this case. It is also not denied that legally the late Raja Sanwal Singh was entitled to make a bequest of the estate, there being again no custom to the contrary.

(36) Assuming that the will propounded by the plaintiff was made by the Raja with all the dispositions it contains, the question is, what was the real object of the testator for which he made it. That he should have expressed concern in the deed for a proper management of the Raj after his death provides a clue into the real motive and genesis of the will. That he should have also expressed an anxiety to have an 'heir' to himself for the same object, through whom alone he aimed at the preservation of the estate cannot also be denied. These two factors, the anxiety of the Raja for the future management of the estate and the achievement of that end through an 'heir' furnish a valuable guide in finding out the actual contingency in which the Raja's widow, whoever she might be, was authorised to make an adoption in obedience to her husband's wishes.

(37) Looking at the question from a purely secular standpoint, it is not likely that any one would prefer a female successor to a large estate, having regard to his desire to conserve the integrity of the estate and also the social status of his family. The late Raja could not be an exception to this most natural wish and outlook. But this essential object could be ill-served if we held that the widows or either of them could not make an adoption, if the Raja left a daughter. Indeed, nothing in answer to this anomaly was suggested by the learned counsel for the defendant-respondent. The position, in fact, becomes all the more patent when we take into account the reference in the will to the Raja's anxiety to have an 'heir', a word which was repeated in para. 6 of the contemporaneous deed of settlement, to which we have already referred earlier.

(38) It was of course admitted on behalf of the defendant-respondent that the Raja's daughter could not be his 'heir' in respect of the property in dispute, which admittedly is an impartible estate. This is apart from the question whether there was also a custom among the Chauhan Rajputs, as claimed by the plaintiffs-appellants, which altogether excluded a daughter from inheritance to all kinds of property. Her disqualification by sex rendered the eligibility of the Raja's daughter to claim the estate as his 'heir' a legal impossibility. And none could have been more conscious of this than the Raja himself, who wanted an 'heir', as I have said, for a two-fold purpose. He must have further desired to ensure the performance of those funeral and other 'post-mortem' services to which a father, for the good of his soul, was entitled from his son and which a daughter was religiously incompetent to carry out.

(39) These, in my opinion, present a fundamental criterion for judging the intention of the testator as regards the circumstances in which his widow or widows could adopt a son. It is obvious that if this depended on the testator not leaving even a daughter, his essential object in authorising an adoption could not be fulfilled. The daughter, according to the defendants, being an obstacle to the adoption, she herself at the same time not being an 'heir' to her father, nor qualified to perform the usual services for his spiritual salvation, the entire scheme and motive underlying the will was defeated. It is interesting to note the reaction of the learned Civil Judge to this vital aspect of the case in his own words:

> "But it must be pointed out that there is intrinsic evidence in the document itself that Raja Sanwal Singh was not moved by any such consideration. He was bequeathing the entire estate to his widow. Therefore not only was he not influenced by any such custom but he was deliberately doing the very contrary of it. Since he was giving the estate by will to the widow there was a likelihood of the estate ceasing to be joint family estate. It could be treated as a separate or self-acquired property of the widow. I do not wish to express any final opinion on that point because that question may arise hereafter on widow's death. What I mean to point out is that there was a possibility of such a contingency arising and the surviving daughter claiming property as an heir to her mother. Whatever preference the late Raja might have given to his own son over his own daughter, he never wanted a daughter born of his own loins to be superseded by an adopted son imported from remoter branches of the family."

(40) The above, in my opinion, hardly meets the points I have noticed as evolving the real intention and object of Raja Sanwal Singh in making the will with an authority to his widows to adopt a son after his death. It must be remembered that the bequest to the widow in certain circumstances could possibly prove only a temporary phase, liable to be terminated by Dharam Singh, the Raja's brother, having a son, if no son was born to the Raja himself, as mentioned both in the will and in para. 3 of the deed of settlement dated the 2nd (4th) November, 1909. No explanation was suggested here of the incongruity resulting from a daughter born to the Raja being allowed to hold the estate, thereby preventing his widow to adopt a son and the Raja's intense wish to provide for the preservation of the estate by good management, and that by none except an 'heir' to himself, that heir being, of course, determined by the rules of his personal law and by the nature of the property devolving on him under that law. Indeed, the observations quoted, assume that even a daughter could be such an 'heir', a supposition not warranted by the Hindu Law.

(41) Our attention was called in the course of the arguments to two judgments of this Court, one

dated 16-4-1934 in a suit brought by Rani Gulab Kuar against the U. P. Courts of Wards, in charge of the estate of Rani Bhagwan Kuar, and the other dated 15-9-1936 in a suit brought by one Har Govind Singh, a collateral in the next senior line, against the Court of Wards. There is nothing in the former having any direct bearing on the question now in hand, but in the latter the following remark by the Bench appears with regard to the meaning of the relevant clause in the will of Raja Sanwal Singh:

"We think that it was the intention of Raja Sanwal Singh to devise the estate to his widow until such time, if any, as either Dharam Singh begot a son or she took a boy in adoption."

(42) The judgment does not show that it had ever been suggested that the Raja's widow or widows could make an adoption only if he had not left either a son or a daughter. Indeed, the observation is explicit on the point that such an adoption could be made if he did not leave a son. No doubt, it is not binding on the defendant-respondent but we have mentioned it only to illustrate the attitude of the parties to that case on this matter of the meaning of the will, as also its approval by this Court on an earlier occasion.

(43) A large number of cases appear to have been cited by the parties in the Court below and many were referred to before us also by their learned counsel. On behalf of the plaintiff-appellant, it was urged that, where the terms of the disposition were ambiguous, so as to be consistent eqally with two alternative positions, it was open to a party to invoke the aid of the surrounding circumstances in order to discover the real intention of the testator. He conceded that, if those terms were absolutely clear & admitted of no difficulty in their application in a particular case, they had to be taken in their literal sense and the conditions in the bequest could then be strictly enforced. This latter aspect appears to have occupied the learned Civil Judge a little too much, and he chose to cite and discuss a number of cases emphasising the same. There was, in fact, no dispute so far as the strict enforcement of the conditions of a will, clearly and unambiguously expressed, were concerned. The real question in the case was: what were actually the intentions of the testator, when he had used words which were of a generic connotation, applicable equally to two alternative situations. Once the words used in the bequest were clear and definite, they had, of course, to be interpreted in their natural sense, and no departure from that principle could be allowed, so as to give them a meaning which they did not literally bear. This was an elementary rule of interpretation, on which both the parties are agreed, and, in my opinion, there was no occasion for the learned Judge to emphasise this rule by citing numerous decisions in his judgment. Now to construe a will embodied in words, more or less of an ambiguous or dubious nature, the most salutary medium of construction available is that the Court can consider the same in the light of all the incidental aspects which are presented by a particular case. The circumstances of a testator, his personal outlook, the custom and practices prevailing among the people of his class and his anxiety to preserve the status and dignity of his house are the usual factors that explain not only the necessity but also the cause of the bequest.

(44) The above would appear as an established rule of interpretation of wills from judicial decisions. Lord Cranworth in — 'Abbott v. Middleton', (1855) 7 H L C 68 at p. 89 (I) observed:

"Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate."

(45) This dictum was followed by the Judicial Committee in — '15 Cal 725 (PC) (D)' at p. 749, where their Lordships remarked:

"It is rather a case in which the difficulty created by the particular expression ought to be solved by adopting the construction which bespeaks a reasonable and proper intention and rejecting that which would indicate an intention unreasonable, capricious and inconsistent with the testator's view."

(46) Again, in — 12 All L J 315 at p. 325 (C)', the same authority laid down:

"In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i.e., to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair'. Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document."

(47) In — 'Rameshwar Baksh Singh v. Balraj Kunwar', AIR 1935 PC 187 (J), Sir Shadi Lal delivering the judgment of the Judicial Committee remarked that in interpreting a will it was the duty of the Court to find out the intention of the testator, that the intention was to be gathered from the language used by the testator, because it was the words used in the instrument by which he had conveyed the expression of his wishes, that the meaning to be attached to the words might, however, be affected by surrounding circumstances and that, when this was the case, those circumstances should be taken into consideration.

(48) Among the rulings noted by the learned Civil Judge in support of the defendant's case was the Privy Council decision in — 'AIR 1919 PC 75 (B)', and he remarked that:

"In that case an authority was given to a widow to make an adoption in case no child was born to her husband. A daughter was born and subsequently died. It was held that the widow could not adopt."

(49) This was really misregarding the facts of that case, for, at p. 76 of the report, we find a quotation from the terms of the will there in dispute to the following effect:

"If by the will of Providence 'no male or female child' be born to me, in that case both my wives, one after another, as provided in para. 2, shall

remain, in concord, proprietors and managers and perpetuate the name and reputation of the family up to the terms of their lives."

Then followed the authority to the wives to adopt.

(50) This meant that the wives of the testator could claim the property or make an adoption 'only' if "no male or female child" was born to him. A daughter having been born, the adoption was naturally held to be invalid. Before this ruling could be relied upon by the defendant-respondent it had to be held that the words 'Aulad Sulbi' in this case did include both sons and daughters, the very question that we have to determine.

(51) Learned counsel for the defendant-respondent also relied upon the case of — 'Jiban Krishna Das v. Jitendra Nath Das', AIR 1949 FC 64 (K), in which it had only been emphasised that in construing a will, the cardinal maxim to be observed was that the Court should, in all cases, endeavour to ascertain the real intention of the testator, that meaning, the intention which the will itself by express words or by implication declares and that the primary duty of the Court was to ascertain from the language of the entire document what the intentions of the testator were.

(52) There is nothing in this decision which affects the rule, which I have emphasised as determining the question of interpretation of the will in this case. Indeed, their Lordships adopted the dictum of the Privy Council, quoted by us from the case in — '12 All L J 315 (PC) (C)', in its very terms.

(53) Taking this principle into account and applying it to the facts of the present case, and particularly in the light of the considerations I have mentioned above in relation to Raja Sanwal Singh, I have come to the conclusion that his intention was to authorise his widow or widows to adopt a son only if he left no son born of his own loins and even though he left a daughter. The view taken by the learned Civil Judge to the contrary was, in my opinion, wrong, and I am not inclined to affirm it.

(54) Accordingly I would allow the appeal, set aside the decree of the Court below and send the case back to that Court with a direction to try the other issues in the case and dispose of the same according to law. The costs will abide the event. The appellant will be entitled to a refund of the court-fee paid by him in this Court.

C/V.R.B. Appeal allowed.

A. I. R. 1953 ALL. 772 (Vol. 40, C. N. 382)

AGARWALA J.

Dr. Rajnath, Applicant v. L. Vidya Ram and others, Opposite Party.

Misc. Case No. 182 of 1950, D/- 20-7-1953.

(a) Civil P. C. (1908), S. 22 — Application when to be made.

Section 22 lays down two conditions in which an application for transfer may be made, first that the application should be made at the earliest possible opportunity and in any case at or before the settlement of issues and second that it should be made after notice to the other party. (Para 1)

Anno: Civil P. C., S. 22 N. 1, 3, 6.

(b) Civil P. C. (1908), Ss. 22, 23 and 24 — Scope.

Section 23 is not an independent section. It is supplemental to S. 22. Section 24 is a general provision empowering the High Court or the District Court to transfer a case on the motion of any other party or on its own motion. The general power conferred by S. 24 is not to be applied where the case falls under S. 22. (Para 1)

Anno: Civil P. C., S. 22 N. 1; S. 23 N. 1; S. 24 N. 2.

(c) Interpretation of Statutes — Special and general provision.

Where there is a special provision for a particular matter and there is also a general provision, the special provision should be applied. (Para 1)

Anno: Civil P. C., Pre. N. 7.

P. N. Bakshi and H. N. Seth, for Applicant; A. K. Kirti, for Opposite Party.

ORDER: This is an application for transfer of a suit pending in the Court of the Civil Judge, Agra to the Court competent to try it in Mainpuri. The parties belong to the same family. L. Vidya Ram, plaintiff-opposite party 1 filed the suit which has given rise to this application for partition of family property in the Court of the Civil Judge Agra. The applicant and the other two opposite parties, L. Kedar Nath and Srimati Attar Dei, are defendants to the suit. The property in dispute is situated partly in the district of Agra and partly in the district of Mainpuri. The issues in the case were framed on 21-2-1950. The applicant did not object to the suit proceeding in the Civil Judge's Court at Agra up to that time. Then six months later, i. e. on 30-8-1950 he made the present application to this Court for the transfer of the case on the ground that the suit could have been instituted at Mainpuri and it would be convenient to both parties that it be tried there.

The ground mentioned in the application is covered by Section 22, Civil P. C. The Section however lays down two conditions in which such an application may be made, first that the application should be made at the earliest possible opportunity and in any case at or before the settlement of issues and second that it should be made after notice to the other party. These conditions were not complied with by the applicant. Learned counsel for the applicant argues that his application is under Sections 23 and 24, Civil P. C. The argument has no force.

Section 23 merely lays down the forum in which applications under Section 22 are to be made. Although Section 22 is mentioned in clause (1) of Section 23 only, clauses (2) and (3) of that section also refer to an application made under Section 22 and do not refer to an application made under S. 24. Section 23 is not an independent section. It is supplemental to Section 22. Section 24 is a general provision empowering the High Court or the District Court to transfer a case on the motion of any other party or on its own motion. The general power conferred by Section 24 is not to be applied where the case falls under S. 22. If Section 24 were to apply to the classes of cases covered by Section 22, it would not have been necessary for the Legislature to enact Section 22 at all. It is a general principle of interpretation of Statutes that where there is a special provision for a particular matter and there is also a general provision, the special provision should be applied. The application in the present case having been made on the ground which is covered by Section 22 falls under that section and not under section 24.

(2) The provisions of Section 22 not having been complied with, the application is not maintainable and is dismissed with costs.

(3) The stay order is discharged. The Court below shall proceed to decide the case without any delay.

B/K.S.B. Application dismissed.

A. I. R. 1953 ALL. 773 (Vol. 40, C. N. 383)

MALIK C. J. AND V. BHARGAVA J.

Padampat Singhania, Applicant v. Commr. of Income-tax, U. P. and Ajmer-Merwara, Lucknow, Respondent.

Misc. Case No. 139 of 1948, D/- 9-4-1953.

Income-tax Act (1922), S. 6 — Business — (Hindu Law — Joint family — Trade — Partnership).

There is no presumption that any business carried on by a member of a joint Hindu family is joint family business and it is for those to prove it who allege that it is so. Where therefore there was no evidence that any joint family funds were used in the business of the firm or any joint family funds were invested in that business, it is not possible to hold that the three minors, who were members of their respective joint families of which their fathers were Kartas, merely represented the joint families and were not there in their own rights.

Under the circumstance the income of the minor member, arising from shares and interest on deposits in the firm did not represent the income of his Hindu undivided family liable to assessment in the hands of his father as the Karta. AIR 1929 PC 1, Relied on; (1952) 21 ITR 164 (All); AIR 1953 All 150, Referred. (Paras 5, 8)

Anno: Income-tax Act, S. 6 N. 5.

G. S. Pathak, for Applicant; S. C. Das, for Respondent.

CASES CITED:

(A) ('29) AIR 1929 PC 1: 113 Ind Cas 897 (PC)
(B) ('52) 1952-21 ITR 164 (All)
(C) ('53) AIR 1953 All 150: 1952-22 ITR 474

MALIK C. J.: A number of references, some under the Income-tax Act and others under the Excess Profits Tax Act, have been lumped up together and numbered as above. During the course of argument, with the consent of learned counsel, we found it necessary to number the cases separately and Miscellaneous Case No. 139 of 1948, was confined only to the reference under S. 66 (1), Income-tax Act in Reference Application No. 226 of 1947-48 before the appellate Tribunal, which related to the income of the firm Harishankar Gopal Hari.

(2) The question referred to us in this reference is as follows:

"Whether in the circumstances of the case, the income of Gopal Hari, a minor member of the Hindu undivided family of Sir Padampat Singhania arising from share and interest on deposits in the firm of M/S. Hari Shankar Gopal Hari represents the income of the Hindu undivided family liable to assessment in the hands of Sir Padampat Singhania as its Karta?"

The facts as they appear from the Statement of the Case and the Appellate Order of the Tribunal are that there is a J. K. Cotton Spinning and Weaving Mills Co., Ltd., at Kanpur. The sole selling agency of the products of the J. K. Cotton Spinning and Weaving Mills Co., Ltd., (hereafter called the Company) was held by Messrs. Juggilal Kamlapat. The partners of this registered firm were Sir Padampat Singhania, Lala Kailashpat Singhania, Lala Lakshmipat Singhania, each holding a 5 annas share, and the mother of the three Singhania brothers mentioned above, who had a one anna share. The three brothers were separate and were being separately assessed. The sole selling agency contract terminated and a new firm Harishankar Gopal Hari was registered and it entered into a contract with the Company and became its sole selling agent. The constitution of this firm is as follows:

"1. Radhakishan Singhania ... 0-1-0.
2. P. D. Chandrana ... 0-0-6.
3. Gopikrishan Jaipuria ... 0-0-6.
4. Harishankar, minor son of L. Lakshmipat Singhania ... 0-4-9.
5. Gopal Hari, minor son of Sir Padampat Singhania ... 0-4-6.
6. Vijaipat, minor son of L. Kailashpat Singhania ... 0-4-9."

As shown above, the last three were minors and were aged 10, 10 and 4 years respectively in the year 1947 when the Appellate Assistant Commissioner made the assessment, and were the sons of L. Lakshmipat Singhania, Sir Padampat Singhania and L. Kailashpat Singhania, who were partners of the firm Messrs. Juggilal Kamlapat. We do not know anything about the other three. Evidently they were strangers.

(3) The facts found and not disputed are as follows:

1. That the sole selling agency contract was with Messrs. Juggilal Kamlapat;
2. That the partners in the firm were the fathers of the three minors, who were admitted to the benefits of the partnership of the firm Harishankar Gopal Hari;
3. That on termination of the sole selling agency contract of Messrs. Juggilal Kamlapat the Company entered into a fresh contract with the firm Harishankar Gopal Hari;
4. That in this firm of Harishankar Gopal Hari 14 annas shares were held by the three minors who were admitted to the benefits of the partnership in Harishankar Gopal Hari:
5. That the three minors are members of the joint Hindu family with their respective fathers, who are separate 'inter se'; and lastly,
6. That there was no evidence to prove that the minors had any separate funds of their own which they might have invested in the business.

(4) The question in this reference is whether on those facts it could be found that the income of Gopal Hari minor, son of Sir Padampat Singhania, was really the income of the joint family and could be assessed as such in the hands of Sir Padampat Singhania as the Karta of the Hindu undivided family.

(5) The law is now well settled that it is open to a member of a Hindu undivided family to carry on a business and there is no presumption that any such business belongs to the joint family (see — 'Annamalai Chetty v. Subramanian Chetty', AIR 1929 PC 1 (A). In that case a member of a joint family had been engaged actively in money-lending business.

With the income of that business he acquired some property and the question was whether that property could be held to be joint family property. Their Lordships of the Judicial Committee held that:

"A member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate."

There is no presumption that any business carried on by a member of a joint Hindu family is joint family business and it is for those to prove it who allege that it is so. In the case before us there is no question of any blending of income. The only question for decision is whether Gopal Hari was admitted to the benefits of the partnership in his own right or he was there merely as representing the Hindu undivided family so that the income of his share was the share of the Hindu undivided family. There is no finding that any funds of the Hindu undivided family were invested in the firm Harishankar Gopal Hari. Learned counsel for the Department has placed before us the assessment order of the Income-tax Officer, the Appellate Assistant Commissioner's order and the Appellate Tribunal's order. No mention is made in the first two about any investments at all, nor is there any suggestion that any family funds were used. The Appellate Tribunal, however, instead of considering whether any joint family funds were invested in the business, considered the question whether the minor had any separate funds of his own and observed that there was no evidence to hold that any funds other than those of the Hindu undivided family were used by or for the minors. There is nothing on the record to show whether funds of any kind were invested at all and we cannot from this very ambiguous sentence conclude that there was any investment of joint family funds. All that we understand the sentence to mean is that on behalf of the assessee no evidence had been given that the minor had any separate funds of his own which he could have invested in the firm Hari Shankar Gopal Hari.

(6) We have discussed the question whether a Hindu undivided family as such can be a partner and whether it can be held that a member of a Hindu undivided family, who is a partner in a business with strangers, represents that family so far as the members of the Hindu undivided family are concerned: — 'In re Mangal Chand Mohanlal', (1952) 21 ITR 164 (All) (B). In that case we laid stress on the point that the entire funds were supplied by the old business which was the business belonging to the Hindu undivided family.

(7) The point was also considered in — 'Ramkumar Ramniwas v. Commr. of Income-tax', AIR 1953 All 150 (C) in which we have discussed the question whether a Hindu undivided family can be a partner at all and, if any member of a Hindu undivided family is a partner in a firm, what the rights of the other members of the Hindu undivided family may be against him and against the partnership.

(8) It has been urged by Mr. Das that there was no reason why the three strangers, who must be the working partners in this firm, should admit to the benefits of the partnership three minors and give them the larger share of the profits, unless the minors represented their fathers' interest and unless their fathers had made substantial investments. If any investments were made by the three Singhania brothers from joint family funds, it should have been easy for the Department to give evidence on the point and prove it. From the fact that no mention is made in the orders of the Income-tax Officer and the Appellate Assistant Commissioner that there were any such investments, we take it that there was no evidence to show that any fund of the Hindu undivided family was utilised in the business Harishankar Gopal Hari. As regards the point, why strangers should admit the three minors to the benefits of the partnership, the answer appears to us to be plain enough. The three Singhania brothers might have found it unnecessary or unprofitable to take the sole selling agency contract as it would only add to the burden of Income-tax and Super tax etc., and they might have agreed to use their influence to get the sole selling agency contract for the firm Harishankar Gopal Hari if their minor sons were benefited by being admitted to the benefits of the partnership. There being no evidence that any joint family funds were used in the business of the firm Harishankar Gopal Hari or any joint family funds were invested in that business, it is not possible to hold that the three minors, who were members of their respective joint families of which their fathers were Kartas, merely represented the joint families and were not there in their own rights. There was thus no material on which the Tribunal could come to the conclusion that it did.

(9) Before we leave this point, however, we may mention that, in the statement of the case, when making the reference, the Tribunal probably realised that the finding given in the Appellate Order was not satisfactory and it added certain words which are not to be found in the Appellate Order. In the Appellate Order, dealing with the question of funds, the Tribunal said as follows:

"There is no evidence to hold that any funds other than of the Hindu undivided families were used by or for the minors"

In the statement of the case after these words the Tribunal added—

"in investing any capital in the firm of M/S Harishankar Gopal Hari."

(10) The result, therefore, is that this reference must be answered in the negative. The assessee is entitled to his costs which we assess at Rs. 400/-.

B/H.G.P. Reference answered.

A. I. R. 1953 ALL. 774 (Vol. 40, C. N. 384)

(LUCKNOW BENCH)

R. SINGH J.

Durga Prasad, Applicant v. State.

Criminal Revn. No. 172 of 1952, D/- 29-5-53.

Interpretation of statutes — Addition or subtraction of words — (U. P. Foodgrains Movement Control Order (1949), Sch. 6, Para 2).

Law should be interpreted as not to make any words redundant if it is possible to interpret it so as to utilize the meanings of all the words used in the legislation. Hence the words "in the Gorakhpur and Basti districts" in Sch. 6, para 2, U. P. Foodgrains Movement Control Order should be inter-

preted as governing the words "are lying within two miles to the north of the river Rapti" also, as when they are interpreted otherwise as governing the area to the west of river Rohin the words "Basti district" would become redundant—Therefore any part lying in Konda district would not be covered by those words. (Paras 4, 5)

R. B. Lal, R. B. Chaudhri and J. D. Pradhan, for Applicant; Manik Chand Jain, for Asst. Govt. Advocate, for the State.

ORDER: This is an application for revision on behalf of one Durga Prasad who has been convicted under S. 7, Essential Supplies Act for having contravened the provisions of Cl. 3 (vi), U. P. Foodgrains Movement Control Order, 1949.

(2) It appears that on 4-3-1951, at about 9-30 p. m. a party of the anti-smuggling squad detected eight cart loads of rice being taken towards Balrampur in village Sisai. One of these carts was owned and [illegible] the applicant. He was then prosecuted.

(3) The learned Magistrate who tried the case came to the conclusion that the applicant was found taking rice to a place within two miles of the river Rapti which was an area to which the prohibition of movement of rice was applicable. The Sessions Judge who heard the appeal also concurred with the Magistrate and held that the area in which the applicant was detected was a prohibited area. The appeal was accordingly dismissed.

(4) The only point which has been pressed in arguments on behalf of the applicant is that the words "in the Gorakhpur and Basti districts" in para. 2, Schedule 6. U. P. Foodgrains Movement Control Order, 1949, governed the words "the area lying within two miles to the north of the river Rapti" also. A plain reading of the words in question may perhaps lead to the inference that the words "in the Gorakhpur and Basti districts" were meant to apply to the area two miles to the west of the river Rohin but it has been argued that no part of the river Rohin lies in the Basti district and if this was the intention of the Legislature, it would not have used the words "in the Gorakhpur and Basti districts" in connection with the area to the west of the river Rohin.

The maps attached to the Gazetteers of the two districts, Basti and Gorakhpur, show that no part of the river Rohin lies in the Basti district and no part of the river Rohin is within two miles of the border of Basti district. If, therefore, the words "in the Gorakhpur and Basti districts" are interpreted to govern the area to the west of the river Rohin, the words "Basti district" would become redundant. It is a normal rule of interpretation that the law should be so interpreted as not to make any words redundant if it is possible to interpret it so as to utilize the meaning of all the words used in the legislation. In the present case it appears to me that the words "in the Gorakhpur and Basti districts" in view of the contention mentioned above would govern the words "area lying within two miles to the north of the river Rapti" also.

(5) It is not disputed that the place where the cart driven by the applicant was detected lay in the Gonda district. That part would not, therefore, be covered by the words of para 2 of Sch. 6, as the corridor referred to in para. 2 of Sch. 6 would be only that part that would lie in the Gorakhpur and Basti districts. In the view that I have taken, the conviction of the applicant cannot stand.

(6) No other point has been pressed in arguments.

(7) The application for revision is, therefore, allowed and the conviction and sentence of the applicant passed by the Courts below are set aside. The rice which has been confiscated shall also be released in favour of the applicant and if the rice has been sold and replaced by the value received, the money shall be made over to the applicant. The fine if realised shall be refunded.

C/M.K.S. Application allowed.

A. I. R. 1953 ALL. 775 (Vol. 40, C. N. 385)

MALIK C. J. AND V. BHARGAVA J.

Padampat Singhania, Applicant v. Commr. of Income-tax, U.P. and Ajmer-Merwara, Lucknow, Respondent.

Misc. Cases Nos. 139(a), 139(b) and 139(c) of 1948, D/- 9-4-1953.

Income-tax Act (1922), Ss. 30, 23(2) and (4), and 27 — Scope of appeal — (Civil P. C. (1908), Ss. 100 and 101).

An appeal is a creature of the statute and, if no right of appeal is given, no appeal can be filed. It may be one thing to say that where an order is really under S. 23(3) but is wrongly labelled as an order under S. 23(4), an assessee has a right to file an appeal. If, however, the assessment has in fact been made under S. 23(4) as the best judgment assessment, it cannot be held that even before the amendment of S. 30 the assessee had a right to file an appeal. (Para 4)

Before the amendment of S. 30, Income-tax Act, the position was that the order of the Income-tax Officer making an assessment under S. 23(4) was final, but if the assessee had made an application under S. 27 that he should not have been assessed under S. 23(4) and the Income-tax Officer had rejected that application, he could file an appeal before the Appellate Assistant Commissioner, go up in appeal to the Appellate Tribunal and even ask for a reference to this Court if a question of law arose. After the amendment of S. 30 the assessee has got two rights: (1) to question the validity of a reference under S. 23(4) in the same way as before, that is, by an application under S. 27, appeal to the Appellate Assistant Commissioner and further appeal to the Appellate Tribunal, or (2) if he did not challenge his liability to be assessed under S. 23(4) he could appeal against the quantum of the tax imposed to the Appellate Assistant Commissioner and the Tribunal. (Para 5)

In compliance with notices issued under S. 23 (2), the assessees filed their returns. The Income-tax Officer then issued notices under S. 22(4) for production of certain account-books. These notices were not complied with and he then proceeded to make the assessment under S. 23(4), Income-tax Act. No application under S. 27, Income-tax Act, was filed on behalf of assessees for cancellation of assessment under S. 23(4) and making a fresh assess-

ment under S. 23(3). They, however, straightway filed appeal before the Appellate Assistant Commissioner who found that assessment unjustified and himself made certain adjustments. (Para 2)

Held that the Appellate Assistant Commissioner was not competent to entertain an objection to the assessment being made under S. 23(4), in proceedings other than those through S. 27 of the Act. Case law considered. (Paras 1 and 2)

Anno: Income-tax Act, S. 23, N. 3, 4; S. 27 N. 1; S. 30 N. 1.

G. S. Pathak, for Applicant; S. C. Das, for Respondent.

CASES CITED:

(A) ('53) AIR 1953 All 401: 1953-23 ITR 272
(B) ('38) AIR 1938 PC 175: 1938-6 ITR 414
(C) ('29) AIR 1929 Lah 593: 10 Lah 596 (FB)
(D) ('31) AIR 1931 All 417: 53 All 451
(E) ('45) AIR 1945 Cal 104: 1944-12 ITR 327
(F) ('53) AIR 1953 All 735: (Misc. Case No. 300 of 1949 All.)

MALIK C. J.: There is one common question of law referred to us in these three references. The question formulated is as follows:

"Whether the Income-tax Appellate Tribunal was legally correct in holding that the Appellate Assistant Commissioner was not competent to entertain an objection to the assessment being made under S. 23(4), Income-tax Act, in proceedings other than those through S. 27 of the Act?"

The facts relating to this matter are very simple and are not disputed. In compliance with notices issued under S. 23(2), Income-tax Act, the three assessees, Sir Padampat Singhania, L. Kailashpat Singhania and L. Lakshmipat Singhania, filed their returns. We may mention that these were three separate cases, the three brothers being separate. The notices were issued to them as heads of the Hindu undivided family represented by each. The Income-tax Officer then issued notices under S. 22(4) for production of certain account-books. These notices were not complied with and he then proceeded to make the assessment under S. 23(4), Income-tax Act. No application under S. 27, Income-tax Act was filed on behalf of any of the three assessees for cancellation of assessment under S. 23(4) and making a fresh assessment under S. 23(3). The three assessees, however, straightway filed three appeals before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner went into the question whether the Income-tax Officer was justified in making the assessment under S. 23(4) instead of under S. 23(3) and he came to the conclusion that the Income-tax Officer was not so justified under S. 23(4) and after having recorded that finding he considered the assessment on the merits and made certain adjustments, and so far as Sir Padampat Singhania was concerned the result of the adjustments was that the total income was reduced by a figure of Rs. 3,85,189/-. This order of the Appellate Assistant Commissioner is dated 16-1-1947.

(2) The Income-tax Officer appealed against this order and the Appellate Tribunal came to the conclusion that no application having been filed under S. 27 and there being no appeal before the Appellate Assistant Commissioner against an order under S. 27, in the appeal against the assessment order under Section 23(4) the Appellate Assistant Commissioner had no right to go into the question, whether the assessment was or was not properly made under that section, with the result that it allowed the appeal and held that the assessment made by the Income-tax Officer must be deemed to be best judgment assessment under S. 23(4) and could not be held to be an assessment under S. 23(3).

(3) The three assessees then applied that the question be referred along with other questions to this Court for its opinion and that is how the question quoted above came to be referred to us.

(4) The point is covered by a recent decision of this Court in — 'Chhotelal Gobardhan Das v. Commr. of Income-tax, U. P., V. P. and Lucknow', AIR 1953 All 401 (A). In that case an application under S. 27 had been filed and had been disposed of. Thereafter there were two appeals before the Appellate Assistant Commr., to the one against the order under S. 27 and the other against the assessment under S. 23(4). Both the appeals were disposed of by the Appellate Assistant Commissioner. The assessee then filed one appeal before the Appellate Tribunal against the order of the Appellate Assistant Commissioner in the appeal against the assessment under S. 23(4). He filed no appeal against the order of the Appellate Assistant Commissioner in the appeal filed against the order under S. 27, and the question was whether the Appellate Tribunal could in that appeal go into the question whether the Income-tax Officer was justified in making assessment under S. 23(4). We held that the appeal before the Tribunal related to the quantum of the tax payable and in that appeal the question, whether there was sufficient cause for not complying with the previous notice, did not arise, no appeal having been filed against the order under S. 27, though an appeal was provided for by the Indian Income-tax Act. Mr. Pathak, on behalf of the assessee, has asked us to reconsider that decision in view of the observations made by their Lordships of the Judicial Committee in — 'Commr. of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas', AIR 1938 PC 175 (B). As that case was not cited before us when we decided the case of Chhotelal Gobardhan Das, we heard counsel on the point and considered the question whether the Privy Council decision made it necessary for us to reconsider our previous judgment. After having carefully considered the matter, however, we do not feel disposed to change the opinion already expressed by us in — 'Chhotelal Gobardhan Das's case (A)'. In — 'Khemchand Ram Das's case (B)', the Income-tax Officer had issued notices under Ss. 22(2) and 22(4). When the assessment was made, S. 30, Income-tax Act, had not been amended and there was no appeal against an assessment order made under S. 23(4). An appeal was, however, filed before the Appellate Assistant Commissioner and was considered on the merits but failed. The question was debated whether the assessment was, in fact, made under S. 23(4) or under S. 34 or S. 35. The Appellate Assistant Commissioner of Income-tax had expressed no opinion but their Lordships of the Judicial Committee held:

"For the order could only be justified, if at all, as one made, not under S. 23(4) but under either S. 34 or S. 35. If it was made, as

the Commissioner has found, in purported exercise of the powers given by S. 23(4), the assessee nevertheless had a right of appeal to the Assistant Commissioner under S. 33 and the Commissioner was in error when he quashed the proceedings on that appeal."

Their Lordships quoted with approval the observations of Sir Shadi Lal in — 'Duni Chand v. Commr. of Income-tax, Punjab', AIR 1929 Lah 593 (FB) (C) :

"The mere fact that the assessment purports to have been made under that sub-section does not shut out an appeal; it must be shown that the circumstances of the case bring it within the scope of that sub-section."

Learned counsel for the assessee has urged that, even if an Income-tax Officer has made the best judgment assessment under S. 23(4), the assessee had a right to file an appeal before the Appellate Assistant Commissioner and urge before him that there were good reasons for his not having been able to comply with the notice under S. 22(4). An appeal, as is now well settled, is a creature of the statute and, if no right of appeal is given, no appeal can be filed. It may be one thing to say that where an order is really under S. 23(3) but is wrongly labelled as an order under S. 23(4), an assessee has a right to file an appeal on the ground that the order has been wrongly labelled and it was really an order under S. 23(3) and he had a right of appeal. Such a case came before this Court in the matter of Gangasagar, AIR 1931 All 417 (D) where the Income-tax Officer made the assessment on the basis of the account-books produced. He, however, said that though he was making the assessment on the basis of the account-books produced yet as the assessee had not complied with the notice under S. 22(4), the assessment order must be deemed to be an assessment under S. 23(4). The question referred to this Court was as follows :

"Whether, in the circumstances of this case, the Income-tax Officer was right in calling his assessment an assessment under S. 23(4) of the Act or whether in law the assessment was one under S. 23(3) of the Act, and whether in the latter case the assessee had a right of appeal in the regular way?"

This Court held that when an assessment is in fact made under S. 23(3), merely by requiring the production of some unnecessary books or documents, which were not needed for the assessment, the Income-tax Officer cannot call it an assessment under S. 23(4). With the observations made in that judgment we respectfully agree. If, however, the assessment has in fact been made under S. 23(4) as the best judgment assessment, we find it difficult to hold that even before the amendment of S. 30 the assessee had a right to file an appeal and have the question debated whether he was prevented from making compliance with the notice under S. 22(4) by reason of sufficient cause.

(5) Mr. Pathak has urged that in a case where an assessee has already made his submissions why he was not able to comply with the notice under S. 22(4) and the Income-tax Officer had held against him and had come to the conclusion that he had not complied with the notice and had thereafter proceeded to make the assessment under S. 23(4), it would be useless for the assessee to apply to him again under S. 27 for reconsideration of the question, and in such a case to require him to file an application under S. 27 would be to ask him to do something which was useless. We do not agree with learned counsel. In some cases it might be that all the facts were already before the Income-tax Officer and it was not likely that he would change his mind, but in the majority of cases it would be useful for an assessee to have an opportunity to place the facts afresh so that, if the Income-tax Officer was not prepared to change his mind, the Appellate Assistant Commissioner or the Tribunal might be able in the light of the facts to consider whether there was sufficient justification for non-compliance with the notice under S. 22(4). Before the amendment of S. 30, Income-tax Act, the position was that the order of the Income-tax Officer making an assessment under S. 23(4) was final, but if the assessee had made an application under S. 27 that he should not have been assessed under S. 23(4) and the Income-tax Officer had rejected that application, he could file an appeal before the Appellate Assistant Commissioner, go up in appeal to the Appellate Tribunal and even ask for a reference to this Court if a question of law arose. After the amendment of S. 30 the assessee has now got two rights: (1) to question the validity of a reference under S. 23(4) in the same way as before, that is, by an application under S. 27, appeal to the Appellate Assistant Commissioner and further appeal to the Appellate Tribunal, or (2) if he did not challenge his liability to be assessed under S. 23(4) he could appeal against the quantum of the tax imposed to the Appellate Assistant Commissioner and the Tribunal. We have taken this view in — 'Chhotelal Gobardhan Das's case (A)', and it is also supported by a decision of the Calcutta High Court in — 'Naba Kumar Singh v. Commr. of Income-tax, Bengal', AIR 1945 Cal 104 (E).

(6) We see no reason to change the opinion already expressed and our answer to the question is, therefore, in the affirmative.

(7) In these cases the assessee has made applications under S. 66(4) and those applications relate to a sum of Rs. 75,000/- in Miscellaneous Case No. 139(a) of 1948 and a sum of Rs. 10,000/- each in Miscellaneous Cases Nos. 139(b) and 139(c) of 1948.

(8) As regards the sum of Rs. 10,000/- which arises in the last two cases, the assessee claimed a deduction to that extent which he alleged was interest due from him to the firm Messrs. Juggilal Kamlapat. This he alleged was interest on amounts drawn by him from that firm. It was, however, admitted by the assessee that he had not paid any interest to the firm, nor was there any agreement to pay that interest. The amount was claimed merely on the ground that the Income-tax Officer, while making the assessment of the firm Messrs. Juggilal Kamlapat, had wrongly disallowed a sum of Rs. 30,000/- as not being interest on the money borrowed for purposes of that business. The assessee's claim was that the Income-tax Officer having made a mistake in assessing the firm Messrs. Juggilal Kamlapat, he must be made to make another mistake while assessing the particular assessee so that the two mistakes might neutralise the effect and the assessment might be as it should have been according to the assessee. This is hardly any ground for claiming the reduction. On the facts admitted that no interest was pay-

able or had been paid, the assessee could not claim any deduction. We cannot, therefore, ask for any reference in these two cases — Miscellaneous Cases No. 139(b) and 139(c) of 1948.

(9) In Miscellaneous Case No. 139(a) of 1948 the sum involved is Rs. 75,000/-. The Income-tax Officer while making the assessment under S. 23(4), found that the assessee's expenses every year exceeded the income showed by him. He deduced therefrom that there must be some other source of income which enabled the assessee to balance his budget. The Income-tax Officer held that the onus of proving the nature and source of the funds which were utilised for personal expenses lay upon the assessee. If he failed to discharge that obligation and was unable to properly explain or disclose the true source from which they had been made and which was within the peculiar knowledge of the assessee, the Income-tax Officer was entitled to treat the money so spent as income from separate sources. Besides that ground the Income-tax Officer gave three other grounds which were as follows:

"(2) Expenses incurred on charitable objects and repairs to the extensive house property incurred through the parent firm of the family, Messrs. Juggilal Kamlapat were written off on the closing day of the accounting period through equivalent cash deposits. It is alleged that these deposits were made by the partners out of their personal drawings. But, there is no entry whatever, in the assessee's books showing the alleged remittances to the firm, Messrs. Juggilal Kamlapat.

(3) The assessee purchased a decree of Messrs. Anundi Lal Poddar & Co. against Messrs. Ram Kumar Rameshwar Das for Rs. 1,60,000/-. This transaction should have in all circumstances found a place in the assessee's account books.

(4) The assessee has a current account with the Imperial Bank of India. It appears from the monthly statements of accounts received from the Bank that a sum of Rs. 41/6/- was deposited by cheque on 8-2-1941. In spite of specific opportunity allowed to the assessee, the particulars of this deposit have not been furnished. The amount involved is a petty one but it proves beyond a shadow of doubt the existence of undisclosed sources of income."

On these facts he held that income from undisclosed sources included the sum of Rs. 75,000/-. The Appellate Assistant Commissioner set this finding aside but the Appellate Tribunal restored it and held that it was undisclosed income and directed the amount to be added back to the taxable income of the assessee. The assessment being under S. 23(4) all that we are required to see is whether the Income-tax Officer's order was a reasonable order or he had made the assessment capriciously (vide our decision in — 'Singh Engineering Works, Kanpur v. Commr. of Income-tax, U.P., Lucknow', AIR 1953 All 735 (F)).

(10) We, therefore, do not feel disposed to direct the Appellate Tribunal to make any reference in this case.

(11) The other questions proposed in these applications do not, in our view, arise.

(12) The assessee must pay costs to the Department which we assess at Rs. 400/- in each case.

B/H.G.P. Order accordingly.

A. I. R. 1953 ALL. 778 (Vol. 40, C. N. 386)

ASTHANA J.

Ramvir and others, Appellants v. The State.

Criminal Appeal No. 1246 of 1950, D/- 7-7-53.

Penal Code (1860), Ss. 149 and 323 — Liability of member of unlawful assembly.

Where the accused were members of an unlawful assembly having a common object of beating the complainant, the mere fact that they did not take part in the actual beating cannot exonerate them of their liability for offence under S. 323, Penal Code, committed by other members of the assembly. They would be guilty under S. 323 when it is proved that they were present in the assembly at the place of occurrence. (Para 5)

Anno: Penal Code, S. 149 N. 1 and 8.

Majeed Uddin, for Appellants; A. G. A., for the State.

JUDGMENT: The appellant Ram Vir is the son of the appellant Rewa Ram. The appellant Sardar is the son of the appellant Sita Ram. They all along with one Lakhan have been convicted under S. 147, I. P. C. Except Lakhan they have also been convicted under S. 323, I. P. C. Lakhan has been convicted under S. 325, I. P. C. He has been sentenced to six months' rigorous imprisonment under S. 147, I. P. C. and to two years' rigorous imprisonment under S. 325, I. P. C. and both the sentences have been made concurrent. The other four appellants have been sentenced to six months' rigorous imprisonment under S. 147, I. P. C. and to the same term under S. 323, I. P. C. and both the sentences have been made concurrent. Lakhan has filed his appeal from the jail and is unrepresented. The other four appellants are represented.

(2) It appears that on the 11-1-1948 in the afternoon at about 3 p. m. there was a marpit at a place between the villages Sheikhupura and Siroli. The report of the occurrence was made by one Babu the same day at 4-30 p. m. at police station Dadon, tehsil Atrauli, district Aligarh and in this report all the accused were named. This report was made under S. 323, I. P. C. It was alleged in this report by Babu that he along with Bahori Lal of his village was going to Bihani fair to purchase cattle and as they reached the river near Sheikhupura the accused Sita Ram, Lakhan, Rewa Ram, Sardar, Talewar and Ram Vir, who were all Ahirs by caste and residents of the same village, met them armed with lathis, and Lakhan, Sita Ram, Rewa Ram and Talewar began to abuse them and plied lathis on Bahori. It is also mentioned in this report that there was a litigation between Bahori and the accused persons in connection with some land and on account of this litigation there was enmity between them and it was for this reason that they all beat Bahori with lathis.

(3) The defence of the accused Sita Ram and Lakhan was that they themselves were beaten by Bahori and Babu alias Habbu, Shiam Lal son of Rupram and Birbal and nine other persons and robbed of their money. They too

made a report about this occurrence. The defence of the other accused was that they had been falsely implicated in the case. They denied their presence on the spot or that they took any part in the beating of Bahori.

(4) The medical evidence shows that Bahori was examined on the 12-1-1948 at about 7 in the morning and at the time of his examination it was found that he had ten injuries on his person, two of which were grievous and the rest were simple. It further appears from the medical evidence that all these injuries had been caused by lathis. The evidence about the occurrence is of Bahori, Shiam Lal, Birbal, Babu & Ram Swarup. The evidence of Ram Swarup has not been accepted by the lower court probably because he was not named in the first information report. The evidence of the remaining four witnesses, two of whom namely Shiam Lal and Birbal were mentioned in the first information report which was made soon after the occurrence was accepted by the lower court. Bahori is the person who was beaten and who received the injuries and Babu is the person who made the first information report. Nothing has been shown on behalf of the appellants why these four witnesses have falsely implicated them.

The occurrence took place in broad daylight and it is unlikely that the assailants were not seen and recognised. It also appears somewhat unlikely that if Bahori had really been beaten by someone else he would falsely implicate the accused and would leave out the real assailants. It is an admitted fact that there was litigation between Bahori and the accused and it is not unlikely that on account of this litigation they had a grudge against them and for that reason they beat them. The defence case that Sita Ram and Lakhan were beaten by Bahori and a number of other persons, does not appear to be true, because in that case it is very unlikely that Bahori would have received as many as ten injuries. There is nothing on the record to show that Lakhan or Sita Ram also received any injuries. In the circumstances, there does not appear any reason to disbelieve the evidence of the four eye-witnesses, namely, Bahori, Shiam Lal, Birbal and Babu that the accused came armed with lathis and four of them, namely, Lakhan, Sita Ram, Rewa Ram and Talewar beat Bahori with lathis.

(5) It has been argued on behalf of the accused Sardar and Ram Vir that from the first information report it appears that they did not take any part in the beating and in view of this fact their conviction under S. 323, I. P. C. was bad and could not be maintained. It is true that in the first information report they are not mentioned among the persons who really beat Bahori and inflicted injuries upon him. It, however, appears from the report as well as from the prosecution evidence that they were also among the persons who had come armed with lathis and were present at the place of occurrence. The mere fact that they did not take part in the beating, which was the object of the unlawful assembly, does not exonerate them from the liability for the offence which was committed by some of the members of the unlawful assembly. They will be liable for the offence which was committed by one or more of the members of the assembly. In the circumstances, I am of opinion that their conviction under S. 323, I. P. C., is correct.

(6) The appeal is, therefore, dismissed. As the appellants Nos. 1 to 4 are on bail they shall surrender to it and serve out their sentences.

B/K.S.B. Appeal dismissed.

A. I. R. 1953 ALL. 779 (Vol. 40, C. N. 387)

MALIK C. J. AND V. BHARGAVA J.

Sri Ram Mahadeo Prasad, Applicant **v.** Commr. of Income-tax, United Provinces, Lucknow, Respondent.

Income-tax Misc. No. 82 of 1949, D/- 8-5-1953.

(a) Income Tax Act (1922), S. 10 (2) (xv) — Hotel charges.

The hotel charges of the proprietors in respect of a tour undertaken for the purposes of procuring business for the firm are not allowable expenditure under S. 10 (2) (xv). 1951-19 ITR 324 (All), Foll. (Para 3)

Anno: Income-tax Act, S. 10 N. 13.

(b) Income-tax Act (1922), S. 10 (2) (iii) and (4) (b) — Interest paid to partner.

An assessee firm is not entitled to claim that the interest paid by it to its partners for money borrowed from them should be treated as expenditure and should be allowed to be deducted at the time of computation of profits. AIR 1941 Mad 672; AIR 1936 PC 133, Distinguished. (Para 7)

Anno: Income-tax Act, S. 10 N. 5 and 15.

(c) Income-tax Act (1922), S. 10 (2) (iii) and (4) (b) — Interest paid by partner — (Partnership Act (1932), S. 13).

A partner is entitled to charge interest under S. 13 of the Partnership Act. Section 10, sub-sections (2) (iii) and (4) (b), Income-tax Act, make it clear that the assessee firm is not entitled to claim a deduction for any interest paid by it to its partners. If the partner has borrowed money from the partnership, it only means that he has divested to his own personal use a part of the capital which might have been invested for business purposes and has agreed to compensate the partnership by paying interest for it. There is no reason why the interest paid by the partner should not be treated as profits made by the partnership. (Para 9)

Anno: Income-tax Act, S. 10 N. 5; Partnership Act, S. 13 N. 3.

S. B. L. Gaur, for Applicant; S. C. Das and J. Swarup, for Respondent.

CASES CITED:

(A) ('51) 1951-19 ITR 324 (All)
(B) ('41) AIR 1941 Mad 672: 1941-9 ITR 284
(C) ('36) AIR 1936 PC 133: 1936-4 ITR 173

MALIK C. J.: This is a reference under S. 66 (1), Income-tax Act, made at the instance of the assessee. The assessee is a registered firm which carries on business, owns house property, has income from dividends and other sources. During the relevant assessment year, the assessee claimed certain deductions as hotel charges incurred by the partners while on tour connected with business. The partners of the assessee firm had also lent money to the firm for purposes of carrying on its business and had from time to time borrowed money from it. There was a Khata in the name of each partner which showed the amount of interest paid by the firm to the partner on the amount borrowed

from him and also interest received from the partner on any amount borrowed by him. The total amount paid to the partners as interest on amounts borrowed from them was Rs. 19,712/-, while the amount received from the partners as interest on monies borrowed by them was Rs. 7,931/-. The assessee had in his return deducted from its income the sum of Rs. 19,712/- paid as interest to the partners. The Income-tax Officer disallowed the hotel charges paid by the partners, as also the whole item of Rs. 19,712/- which he added back to the income. The Appellate Assistant Commissioner and the appellate Tribunal directed a sum of Rs. 13,412/- only to be added back to the return.

(2) On the application of the assessee, the following two questions have been referred to us for our decision:

"1. Whether the hotel charges of the proprietors in respect of a tour undertaken for the purposes of procuring business for the firm are allowable expenditure under S. 10 (2) (xv) of the Income-tax Act?

2. Whether the excess interest received from the partners of the firm on the amounts overdrawn by them after adjustment against the payments of interest made to them by the firm is taxable income in the hands of the firm?"

(3) As regards the first question it is already covered by our decision in — 'Ramkishan Sunderlal v. Commr. of Income-tax, U. P.', (1951) 19 ITR 324 at p. 330 (All) (A). We see no reason to reconsider our view and answer the question in the negative.

(4) As regards the second question, the assessee was a partnership firm of which the five partners were, (1) Jagannath Mahadeo Prasad (2) Kamta Prasad (3) Har Prasad (4) Chunnilal Sohanlal and (5) Gangadin Kedarnath. It appears that the first four partners had invested money in the partnership firm on which the firm was paying interest to them. The amount of interest paid by the firm to Jagannath Mahdeo Prasad being Rs. 12,166/-, to Kamta Prasad Rs. 601/-, to Har Prasad Rs. 3,423/- and to Chunnilal Sohanlal Rs. 3,522/-, the total amount thus paid as interest to the partners on the capital borrowed from or invested by them came to Rs. 19,712/-. It appears from the accounts that the partners withdrew or borrowed money from the firm on which they were charged interest by the firm. The amount of interest thus paid by Jagannath Mahadeo Prasad was Rs. 5,699/-, Kamta Prasad Rs. 1,439/- and Gangadin Kedarnath Rs. 793/-. The total amount of interest received by the firm from the partners for money borrowed by them from the firm was Rs. 7,931/-.

(5) The Income-tax Officer added back the whole amount of Rs. 19,712/- paid by the firm to the partners for money borrowed from them without deducting the sum of Rs. 7,931/-, the interest received by the firm from the partners. The assessee filed an appeal and the Appellate Assistant Commissioner amended the order by deducting the amounts of Rs. 5,699/- and Rs. 601/- only, thus holding that a sum of only Rs. 13412/- (Rs. 19,712/- minus Rs. 6300/-) should have been added back to the return made by the firm. The Tribunal upheld the Appellate Assistant Commissioner's order.

(6) The Appellate Assistant Commissioner and the Tribunal dealt with the amount received from and paid to each partner separately. For example, Jagannath Mahadeo Prasad had received Rs. 12,166/- as interest on money lent by him to the partnership, while he had paid Rs. 5,699/- as interest on amount borrowed by him from the partnership. The amount paid to him as interest was adjusted against the amount received from him so that only the difference between Rs. 12,166/- and Rs. 5,699/- was directed to be added back. Kamta Prasad had lent money to the partnership for which he had been paid Rs. 610/- as interest. He had, however borrowed more than what he had lent to the partnership and had, therefore, to pay Rs. 1,439/- as interest to the partnership. The amount of Rs. 601/- was allowed by the Assistant Commissioner and the Tribunal to be deducted out of Rs. 1,439/-.

(7) As regards sums of money which were borrowed from partners and on which the assessee firm paid interest to the partners, the provisions of S. 10 (2) (iii) and 10 (4) (b), Income-tax Act, make it perfectly clear that the amounts could not be deducted in computing profits or gains of the partnership. The relevant portion of section 10 (2) (iii) is as follows:

"(2) Such profits or gains shall be computed after making the following allowances, namely:

(iii) in respect of capital borrowed for the purposes of the business, profession or vocation the amount of the interest paid:

Provided that no allowance shall be made ..... in the case of a firm, for any interest paid to a partner of the firm;"

Again S. 10 (4) (b) provides that:

"..... nothing in clause (xv) of sub-section (2) shall be deemed to authorise (b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm;"

It is thus clear that the assessee was not entitled to claim that the interest paid by it to its partners for money borrowed from them should be treated as expenditure and should be allowed to be deducted at the time of computation of profits. There is, however, nothing in the Income-tax Act which excludes from the computation of the income of the partnership any amount paid as interest by a partner for money borrowed by him from the partnership.

(8) Our attention has been drawn to a decision of the Madras High Court in — 'Venkadari Somappa v. Venkataswami Chetty', AIR 1941 Mad 672 (B) and reliance has been placed on behalf of the assessee on the observations in that judgment that, when the income of a partnership is assessed to tax under the Income-tax Act, what is really assessed is nothing less than the income of individual partners and that a partner is entitled to apply under S. 48 for the refund of the tax upon his share if his total income for the year is below the taxable minimum. These observations, however, relate to an entirely different set of circumstances. In that case the question was whether the appellant was an agriculturist entitled to claim the benefit of an Act passed for the benefit of agriculturists and a person was not deemed to be an agriculturist if he had been assessed to Income-tax under Proviso (A) to S. 3 of Act 4 of 1938. The appellant in that case was a partner in a ginning factory and was entitled to one-fourth share of the profits. The factory was assessed to Income-tax for its profits in the year 1937-38. The point raised was whether the appellant could be said

to have been assessed to Income-tax as the factory of which he was a partner had been assessed to Income-tax.

(9) The case of — 'Arunachalam Chettiar v. Commr. of Income-tax, Madras', AIR 1936 P C 133 (C) was also relied upon. That was a case in which the question arose whether a partner could undertake the liability to pay the losses incurred by another partner and claim to set it off against his profits from other business. Another point in the case was whether the losses incurred by the other partner could be treated as bad debt in the year in question. While dealing with these points their Lordships of the Judicial Committee said:

"From section 24 (2) of the Indian Income-tax Act it would seem that the Indian legislature thought it necessary to anticipate any possible apprehension that a partnership, by being registered as a registered firm within the meaning of section 26 of the Act, might be treated as a separate assessee in so absolute a sense as to prevent a partner's share of loss being set off against his individual profits or gains. In their Lordships' opinion whether a firm is registered or unregistered, partnership does not obstruct or defeat the right of a partner to an adjustment on account of his share of loss in the firm, whether the set off be against other profits under the same head of income within the meaning of Section 6 of the Act or under a different head (in which case only need recourse be had to S. 24 (1)."

We do not see how these observations help the assessee. In neither of the two cases has it been held that it is not possible for a partner to borrow from or lend money to a partnership. As a matter of fact S. 13, Partnership Act (4 of 1932), provides that:

"Subject to contract between the partners..... (d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe. is entitled to interest thereon at the rate of six per cent. per annum."

A partner, therefore, is entitled to charge interest under the Partnership Act at such rate as may be agreed upon between the partners and in the absence of an agreement six per cent per annum for all sums advanced by him beyond the amount of capital he had agreed to subscribe. The provisions of the I. T. Act quoted above make it clear that the assessee firm is not entitled to claim a deduction for any interest paid by it to its partners. If the partner has borrowed money from the partnership, it only means that he has divested to his own personal use a part of the capital which might have been invested for business purposes and has agreed to compensate the partnership by paying interest for it. There appears to be no reason why the interest paid by the partner should not be treated as profits made by the partnership.

(10) In the case before us the Appellate Assistant Commissioner and the Tribunal treated the case of a partner, who had lent money to the partnership and had also borrowed money from it, as a case of double entry and treated the balance alone as the amount either borrowed by him from or lent by him to the partnership. as the case might be, and after having made this adjustment they disallowed all interest paid by the partnership to such a partner by reason of the provisions of Ss. 10 (2) (iii) and 10 (4) (b) quoted above, while in the case of a partner who had borrowed more than he had lent, the excess amount paid as interest was treated as profits.

(11) The Appellate Assistant Commissioner and the Tribunal thus treated the assessee most fairly and, our answer to the second question be in the affirmative. The assessee must pay the costs of this reference which we assess at Rs. 300/-.

B/V.S.B. Answered accordingly.

A. I. R. 1953 ALL. 781 (Vol. 40, C. N. 388)
(LUCKNOW BENCH)

BEG J.

Samresh Singh, Applicant v. The State.

Criminal Revn. No. 75 of 1951, D/- 24-9-1951.

(a) Criminal P. C. (1898), S. 94 — Stage for filing evidence.

No definite stage for filing evidence is prescribed by the Criminal Procedure Code and it is certainly open to the complainant to summon it at any stage. (Para 4)

Anno: Cri. P. C., S. 94 N. 2.

(b) Criminal P. C. (1898), S. 342 — Non-compliance — Effect — Written statement by accused. AIR 1944 Pat 67, Diss. from.

The omission to put questions on important pieces of evidence against the accused must result in the complete exclusion of evidence relating to them. The Court cannot say that because the accused had promised to file a written statement, it was not bound to put any such questions. The duty is of the Court and the Court alone, and the Court must discharge it. The provisions of S. 342 can neither be short-circuited nor bypassed without incurring the risk of prosecution case suffering a complete breakdown or without seriously imperilling its integrity. There is no provision for filing the written statement in the Criminal Procedure Code and it is only by way of courtesy that the Courts receive such statements . Case law referred. (Paras 8, 10, 11)

Anno: Cr. P. C., S. 342 N. 35, 18.

(c) Criminal P. C. (1898), S. 342 — Admission by counsel of accused — Effect.

Whatever value the statement of the counsel may have in a civil case, the counsel cannot by his statement made in the course of his arguments on a question of fact bind the accused with it, nor such statement can be treated as a substitute for the mandatory provisions of S. 342. (Para 13)

Anno: Cr. P. C., S. 342 N. 17.

(d) Evidence Act (1872), Ss. 101 to 103 — Burden of proving fraudulent intention — Criminal P. C. (1898), S. 367.

The fact that the motive attributed by the accused to the complainant is not proved cannot relieve the prosecution of the initial burden. (Para 17)

Anno: Evi. Act, Ss. 101 to 103 N. 3; Cr. P. C., S. 367 N. 6.

S. D Misra, for Applicant; M. H. Faruqi, for the State; S. M. Yusuf, for Complainant.

CASES CITED:

(A) ('33) AIR 1933 PC 124: 34 Cri LJ 322
(B) ('34) AIR 1934 All 735: 36 Cri LJ 33
(C) ('45) AIR 1945 All 81: 46 Cri LJ 750
(D) ('47) AIR 1947 All 424: 48 Cri LJ 859
(E) ('33) AIR 1933 Oudh 305: 34 Cri LJ 568
(F) ('36) AIR 1936 Oudh 405: 37 Cri LJ 955
(G) ('48) AIR 1948 Oudh 81: 1947 Oudh WN (CC) 503: 49 Cri LJ 43
(H) ('44) AIR 1944 Pat 67: 45 Cri LJ 624

ORDER: This is a revision on behalf of one Samresh Singh, who has been convicted under S. 408, Penal Code, by the learned Additional Sessions Judge of Bahraich and sentenced to three months' rigorous imprisonment and a fine of Rs. 200/-, in default two months' rigorous imprisonment. This case has had a chequered career. The accused, along with his father, Kumar Singh, was prosecuted under S. 408, Indian Penal Code. The accused was charged with having embezzled Rs. 1,864/2/9 in his capacity as an agent of Chandra Bir Singh. This amount is alleged to have been embezzled between 20-3-1949 and 10-6-1949. The father of the accused Kumar Singh was also alleged to have embezzled a sum of Rs. 1,500/- and he was also charged, along with the accused in this case, for having committed a breach of trust in respect of that amount and the accused was charged with having abetted his father in the commission of the said offence.

(2) The learned trial Court acquitted the accused's father in respect of the offence for which he was charged as well as the accused-applicant for abetment of the same. As regards the amount of Rs. 1,864/2/9 in respect of which the applicant was charged under S. 409, (sic.) the Magistrate did not find that the entire amount was embezzled and he acquitted the accused in respect of some of the items. He, however, convicted the accused for having embezzled a sum of about Rs. 900/- which formed the price of the sugar-cane supplied and sold by the accused on behalf of his master to the sugar mills. He also convicted the accused in respect of certain amounts which he had realised from tenants of some of the villages.

(3) The accused filed an appeal against the said judgment before the learned Additional Sessions Judge of Bahraich, who allowed the appeal of the accused and acquitted him. The complainant filed a revision against the said order of acquittal which came before a learned Judge of this Court, who remanded the case to the lower Court and directed that the appeal should be reheard. In accordance with the said order appeal was again heard by the learned Additional Sessions Judge of Bahraich, who dismissed the appeal of the accused upheld his conviction and maintained the sentence passed on him by the trial Court. The accused has now filed a revision in this Court. After hearing it at length, I have come to the conclusion that this revision must be allowed.

(4) So far as the accused is concerned, the charge of embezzlement against him relates to two items; the first item consists of the price he realised for the sale of sugar-cane at the sugar mills and the second amount consists of various amounts which the accused is alleged to have realised from the tenants of the villages owned by his master. So far as the first amount is concerned, learned Counsel appearing for the complainant stated before me that after a scrutiny into the evidence of the case all that he could say was that the amount came approximately to a figure of Rs. 900/- out of which the complainant had adduced evidence to prove that Rs. 884/- was embezzled by the accused. The practice would appear to be that the accused used to take sugar-cane on behalf of his master to the sugar mills and he used to be given parchas or purzis indicating the price of the sugar-cane. It would appear that the accused used to get these receipts and hand them over to one Ram Kumar, who was a servant of a brother of the complainant and put his signature on those purzis to indicate that he had received the amounts shown in the purzis and was responsible for the same. These purzis formed the most important pieces of evidence for proving that the amounts had been realised by the accused and the payments acknowledged by him. One would think that the complainant would have filed these purzis either with the complaint or in proceedings under S. 202, Criminal P. C. No definite stage for filing evidence is, however prescribed by Criminal P. C., and it was certainly open to the complainant to summon it at any stage. The complainant admitted in his statement that he came to know that these purzis were with Ram Kumar on 11-6-1949. The complaint was filed on 14-6-1949, and Ram Kumar was summoned on a number of dates by the complainant. The complainant made the first application for summoning witnesses on 18th June but the name of Ram Kumar was not mentioned in it at all. If the complainant knew that Ram Kumar had these important documents in his possession, there was no justification for the complainant to omit such an important witness as Ram Kumar from the list of witnesses summoned. On 18-7-1949, the complainant made another application for summoning witnesses. He did mention the name of Ram Kumar as a witness to be summoned. In spite of it he did not summon these purzis from Ram Kumar. Again the complainant gave applications for summoning witnesses on 12-8-1949 and 24-8-1949 but in none of these applications was Ram Kumar summoned with the purzis. An application for summoning these purzis from Ram Kumar was for the first time made on 12-11-1949, on which date he was summoned with these purzis for 25-11-1949, when he appeared in Court and produced these purzis in evidence.

(5) The manner in which Ram Kumar was summoned and the delay in summoning purzis made by the complainant certainly goes to support the argument on behalf of the accused that the prosecution had not come to Court with clean hands and that it was trying to suppress the production of these purzis. The reason seems to have been that these purzis bore the signatures of the accused and they would have shown beyond doubt that the accused did not at all want to conceal the fact that he had realised these amounts and was responsible therefor. They would have shown not only that he had appended his signatures to these purzis, but also that he had handed over these purzis to Ram Kumar, who was the servant of the complainant's own brother. If the accused had a dishonest intention, it is inconceivable that he would hand over most important documents which would provide evidence against him to the servant of the complainant's own brother. They certainly go to negative the case of dishonest intention set up by the prosecution against the accused.

(6) Further it is also significant that the complainant made an application for the issue of a search warrant against the accused. At item No. 22 in the search warrant he mentioned the purzis as the documents in respect of which the house of the accused was to be searched. The complainant has admitted that he knew the fact that the purzis were with Ram Kumar on 11-6-1949, i. e.,

three days prior to the date on which he filed his complaint, and yet in his application for search warrant given on 14-6-1949, he applied for a search of the house of the accused being made for the recovery of the purzis. There was, therefore, absolutely no justification for mentioning these purzis in the warrant of search. It clearly implied that the purzis were retained by the accused who was acting dishonestly throughout. I understand from the statement made by the learned counsel on behalf of the accused that a number of other documents were recovered from the house of the accused but no purzis were recovered.

(7) To add to all these infirmities of the prosecution case, there can be no doubt that the learned Magistrate who tried the case committed a serious error of law in not putting any question whatsoever to the accused relating to these purzis. His attention was never drawn to the fact that there were purzis on which he had signed. He was never given any opportunity to explain as to what he had to say on this point. As a matter of fact on the amounts embezzled the trial Court put only the following two questions to the accused:

(1) "Question: Did you between the dates 20-3-1949 and 10-6-49 in your capacity as a servant of Thakur Chandra Bir Singh and having authority as such embezzled an amount of Rs. 1,864/2/9?

(2) "Question: Did you on 5-6-1949 abet Kumar Singh in embezzling a sum of Rs. 1,500/-?

1. "Kya tumne batarikh 20-3-1949 Isvi wa 10-6-49 Isvi ke darmiyan men Thakur Chandra Bil Singh ki mulazmat men hote hue aur is haisiyat se adhikar hote hue mubligh 1864 rupaiya do anna nau pie ka gavan kiya?

2. "Kya tumne batarikh 5-6-1949 Isvi ko Kumar Singh ke mubligh 1500/- rupaye gavan karne men madad diya?

(8) The first question is a composite one. It is complicated and misleading. It only gives a consolidated amount of Rs. 1864/2/9 which the accused is alleged to have embezzled. The accused in reply to that question gave a reply in the negative. It only meant that he had not embezzled the said amount. It would, therefore, appear that the trial Court did not even ask the accused as to whether he had realised or collected any amount in respect of the sale of sugar-cane. He did not even specify the said amount. He did not ask as to what he did with it if he realised it and as to what explanation he had to offer on those points. The learned Counsel appearing for the accused stated that the consolidated amount of Rs. 1,864/2/9 mentioned in the charge was made up of the following items embezzled at various times:

(1) Rs. 884/- realised by sale of sugar cane.

(2) Rs. 100/- realised by sale of the mango grove.

(3) Rs. 24/- realised as rent from tenants of village Dharampur.

(4) Rs. 385/2/3 realised as rent from tenants.

(5) Rs. 272/14/- realised as rent from tenants.

(6) Rs. 248/2/6 realised as rent from tenants.

None of the above items was specifically put to the accused nor his explanation asked in regard to them. I consider this mistake committed by the trial Court to be of a serious nature. It has no doubt caused a grave prejudice to the accused. This error on the part of the trial Court has been considered to be fatal in a large number of cases which are based on the famous Privy Council ruling reported in — 'Dwarkanath Varma v. Emperor', AIR 1933 P. C. 124 (A). The practice adopted by the trial Court has been considered to be indefensible and fatal to the prosecution case and calculated to defeat the very object of Section 342, Criminal P. C. The provisions of Section 342 are clearly mandatory and the purpose of Section 342 is to obtain from the lips of the accused an explanation of the main items of prosecution evidence against him. If any reference were necessary to further rulings on this point, I may only refer to — 'Raghubar Dayal v. Emperor', A. I. R. 1934 All 735 (B), — 'Makkhan v. Emperor', A. I. R. 1945 All 81 (C), — 'Makund Lal v. Emperor', AIR 1947 All 424 (D), — 'Sohan Lal v. Emperor', AIR 1933 Oudh 305 (E) and — 'Mahamed Anis v. Emperor', AIR 1936 Oudh 405 (F).

(9) In — 'Abu v. King Emperor', A. I. R. 1948 Oudh 81 (G) the prosecution had failed to put an alleged confession to the accused and it was laid down by a learned Judge of the later Chief Court of Avadh that

> "The failure of the trying Magistrate to put an alleged confession to the accused to elicit his explanation when the accused has pleaded not guilty is an infringement of the provisions of S. 342, Cr. P. C. and would exclude the confession from consideration in determining the guilt of the accused. It is an illegality and not a mere irregularity which can be cured under Section 537, Cr. P. C."

(10) The above rulings indicate that the omission to put questions on important pieces of evidence against the accused must result in the complete exclusion of evidence relating to them. It is obvious that the purzis constituted a most important piece of evidence against the accused. If no question relating to purzis or even payment of the specific sum realised through them was put to the accused, then the Court would be fully justified in excluding all that evidence on the point. If that evidence is completely ignored, the whole case of the prosecution relating to that item must break down. The same is true of other items also.

(11) In spite of this clear legal position a vigorous attempt has been made to support the conviction of the accused and it has been strenuously argued on behalf of the State that where an accused has filed a written statement or has promised to file one, there has been sufficient compliance with the provisions of Section 342, Criminal P. C. Reliance in this connection was placed on — 'S. Satyanarayana v. Emperor', AIR 1944 Patna 67 (H) and other rulings. If any such law was meant to be laid down in any of those cases, then I express my respectful dissent from them. I am of opinion that the law laid down under Section 342 is quite clear and casts a grave responsibility on the Court in solemn proceedings instituted against the accused to comply with its mandatory provisions, and the Court cannot absolve itself of its onerous responsibility by shifting the burden of it on the accused and saying that because the accused had promised to file a written-statement the Court was not bound to put any such question. The duty is of the Court and the Court alone, and the Court must discharge it. The provisions of Section 342, Criminal P. C., can neither be short-circuited nor by-passed without incurring the risk of prosecution case suffering a complete breakdown or without seriously imperilling its integrity. There is no provision for filing the written statement in the Criminal Procedure Code and it is only by way of courtesy that the Courts receive such statements.

(12) It has been further argued that in view of certain statements made in the written statement the accused is not prejudiced. I allowed the learned Counsel appearing for the State to read

out those portions which stated that the accused had realised the amounts of the sale proceeds of sugar-cane or had specifically dealt with the question of purzis. All that the learned Counsel could point out was the statement made by the accused in his written statement to the effect that the complainant had shown some fictitious amounts as having been embezzled by him. It is evident that trial Court did find that some of the items in respect of which the accused was charged were not embezzled by him at all, and the allegation of the accused was perfectly correct. It is, therefore, clear that even the written statement is quite silent on this point.

(13) The learned Additional Sessions Judge trying the case at the stage of the appeal has stated repeatedly in his judgment that the Counsel appearing for the accused admitted or rather conceded before him that the payment of these amounts was made to the accused. I think this procedure is absolutely unjustifiable. Whatever value the statement of the Counsel may have in a civil case, I certainly do not think that the Counsel can by his statement made in the course of his arguments on a question of fact bind the accused with it, or that such statement can be treated as a substitute for the mandatory provisions of Section 342. If such a procedure were to be followed, it is bound to have disastrous consequences, for it would result in denuding the accused of that cloak of protection which is thrown round him by the salutary provisions of Section 342, Criminal P. C.

(14) I have no doubt that the failure to comply with the provisions of Section 342, Criminal P C., has caused a serious prejudice to the accused and neither the trial Court nor the appellate Court was justified in resorting to any other method for taking the explanation of the accused on vital points.

(15) The second part of the prosecution case against the accused relates to certain realisations alleged to have been made by the accused from the tenants. The accused issued receipts in respect of these amounts and under the circumstances there was no question of any attempt on the part of the accused to conceal the realisation of these amounts. It is however unnecessary for me to examine the evidence in detail on this point for the simple reason that against the accused was not put any question relating to the realisations made by him from the tenants. No particular amount was specified as having been realised by the accused from the tenants. No dates of any such realisations were given. No question was even put to the accused as to whether he had any explanation to offer with regard to the realisations made by the tenants. When I put this question to the learned Counsel appearing for the complainant, the only answer that he could give to this question was that as the accused had filed a written statement, therefore in the circumstances of this case the provisions of Section 342 should be taken to have been complied with. As I have mentioned above, I am of opinion that there is no force in this argument. Even supposing for a moment, one admits the written statement and scrutinises the contents of the same, one would fail to find any reference to the realisations of rents from tenants by the accused. All that is contained in the written statement is a vague statement that "the realisations from tenants used to remain with the complainant". This is obviously a general statement and would not help the Court in coming to the conclusion as to the specific items in respect of which the accused was charged. The learned Additional Sessions Judge in his judgment has translated the written statement of the accused and has observed that according to the written statement "the realisations "all" remained with the complainant". The written statement has been read out to me by the learned Counsel appearing for the State and I fail to find the word "all" in the written-statement. This case, therefore, exemplifies the danger of making a written statement or the statement of the Counsel a substitute for Section 342. That is the reason why the Court is bound to record the questions put to the accused and the answer of the accused himself. Again, on this point I am constrained to observe that the non-compliance with the provisions of section 342 has caused a serious prejudice to the accused.

(16) The lower appellate Court has further observed in its judgment, "The second point of importance is that the appellant did not offer to pay the money when the complaint was brought". The complainant himself does not state in his evidence that he made any demand for payment. There is no doubt that the lower appellate Court treated failure of offer to pay as an important point against the accused and yet no question was put to the accused as to whether he had offered to pay the money to the complainant or not. In the absence of any evidence or any question on this point, which the appellate Court considered to be a point of great importance, the omission of the trial Court to ask any question was not justifiable and the lower appellate Court should not have placed any reliance on this circumstance at all.

(17) The accused's case would appear to be that there is enmity between him and the complainant and that a report of the murder of one Ummed was lodged at the police station and the name of Chandra Bir Singh was mentioned in that report. That report has been read out to me and no doubt Chandra Bir Singh has not been mentioned as an accused in that case, yet it is mentioned therein that Chandra Bir Singh was at the back of a large number of cases instituted against the deceased Ummed. The case of the accused is that he was asked by his master to help him in this matter and he having refused to do it a complaint was lodged against him. This report was made at 8 P. M. on 13th of June and the complaint in the present case was filed on the very next day, that is, on 14th June without sending a notice to the accused or calling upon him to make the payment The sequence of dates and the hurry in lodging the present complaint are rather significant; but, in the absence of other reliable evidence on the point, it is difficult to hold that the motive attributed by the accused to the complainant is proved. That, however, cannot relieve the prosecution of the initial burden of proving the dishonest or fraudulent intention of the accused; and, if there is any doubt on the question of intention, the prosecution must fail on the ground that the necessary ingredient of mens rea has not been made out.

(18) In view of the above circumstances, and particularly in view of the breach of the mandatory provisions of Section 342, Criminal P. C., and the grave prejudice to the accused caused thereby, the conviction of the accused must be set aside.

(19) The only point that remains to be considered by me is whether I should order a retrial in this case. This case has been going on since June 1949. It has dragged on for sufficiently long time. The parties have already incurred a good deal of expenditure in the case. Even if the case is retried, it is not quite certain that the prosecution would succeed in proving that the intention of the accused was fraudulent or dishonest. Under these circumstances, I do not think that it is a fit case for ordering a retrial.

(20) I accordingly allow this revision and set aside the conviction of the accused. The fine if paid shall be refunded. The accused is on bail. He need not surrender.

C/D.H. Revision allowed.

A.I.R. 1953 ALL. 785 (Vol. 40, C. N. 389)

DESAI J.

On difference of opinion between AGARWALA AND GURTU JJ.

Birey Singh, Applicant v. State.

Criminal Appeal No. 1065 of 1950; Referred No. 103 of 1950 and Govt. Appeal No. 201 of 1951, D/- 25-9-1951.

(a) Evidence Act (1872), S. 33 — Sessions Judge bringing on record deposition made by witness before committing Magistrate — Reason given for dispensing with his personal attendance insufficient — In committing Magistrate's Court witness not cross-examined with reference to his earlier statements during investigation and under S. 512, Criminal P. C. — Held it was premature for the Sessions Judge to give finding at time of admitting witness's deposition that it was of little use to prosecution because the witness had not named accused before he was examined in Committing Magistrate's Court — (Criminal P. C. (1898), S. 288). (Para 4)

Anno: Evidence Act, S. 33 N. 1; Cr. P. C., S. 288 N. 2.

(b) Evidence Act (1872), S. 9 — Absence of identification proceedings.

In the absence of identification proceedings the mere 'ipse dixit' of the witnesses that the accused was one of the dacoits could not be believed. (Para 4)

Anno: Evidence Act, S. 9 N. 4, 5.

(c) Criminal P. C. (1898), S. 162 — Statement under — Use of.

The statement under S. 162 can be used only to contradict the witness and before the witness can be contradicted, his attention ought to be drawn to the contradictory portion of the statement as required under S. 145, Evidence Act. Failure of the Court to do so is fatal to the availability of the statement for the purpose of contradicting the deposition. AIR 1951 SC 441, Foll. (Para 4)

Anno: Cr. P. C., S. 162 N. 10, 20a.

(d) Criminal P. C. (1898), S. 162, Proviso — Contradicting witness — Procedure.

The Judge should not exhibit the whole statement; he should exhibit only the particular portion which contradicted the deposition given in Court.

Where the Judge allowed the witness to be put question after question regarding what he had, or had not, stated to the investigating officer and recorded the answers and at one place he had made a note that a particular statement said by the witness to have been made was not there:

Held that this was not the proper way of contradicting the witness. The particular part of the statement which contradicted the deposition of the witness ought to have been read over to the witness and exhibited. (Para 4)

Anno: Cr. P. C., S. 162 N. 16.

(e) Evidence Act (1872), S. 24 — Confession — Corroboration.

If it is found that the confession was made and was free or voluntary and genuine, there would remain nothing to be done by the prosecution to secure conviction. If the Court finds that it is true that the accused committed the crime, it means that the accused is guilty and the Court has to do nothing but to record conviction and sentence him. No question of corroboration of the confession can possibly arise in such a case. Even if there is corroboration, and corroboration in material particulars, the Court's finding would still be the same, e.g. that it is true that the accused committed the crime. If the finding remains the same, it is evident that the corroborative evidence was quite redundant. Corroborative evidence certainly does not add to the efficacy of the finding of guilt at all. (Para 6)

Anno: Evidence Act, S. 24 N. 1, 8.

(f) Evidence Act (1872), S. 24 — Confession must be free.

It is quite injudicious on the part of the Magistrate recording confession to go in the company of police officers to the jail for recording confession. His going to jail in the company of police officers is likely to be misunderstood or misinterpreted by others. (Para 7)

Anno: Evidence Act, S. 24 N. 3, 5.

(g) Evidence Act (1872), S. 24 — Judicial confession.

Judicial confessions should be distinguished from extra-judicial confessions. It may be doubted whether a conviction can be based solely upon an extra-judicial confession, but there is no reason for hesitating to base conviction on a judicial confession. The evidence of verbal confessions of guilt may have to be received with great caution. But many of the reasons which necessitate great caution do not operate in the case of a judicial confession. (Para 8)

Anno: Evidence Act, S. 24 N. 8.

(h) Evidence Act (1872), S. 24 — 'Corpus delicti'.

A case where there is no proof of 'corpus delicti', must be distinguished from another where that is proved; in the absence of proof of 'corpus delicti', a confession alone may not suffice to justify conviction. (Para 8)

Anno: Evidence Act, S. 24 N. 8.

(i) Evidence Act (1872), S. 24 — Confession as against maker and as against others.

A distinction is made in law between the effect of a confession as against the maker and that as against the others. A rule of caution has been adopted by all Courts that A should not be convicted on the basis of B's confession without material corroboration. One may not lose anything by implicating others falsely, but the same cannot be said of accusing ownself falsely. That is why confessions as against the makers, are supposed to be the best evidence. (Para 9)

Anno: Evidence Act, S. 24 N. 8.

(j) Evidence Act (1872), S. 24 — Retracted confession.

The retraction of a confession by itself does not require corroboration before the confession can be made the basis of conviction. If the confession is found to be voluntary and genuine, the retraction is wholly immaterial. If it is found that the confession was genuine, it means that the retraction or subsequent statement about its being false has no value. If the Court is not satisfied that the confession was genuine, it cannot be used in evidence, whether corroborated or not. In that case in order to justify conviction there must be evidence of such a nature as to justify conviction without any confession. (Para 10)

Anno: Evidence Act, S. 24 N. 9.

(k) Evidence Act (1872), S. 24 — Confession — Genuineness.

When the Court has disbelieved a witness it would be wrong to judge the genuineness or otherwise of the confession of the accused by comparing it with the deposition of the witness. (Para 11)

Anno: Evidence Act, S. 24 N. 8, 12.

(l) Evidence Act (1872), S. 24 — Confession — Omissions in.

It would be illogical to say that a confession contradicts the other evidence by not mentioning what is mentioned in the other evidence. Omission is not always contradiction. (Para 11)

Anno: Evidence Act, S. 24 N. 8, 12.

(m) Evidence Act (1872), S. 24 — Confession — Proof — Judgment based on confession.

A judgment in which the accused on the basis of his confession was convicted for the murder of a person is certainly no evidence to prove the truth of the confession regarding the murder. The judgment proves nothing beyond the fact that the accused was found guilty of that murder. Whether he committed that murder or not is another question. (Para 11)

Anno: Evidence Act, S. 24 N. 12.

(n) Evidence Act (1872), S. 24 — Confession containing more details.

No particular inference can be drawn from the fact that the confession is a detailed one running into more than three closely printed foolscap sheets. (Para 11)

Anno: Evidence Act, S. 24 N. 8, 12.

(o) Evidence Act (1872), S. 24 — Confession — Corroboration — Necessity.

Corroboration is not necessitated by the mere fact that the prosecution tried to provide corroboration and miserably failed. The prosecution might have been wrongly advised that corroboration was necessary, and might have unnecessarily produced spurious evidence. Because it felt the necessity of producing corroborative evidence it cannot be said that such evidence was necessary either under the law or on the facts of the particular confession. (Para 11)

Anno: Evidence Act, S. 24 N. 8.

(p) Evidence Act (1872), S. 9 — Identity of accused — Charge sheet submitted against Dilawar alias Birley Singh son of Bansi Singh — Accused never known as Dilawar and his father's name was not Bansi Singh — No reason to think that police did not intend to prosecute accused — One of the two names, namely Birley Singh, of the person against whom charge sheet was submitted applying to accused — Held this was sufficient. (Para 13)

Anno: Evidence Act, S. 9 N. 4.

Kripa Shanker Sinha, for Applicant; Shri Rama, Dy. Govt. Advocate, for the State.

CASES CITED:

(A) (1853) 16 Howard 38: 14 Law Ed 835
(B) ('51) AIR 1951 SC 441: 1951 SCJ 518: 52 Cri LJ 1491 (SC)
(C) 1 Leach Cr C 299
(D) ('51) Cri Appeal No 1066 of 1950, D/- 19-6-1951 (All)

DESAI, J.: (On difference of opinion between Agarwala and Gurtu JJ.) This appeal and the connected matters have come to me for my opinion on a difference between my brethren Agarwala and Gurtu. The appeal is by Birey Singh alias Birey from his conviction under S. 396, I. P. C., resulting in a sentence of death. There is also the reference by the Sessions Judge for confirmation of the death sentence. The connected Government appeal is from acquittal by the learned Sessions Judge of Birey Singh of thirteen other charges which were framed against him in addition to the charge under S. 396, I. P. C.

(2) It is proved beyond any doubt, and is not disputed, that a very serious dacoity was committed on 22-7-1946, at about 11 p.m. in the house of Mashal Singh in village Samachipur by about twelve dacoits led by Girand Singh. The dacoits killed six persons including Mashal Singh and his wife and wounded others by shooting at them or striking them with lathis. Among the injured was Mahtab Singh, resident of village Jijota, son-in-law of Mashal Singh and employed as a police constable. He was involved in case of rioting & murder was committed on 1-4-1946 in Samachipur where he was in those days staying when on leave. On being involved in the case, he absconded & joined the gang of Girand Singh who was a notorious dacoit. He remained in his gang for a month or two and one day got an opportunity to seize Girand Singh's rifle and shot him with it.

After shooting Girand Singh he ran away and gave information to the police that he had shot Girand Singh dead and deposited the rifle in the police malkhana. He expected thereby to be shown favour in the case of rioting and murder pending against him. Actually Girand Singh had not died; he had simply been wounded on a hand. He took a vow to avenge himself upon Mahtab Singh. On the day of the occurrence Mahtab Singh accompanied by his wife, Mashal Singh and others went from Jojota to Samachipur. He had heard of Girand Singh's vow and was in constant fear. Girand Singh heard on the same day that Mahtab Singh had gone to Samachipur in order to fetch his wife; so he took a gang of about eleven men to Samachipur. In the evening two men dressed as police constables arrived in Samachipur and asked Kanhai Singh, brother of Mashal Singh, to point out the house of Harpal Singh mukhia.

This Harpal Singh was the person against whom the riot was committed on 1-4-46. Kanhai Singh took the two men to the house of Harpal Singh where they had some talk with him. It is said that the appellant was one of them. At about 11 p.m. Girand Singh brought his gang at

the house of Mashal Singh and started beating Mashal Singh, etc., who were lying outside. The gang was armed with guns, pistols, spears and lathis. Mahtab Singh was at that time reading in a kotha inside the house. Mashal Singh shouted from the door that Mahtab Singh should run away because Girand Singh had arrived to kill him. The dacoits shot dead Mashal Singh and others who were outside the house. Then Girand Singh accompanied by three or four men were into the kotha and shot at Mahtab Singh. Mahtab Singh was wounded, fell down and feigned to be dead.

Girand Singh, etc., then left him there and plundered the house and injured other persons. In the meantime Mahtab Singh got an opportunity to run away from the house. Girand Singh climbed up the roof of the house and shouted that he was Girand Singh and had come to kill Mahtab Singh and called upon him to surrender himself if he was a Kshatriya. Harpal Singh seeing the dacoity being committed in Mashal Singh's house, promptly went to the police station Nawabganj which is about three miles away and at 3 a.m. lodged the first information report. He had not seen the dacoits; so he did not name anybody. But he did mention the fact that one of them was proclaiming that he was Girand Singh, that those who had not seen him could see him and that Mahtab Singh should be caught and the house plundered. The dacoits left the house after committing the dacoity and murders.

The investigation started. None of the witnesses of the dacoity knew the appellant, not even Mahtab Singh. So none of the persons examined by the police gave out the name of Birey Singh or Birey. But the police were informed that during the progress of the dacoity one dacoit was addressed as Dilawar. No arrests were made and the police submitted a charge-sheet against Girand Singh, Ajodhi and Birey Singh alias Dilawar son of Bansi Singh Ahir of village Bijeypur. Girand Singh's name was given by all the witnesses; the other two names were obtained by the investigating officer from a report made by a sub-inspector of another police circle that on the day of occurrence a gang of dacoits including Girand Singh, Ajodhi and Birey Singh or Dilawar was seen going towards Samachipur and that the dacoity was committed by it. The charge-sheet was submitted against the three men as absconders and evidence under S. 512 Cr. P. C., was recorded by a Magistrate.

Subsequently Girand Singh and Ajodhi were killed in encounters with the police. The appellant was arrested in another encounter with the police led by the Superintendent of Police in police circle Kampil on 18-10-1949. At that time he had an injury on a hand. On 30-10-1949, he was produced before Shri C. M. L. Bhatnagar, a Magistrate exercising First Class powers, for the recording of his confession. Shri Bhatnagar recorded his confession in four instalments on November 1, 2, 3, and 24, 1949. In this confession he admitted that he, Girand Singh, Dilawar, Ajodhi, etc., had committed the dacoity in the house of Mashal Singh and murdered six men and injured six others, that they had intended to kill Mahtab Singh and that he had escaped somehow or other. The appellant was not put up for identification before the witnesses of the dacoity.

(3) The prosecution examined five witnesses to prove the commission of the dacoity and murders. Four of them were the inmates of the house and the fifth is Harpal Singh mukhia. Out of these, only Mahtab Singh and Kanhai Singh deposed that the appellant was one of the dacoits; the other three did not give any evidence specifically against him. Kanhai Singh was not examined before the learned Sessions Judge. On the date fixed for his attendance at the trial he was absent and the learned Sessions Judge brought on record, under S. 33, Evidence Act, the deposition made by him before the Committing Magistrate. Besides the evidence of these two witnesses, there is the confession of the appellant; there is no other evidence against him.

(4) Both my learned brothers have refused to rely upon the evidence of Mahtab Singh and Kanhai Singh as regards the participation of the appellant in the crimes. The evidence of Kanhai Singh has not been noticed at all by one of them, while the other, though he has not expressly disbelieved him, does not appear to have relied upon him. The learned Sessions Judge, while admitting Kanhai Singh's deposition into evidence, observed that it was of little use to the prosecution because Kanhai Singh had not named the appellant before he was examined in the Committing Magistrate's Court. It was certainly premature for the learned Sessions Judge to give this finding about the worth of Kanhai Singh's deposition. He was an important witness for the prosecution. In the Committing Magistrate's Court he had not been cross examined with reference to his earlier statements during the investigation & under S. 512, Cr. P. C., and it was not open to the learned Sessions Judge to give a finding that no reliance could be placed upon his statement that the appellant was one of the dacoits.

The reason given by him for dispensing with his personal attendance in Court was quite insufficient. But it has not been contended before me that the deposition of Kanhai Singh should be completely disregarded because there was not sufficient justification for the learned Sessions Judge to act under S. 33, Evidence Act. I would, therefore, treat it as valid evidence. Coming to the merits, I am satisfied that it is not reliable evidence at all. His statement that the dacoits shouted that Girand, Birey and Ajodhi had arrived is against the statements of other witnesses who stated that only Girand Singh had shouted that he had arrived. His statement that the appellant was one of the two men who had gone earlier in the day disguised as constables is not supported either by Harpal Singh and Subedar who also had seen them or by the appellant's confession which makes absolutely no mention of two men going earlier to the village posing to be constables.

Then, in the absence of identification proceedings, I do not know how the mere 'ipse dixit' of the witnesses that the appellant was one of the dacoits could be believed. The prosecution has not offered any explanation for not holding identification proceedings. If it be said that they did not expect the eye-witnesses to identify anybody after three years, I do not know why Kanhai Singh should be made an exception and believed. His evidence about the appellant's complicity in the crime cannot be believed. Mahtab Singh's testimony is hardly better. He has been disbelieved on this point by both my learned brothers and, with respect, I agree with them. It is clear from the evidence that the appellant was not known as Dilawar while he was a member of Girand Singh's gang, that there was Dilawar in that gang but he was a different man, that that Dilawar had taken part in the crime and that during the

dacoity it was he, and not the appellant, who was being addressed by the other dacoits as "Dilawar".

The appellant in his confession stated that he was known as "Chotey Mian", and that Dilawar was another member of the gang. He never said that he also was known as "Dilawar" at any time or was addressed as such. There is only Mahtab Singh's evidence that the appellant was addressed as "Dilawar" by his accomplices. He did not know previously that his name was Birey Singh or Birey. But he stated that some of the dacoits addressed him as "Birey" also. If his pseudonym was Dilawar or Chhotey Mian, his accomplices would not have addressed him by his real name. Mahtab Singh further stated that the appellant was addressed as "Chotey Mian"; it is difficult to believe that he had two pseudonyms. And when there certainly was another dacoit known as Dilawar, that would not have been the pseudonym of the appellant also. There is no doubt that because the police had submitted the charge-sheet against Birey Singh alias Dilawar, an attempt was made by the prosecution to prove that the appellant Birey Singh was also known as Dilawar. It is unfortunate that the prosecution could not try to prove the case against the appellant without fabricating some evidence.

Both my learned brothers have used the statement made by Mahtab Singh under S. 162, Cr. P. C., to contradict his deposition in Court, but in my opinion that statement was not available for that purpose. The reason is that the learned Sessions Judge, who ought not to have been unaware of the provisions of S. 145, Evidence Act, failed to confront the witness with his statement under S. 162. The statement under S. 162 could be used only to contradict the witness and before the witness could be contradicted, his attention ought to have been drawn to the contradictory portion of the statement as required under S. 145, Evidence Act. There is nothing on the record to show that the learned Sessions Judge did this. His failure to do so is fatal to the availability of the statement for the purpose of contradicting the deposition.

The rule contained in S. 145 is a common law rule. Referring to it McLean, J. said in — 'Frederic D. Conrad v. David Griffey', (1853) 14 Law Ed 835 at p. 839 (A):

> "This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony. This rule is generally established in this country as in England."

He added that the rule is a salutary one and cannot be dispensed with. The law in India is not different. The other day our Supreme Court refused to look into a statement because it was not brought to the notice of the witness as required under S. 145; see — 'Tara Singh v. State', AIR 1951 SC 441 (B), Bose, J. observed in that case that the failure to act as required under S. 145 is a fatal defect.

It is unsatisfactory that the learned Sessions Judge does not know how to confront a witness with his previous statement. He has exhibited the whole statement as D1; he should have exhibited only the particular portions which contradicted the deposition given in Court. He allowed the witness to be put question after question regarding what he had, or had not, stated to the investigating officer and recorded the answers. At one place he has made a note that a particular statement, said by the witness to have been made, is not there. This was not the proper way of contradicting the witness. The particular part of the statement which contradicted the deposition of the witness ought to have been read over to the witness and exhibited. In the whole memorandum of the evidence given by the witness, one would search in vain for a mention of Ex. D1, which is the number given to the entire statement recorded under S. 162, Cr. P. C. The learned Sessions Judge has not even seen that the statement Ex. D1 was properly proved by the investigating officer.

In these circumstances I would not consider Ex. D1 while weighing the evidence of Mahtab Singh. The fault is not exclusively of the learned Session Judge; the appellant's counsel also is not free from blame. If he wanted Mahtab Singh to be disbelieved on account of the conflict between his deposition and the statement Ex. D1, it was his duty to proceed according to law and to see that the provisions of S. 145, Evidence Act, were complied with and that Ex. D1, if denied by the witness, was properly proved by the investigating officer. When Mahtab Singh was not made to pick out the appellant in an identification parade, I would not rely upon his statement that he was one of the dacoits. I have no doubt about his presence during the dacoity. My brother Gurtu has not said that he was not convinced of the presence of Mahtab Singh during the dacoity, but he has mentioned certain suspicious features. Mahtab Singh was found present by the investigating officer on arrival in Samachipur on 23-7-46.

There is no doubt that the object behind the crimes was to kill Mahtab Singh. The commission of so many murders, and Girand Singh's shouting that Mahtab Singh should be seized and killed are sufficient proof of this fact. The appellant admitted in his confession that Mahtab Singh was there. The mere fact that Mahtab Singh, to kill whom Girand Singh had taken his gang, had not been killed does not mean that he was not present in Mashal Singh's house. Girand Singh certainly knew him and would not have led him escape. But it may be that when Mahtab Singh fell down on being shot at, he thought that he had died. The injuries on Mahtab Singh are a contused wound on the right side of the head, another in front of the pigtail, a lacerated wound on the right arm and two patches of contusion on the left thigh caused with some blunt weapon. The doctor originally stated that all the injuries were caused with some blunt weapon. On a further question he stated that the lacerated wound could have been caused by a shot from a revolver. He was not asked about the other injuries, whether they also could have been caused by a shot from a revolver or a gun.

It appears that injuries looking like those caused with a blunt weapon have been inflicted on others by shooting at them. For example, Subedar stated that he was shot at on his foot with a revolver and the injuries on the foot are only two small round abrasions. Kanhai Singh stated that he was shot at in the jaw and he had a lacerated wound on the lower lip. So it cannot be said that the other injuries of Mahtab Singh also were not caused by shooting. There is, therefore, no reason to doubt that Mahtab Singh witnessed the dacoity. But I would not believe him when he said that the appellant was one of the dacoits.

(5) There remains only the appellant's confession. Shri Bhatnagar has deposed that the con-

fession was made by the appellant as taken down by him and that he had satisfied himself that it was a free and voluntary confession. In the Magistrate's Court the appellant denied having made the confession. In cross-examination Shri Bhatnagar was asked if he had not obtained the appellant's thumb-impression on a previously prepared statement without his having made it. Before the learned Sessions Judge the appellant stated that the confession is not his statement. He admitted that it bears his thumb-impressions and stated that the Superintendent of Police by promising to get him released and by threatening to get him hanged, induced or compelled him to put his thumb-impressions daily on what was written by the Magistrate. He denied that the confession was read over to him or is true.

In his grounds of appeal he states that on account of a serious wound in his right hand he was not in sound mind and health, that the Superintendent, and the Deputy Superintendent, of Police had compelled him to make the confession according to their dictation and that he had made the confession before Shri Bhatnagar as tutored. Both my brethren are agreed, that the appellant made the confession as recorded, that he was in sound mind at the time of making it, that there was no evidence of any inducement or threat, that there was no defect or impropriety in the recording of it and that it is relevant in the case. Agarwala, J. held that the confession was genuine. but Gurtu, J. was not satisfied of its genuineness. Agarwala J. was of the opinion that the appellant's conviction could be based solely on the confession while Gurtu J. was not prepared to act upon it without corroboration.

(6) When a confession is produced in evidence against an accused, there are three questions which can possibly arise; they are:

(1)whether it was made by the accused, (2) whether it was free and voluntary, and (3) whether it was genuine or true. If it is found that the confession was made and was free or voluntary and genuine, there would remain nothing to be done by the prosecution to secure conviction. If the Court finds that it is true that the accused committed the crime, it means that the accused is guilty and the Court has to do nothing but to record conviction and sentence him. No question of corroboration of the confession can possibly arise in such a case. Even if there is corroboration, and corroboration in material particulars, the Court's finding would still be the same, e.g., that it is true that the accused committed the crime. If the finding remains the same, it is evident that the corroborative evidence was quite redundant. Corroborative evidence certainly does not add to the efficacy of the finding of guilt at all.

What I have said is axiomatic, but I found it necessary to say it because of remark made by my brother Agarwala that the appellant's counsel had "not attacked the confession as being not genuine". Had he admitted that the confession was genuine, there was nothing left in the case. That would have meant that he admitted that the appellant had committed the crimes. Mr. Kripa Shankar denied that he had conceded before my brethern that the confession was genuine and my brother Gurtu has not proceeded on the basis that he had conceded so. Mr. Kripa Shankar did not contend before me that even a genuine or true confession must be corroborated before it can be acted upon. Gurtu J. is also not of that opinion. What Mr. Kripa Shankar contended before me, and what has been Mr. Justice Gurtu's conclusion, is that this particular confession cannot be acted upon without corroboration. They mean that the confession has not been proved to be genuine or true.

(7) I am satisfied from the evidence that the appellant made the confession and that he made it voluntarily without any threat or inducement. He had first falsely denied having made it at all. I do not know how he could have been induced to make it by the Superintendent of Police. The charge-sheet in this case had been submitted by the police three years ago; it was against the appellant and two other men who had died before the confession. So as far as this crime is concerned, the appellant's confession was not to be used except as against his own self. I do not know how the appellant could have believed that by confessing to the crime he would be released. There is absolutely nothing to support his allegations of inducement and threat. Shri Bhatnagar put him several questions before recording his confession & gave him ample time to think of the consequences of making a confession. He told him in clear words that nobody had beaten or tempted him. Shri Bhatnagar warned him not to be under any illusion that he would be released if he made the confession and warned him that it could be produced in evidence against him and could form the basis of his conviction.

But his reply was that he was not afraid of anything, even death, and that he had made up his mind to speak the truth regardless of all consequences. Shri Bhatnagar again told him not to make any confession unless it was voluntary and he replied that he was making it out of his own volition and not on any inducement. He told him that he had to appear before God and so wanted to make a clean breast of everything. Even after this Shri Bhatnagar did not proceed to record his confession but gave him twenty-four hours' time. On the next day the appellant told him that he had thought over the matter and adhered to his determination to confess. After confession to other crimes with which we are not concerned, he said that he felt tired and would continue next day. Next day he continued and described the dacoity in Samachipur and other crimes and then feeling pain in his hand stopped, promising to make further disclosures on the next day. So on the third day he made further disclosures and then again stopped because of pain in his hand.

Then his hand was operated and when he felt better he himself sent for Shri Bhatnagar. Shri Bhatnagar went to the jail on 24-11-49 and the appellant concluded the confession. In the end he voluntarily said that he would be punished by God for his mis-deeds, and that he had made no false statement consciously. The entire confession was read over to him and he corrected it at places and then put his thumb-impression. It would be impossible for any one to say that a confession made in these circumstances was not made voluntarily.

I ignore the fact that the confession was recorded in jail and also the fact that Shri Bhatnagar went to jail on the first occasion in the company of the Deputy Superintendent of Police and on the second occasion in the company of the Superintendent, and the Deputy Superintendent of Police. It was quite injudicious on his part to go in the company of police officers to the jail for recording confession. If his car was out of order, he could have used another conveyance or borrowed a car from somebody but not accepted a lift in the car of police officers. He ought to have realised that his going to jail in the company of police officers was likely to be misunderstood or misinterpreted by others.

But I am satisfied that the appellant would have made the same confession even in the absence of these facts; so they had no connection at all with the making of the confession. He had certainly pain in his hand, but that does not mean that he was in a sound state of mind or that he did not understand the implications of what he was doing or saying. The jail doctor who was treating him in the jail hospital had advised amputation, but he was not agreeing to it. On one occasion he mentioned this fact to Shri Bhatnagar and told him that he would like to be under the treatment of the Civil Surgeon who had examined him on a previous occasion. He himself did not allege that he was threatened with amputation in case he did not confess. The amputation was advised on medical grounds and had absolutely no connection with his confession. The confession is, therefore, fully relevant.

(8) There remains the question whether the confession was genuine or true or not. In deciding this question I may have to consider whether there was corroboration of the confession but once I decide upon the genuineness, the appellant's conviction would have to be upheld even if there was no corroboration. There is no law that a conviction cannot be based exclusively on a confession in any circumstances and that even a genuine confession must be corroborated, in some particulars, whether material or not. The Evidence Act simply makes the confession relevant or admissible in evidence; it is a piece of evidence against the accused and warrants conviction, if it is relied upon. It is stated in Archbold's Criminal Pleading, Evidence and Practice, 32nd edition;

> "A free and voluntary confession of guilt by a prisoner, whether under examination before magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proved, is sufficient to warrant a conviction, without any corroborative evidence. (p. 400).

The same law is stated by Phipson on Evidence, 8th edition, page 249; but he adds that the general rule has been thought not to apply to confessions of murder. According to Archbold, in recent times confession has been acted upon even in cases of murder; p. 400. No such exception is made in Indian Law or even in American Law. According to Greenleaf on Evidence, 7th edition, volume 1, para. 216, judicial confessions are

> "Sufficient to found a conviction, even if to be followed by a sentence of death, they being deliberately made, under the deepest solemnities, the advice of counsel, and the protecting caution and oversight of the Judge."

Judicial confessions should be distinguished from extra-judicial confessions. It may be doubted whether a conviction can be based solely upon an extra-judicial confession, but there is no reason for hesitating to base conviction on a judicial confession. The evidence of verbal confessions of guilt may have to be received with great caution, as advised by Greenleaf in para. 214. But many of the reasons which necessitate great caution do not operate in the case of a judicial confession. Again a case where there is no proof of 'corpus delicti' must be distinguished from another where that is proved; in the absence of proof of 'corpus delicti', a confession alone may not suffice to justify conviction (see Wills on Circumstantial Evidence, page 120). In the present case there is abundant proof of 'corpus delicti'.

(9) A confession, particularly a judicial confession is not a tainted piece of evidence and if it is made freely and without inducement or compulsion, does not suffer from any infirmity such as exists in the testimony of an approver. A confession may implicate other persons besides the maker. The effect of the confession as against the maker is different from that as against the others. The maker might have implicated the others out of enmity or in order to propitiate certain persons. He would stand to lose nothing by implicating the others along with him. This is one of the facts which make the confession, as against the others, of less value than as against the maker himself. Even if the confession is true as against the maker, it might be false as against the others.

So a distinction is made in law between the effect of a confession as against the maker and that as against the others. Under the Evidence Act the confession can only be taken into consideration as against the others. (sic) A rule of caution has been adopted by all Courts that A should not be convicted on the basis of B's confession without material corroboration. In the face of the distinct possibility that the others might have been falsely implicated, it would not be correct to convict them without material corroboration. Unless the Court is in a position to say that the others have not been falsely named in the confession, there would always remain a doubt which would prevent the conviction of the others. If they are to be convicted, that doubt must be removed by the production of evidence indicating the connection of the others with the crime. One cannot be said to be one's own enemy, and one would have no reason to accuse ownself falsely of a crime. One may not lose anything by implicating others falsely, but the same cannot be said of accusing ownself falsely. That is why confessions, as against the makers, are supposed to be the best evidence; see Wills, page 119 and Greenleaf, para. 215.

Greenleaf quotes Eyre C. B. observing in — Warickshall's case, 1 Leach Cr. C. 299 (C):

> "a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers."

Phipson writes that "confessions may reasonably be taken to be true as against the defendant himself." (p. 249)

(10) The retraction of a confession by itself does not require corroboration before the confession can be made the basis of conviction. If the confession is found to be voluntary and genuine, the retraction is wholly immaterial. A retracted confession is simply a mixture of two pieces of evidence, (1) admission of the accused that he committed the crime and, (2) his statement that his admission was false. The question that arises is which piece of evidence to believe. Both cannot exist together; both may be false, but both cannot be true. If it is found that the confession was genuine, it means that the retraction or subsequent statement about its being false has no value. If the Court is not satisfied that the confession was genuine, it cannot be used in evidence, whether corroborated or not. In that case in order to justify conviction there must be evidence of such a nature as to justify conviction without any confession.

(11) The appellant has not explained satisfactorily why he should have made a false confession. It was not a confession made on the spur of the moment; it was a confession made with due deliberation and continued for several days. There could be no reason for making the confession, other than that it was true. I do not find any conflict between the confession and the rest of the evidence. Mahtab Singh went to Samachipur

with his wife to stay there and not to fetch his wife from there.

If the appellant said in his confession that they had heard that Mahtab Singh had gone to Samachipur to fetch his wife, he is certainly not contradicted by Mahtab Singh. He mentioned what he and Girand Singh had heard; they might have been misinformed as to the purpose behind Mahtab Singh's visit to Samachipur, or they might have misunderstood their informant or the appellant might have forgotten the exact purpose. I have previously dealt with the injuries of Mahtab Singh; they do not contradict the statement in the confession that he was only shot at. The appellant did not know Mahtab Singh still he could say in his confession that Mahtab Singh was wounded; he could say this on the basis of hearsay.

Mahtab Singh said that the appellant was one of the dacoits who entered into the Kotha and shot at him; the appellant did not expressly state that he entered into the Kotha; he simply stated that he remained at the door. Mahtab Singh also stated that it was the appellant who shot at him in the chest, but the appellant did not say anything like this. When we have disbelieved Mahtab Singh, it would be wrong to judge the genuineness or otherwise of the confession by comparing it with Mahtab Singh's deposition. It is quite likely that what Mahtab Singh deposed is untrue and if it is untrue, what the appellant said in the confession cannot be said to be untrue simply because it conflicts with Mahtab Singh's deposition. I do not think there is any connection between the genuineness of the confession and the fact that the appellant could not explain the escape of Mahtab Singh.

That Girand Singh knew Mahtab Singh and was one of the dacoits, that Mahtab Singh was present during the commission of the dacoity and was even shot at and that he escaped, are facts which cannot be controverted at all. The appellant, not knowing Mahtab Singh, could not explain how he escaped. To him Mahtab Singh was like several other persons inside the house. How he escaped was a mystery to all the dacoits including Girand Singh. Even Girand Singh could not have explained how he escaped; why then blame the appellant for his failure? Mr. Kirpa Shankar relied upon certain omissions in the confession but it would be illogical to say that the confession contradicts the other evidence by not mentioning what is mentioned in the other evidence. Omission is not always contradiction. The appellant confessed to several dacoities and not only to the dacoity under consideration. He could not be expected to give detailed accounts of all the dacoities and had no reason to give a detailed account of the dacoity under consideration in particular.

It will suffice to say that what he omitted to say in the confession is not inconsistent with what he said. Thus he did not mention the visit of two persons in the disguise of constables or that he was one of them. If he were one of them he would have mentioned the fact. I have not believed the evidence of Kanhai Singh; otherwise there is no evidence that the appellant was one of the two men. He might have been even unaware of the fact that two men were sent in advance to Samachipur. Then the confession does not mention the fact that Girand Singh shouted from the top of Mashal Singh's house, that he was Girand Singh and had gone to kill Mahtab Singh. These are mere details which the appellant might not have thought fit to refer to in his confession. Once Mahtab Singh stands discredited their remains nothing to contradict the statement in the confession that the appellant was known as Chotey Mian and that another dacoit was known as Dilawar. Although I find that the confession is not contradicted by the rest of the evidence in the case, I also find that it does not contain inherent evidence of its truth.

My brother Agarwala was impressed by the wealth of details relating to other crimes; he remarked:

> "The details mentioned in his statement are of such a nature that they could not have been known to the police and could have been known only to the applicant."

My brother Gurtu has rightly pointed out that there is nothing on the record to show the truth of the details of other crimes.

Mr. Sri Ram argued that the confession in respect of another crime has been accepted as genuine by this Court and the appellant has been convicted for that crime; he referred me to criminal appeal no. 1066 of 1950 (All) (D) 19-6-1951, in which the appellant on the basis of his confession was convicted for the murder of Mewa Ram. The judgment is certainly no evidence to prove the truth of the confession regarding the murder of Mewa Ram. The judgment proves nothing beyond the fact that the appellant was found guilty of that murder. Whether he committed that murder or not is another question. I do not think any particular inference can be drawn from the fact that the confession is a detailed one running into more than three closely printed foolscap sheets. Six pages are nothing compared to thousands of pages written by novelists without misleading any reader into thinking that what is written there is true.

Though there is no corroboration of the confession in respect of the other crimes, my brother Gurtu was inclined to accept the confession as completely true as regards the other crimes. If so, it must be accepted as completely true as regards the dacoity under consideration also because there is nothing to distinguish between the confession as regards this dacoity and the confession as regards the other crimes as far as the genuineness is concerned. The appellant was arrested for all crimes committed by him and not for this dacoity in particular and he confessed also to all crimes committed by him. He had no reason to make a true confession in respect of the other crimes and to make a false confession in respect of this dacoity. That the confession was made three years later or that it was recorded in jail does not affect its genuineness.

I am satisfied that the confession is true and that the appellant took part in the commission of the dacoity under consideration. I arrive at this finding, even though there is no material corroboration and there is no other evidence pointing towards the appellant's guilt. My brother Gurtu was not prepared to accept the confession as true without corroboration because the prosecution attempted to produce evidence of material corroboration and failed.

My learned brother had in his mind the false evidence of Mahtab Singh to the effect that the appellant was one of the dacoits and was addressed as "Dilawar" also as "Birey" by his accomplices. With great respects to him I would say that corroboration is not necessitated by the mere fact that the prosecution tried to provide corroboration and miserably failed. The prosecution might have been wrongly advised that corroboration was necessary, and might have unnecessarily produced spurious evidence. Because it felt the necessity

of producing corroborative evidence it cannot be said that such evidence was necessary either under the law or on the facts of this particular confession.

(12) The confession having been found to be true it must be held that the appellant was one of the dacoits who committed the various offences at Samachipur on the night of 22-7-1946.

(13) No question of identity was raised before me. It was not contended that the appellant is not the man against whom the charge-sheet was submitted by the police. The charge-sheet was submitted against Dilawar alias Birey Singh son of Bansi Singh. It has been found that the appellant was never known as Dilawar and that his father's name is not Bansi Singh. The police submitted the charge-sheet against Dilawar on the basis of the evidence that one of the dacoits was addressed as such by his accomplices. But that dacoit has been found to be other than the appellant. Though the witnesses meant some other person by "Dilawar", there is no doubt that the police thought that it was the appellant.

Before the charge-sheet was submitted the police had already received information that Birey or Birey Singh alias Dilawar was one of the dacoits. The police could have prosecuted anybody and there is no reason to think that they did not intend to prosecute the appellant. One of the two names of the person against whom the charge-sheet was submitted applies to him and that is sufficient.

(14) I do not understand at all the controversy that raged in the trial court about the appellant's being guilty of "dacoity with murders" or of "murders with dacoity". The question is what offences the appellant committed? The dacoits are all guilty under Section 147, I. P. C., and as the offences against the various murdered and injured persons were committed by the members of the unlawful assembly in prosecution of the common object, all the members including the appellant are responsible for all those crimes. Section 149, I. P. C., clearly applies. The learned Sessions Judge has not come to a definite finding as regards the other charges; he ought to have recorded either conviction or acquittal under those charges.

(15) My opinion is that the appellant's conviction and sentence under Section 396, I. P. C., be confirmed the reference made by the learned Sessions Judge be accepted, the Government Appeal be allowed, the appellant be convicted under the remaining 13 charges and sentenced to death under the second, third, fourth, fifth, sixth and seventh charges, (relating to the murders of Mashal Singh, Atar Singh, Yadav Singh, Pan Singh, Smt Dhanwanti & Bagh Singh), to rigorous imprisonment for ten years under the eighth, ninth & thirteenth charges (relating to attempts to murder Mahtab Singh, Subedar Singh and Smt. Bittan), to rigorous imprisonment for two years under the 10th charge (relating to the injuries caused to Bechan Singh), to rigorous imprisonment for six months under the eleventh and twelfth charges (relating to simple hurt caused to Kanhai Singh and Man Singh) and to rigorous imprisonment for two years under the first charge (relating to the rioting armed with a deadly weapon), the sentences of death be carried out in accordance with law, and the other sentences of imprisonment be undergone simultaneously with the sentences of death.

B/D.H.Z. Order accordingly.

A.I.R. 1953 ALL. 792 (Vol. 40, C. N. 390)

MALIK C. J. AND BIND BASNI PRASAD J.

Rex v. Moti, Accused-Respondent.

Criminal Appeal No. 1119 of 1949, D/- 30-7-1951, against the order of S.-J. Muttra, D/- 7-6-1949 in S. T. No. 62 of 1948.

(a) Criminal P. C. (1898), S. 164 — Magistrate not informing accused that he was Magistrate and not recording that no police was present and writing that he was sub-divisional Magistrate.

Though S. 164 does not, in so many words, require it, yet unless the accused person is told that he is before a Magistrate and under his protection and that he is no longer in the custody of the police, it is not likely that he would have the courage to give correct answers to the questions that a Magistrate has to put to him under S. 164(3).

Where it is not recorded that no policeman was present at the time when the confession was made before the Magistrate and the Magistrate instead of writing that he was a Magistrate, first class, wrote that he was a Sub-Divisional Officer, and the Magistrate also had not informed the accused that he was a Magistrate, first class.

Held that these are defects which do not make the confession inadmissible in evidence. They may only detract from its evidentiary value. (Para 7)

Anno: Cri. P. C., S. 164 N. 11, 16.

(b) Evidence Act (1872), S. 26 — Confession while accused is in police custody — Criminal P. C. (1898), S. 164.

Though a confession made in the immediate presence of a Magistrate while an accused is still in police custody is admissible under S. 26, the fact that the accused was in police custody at the time when he makes the confession detracts to a large extent from the evidentiary value. (Para 8)

Anno: Evidence Act, S. 26 N. 3, 4; Cri. P. C., S. 164 N. 17.

(c) Criminal P. C. (1898), Ss. 164 and 364 and 533 — Confession — Mode of recording.

Where an accused person makes in the form of a narrative the whole of his confession, without any question being put to him to elicit facts, it is not possible for the Magistrate to record the confession in the form of questions and answers. Though the Magistrate would be well advised to record the questions that he had put to accused to satisfy himself that he was making a voluntary confession and the answers given, the mere fact that he did not, though it may detract from the value of the confession, does not make it inadmissible. Such a defect is curable under S. 533. AIR 1936 PC 253(2), Disting. AIR 1930 Oudh 449; AIR 1934 All 81 (FB), Rel. on. (Paras 10, 11)

Anno: Cr. P. C., S. 164 N. 11; S. 364 N. 2; S. 533 N. 2.

Shri Rama, D. G. A., for the State; Prakash Chandra, for Respondent.

CASES CITED:

(A) ('30) AIR 1930 Oudh 449: 6 Luck 335: 32 Cri LJ 97

(B) ('34) AIR 1934 All 81: 56 All 302: 35 Cri LJ 385 (FB)

(C) ('36) AIR 1936 PC 253 (2): 37 Cri LJ 897 (PC)

MALIK C. J.: A dacoity was committed at the house of one Lakkhan Singh on the night between 15th and 16th of October, 1947, in village Kukargaon, district Mathura. A report of the dacoity was made at the police station, which is at a distance of two miles from the place of occurrence, at 2-30 A.M. on the early morning of 16-10-1947. It was mentioned in the first information report that fifteen or twenty dacoits had raided the house of Lakkha Singh, Mukhia, they had fired guns and after successfully committing the dacoity they had left the village. A list of properties that were removed by the dacoits was furnished to Sheodan Singh, Sub-Inspector, on 16-10-1947, when he went to make the investigation and when he prepared the site plan Ex. P30. Eight persons were sent up to stand their trial in the court of session under Ss. 395/397 of the Penal Code. Maharaj Singh, accused, was in addition prosecuted under S. 412 of the Penal Code. By an order dated 7-6-1949, the learned Sessions Judge acquitted all of them. The Government has filed this appeal against Moti on the ground that he was wrongly acquitted.

(2) Moti accused was arrested on 15-3-1948. He is a resident of village Karkauli, district Mathura, which is at a distance of five miles from Kukargaon where the dacoity took place. The house of Moti accused was searched on 16-3-1948, and four things were recovered from his house which, it was said, the dacoits had removed at the time when the dacoity was committed. Those articles are Nos. 9, 12 and 37 of the list Ext. P18 which was, as we have already said, furnished to the police on 16-10-1947, and item No. 24 of the same list under the heading 'ornaments.' It is not necessary for us to deal with articles Nos. 9 and 12 as they were not satisfactorily identified and we may, therefore, omit those two from consideration. One of the articles recovered was a durrie, Ext. II, which had blue and red stripes and the other was a Moradabadi engraved tumbler, Ext. I. These articles were put up for identification by Lakkha Singh and his wife, Srimati Anandi, on 24-5-1948. The tumbler Ext. I and the durrie Ext. II were correctly identified by Lakkha Singh as well as by Srimati Anandi, who made no mistakes in the identification.

(3) The accused in the court of the Magistrate did not make a statement and he reserved his answers for the court of session. He was asked pointedly by the Magistrate whether the durrie Ext. II and the tumbler Ext. I were recovered from his house and whether they formed part of the property that had been looted. The answer given by the accused was that he would give his statement in the court of session. In the court of session, he denied that the durrie and the tumbler were recovered from his house.

(4) The prosecution produced Lakkha Singh and Srimati Anandi. Lakkha Singh stated in his examination-in-chief that the tumbler Ext. I and the durrie Ext. II belonged to him and that he had identified the two articles when the identification was held. Srimati Anandi identified these two articles and said that they were her property. In the cross-examination of Lakkha Singh not a single question seems to have been asked to challenge this part of his statement. Srimati Anandi was asked some questions in cross-examination and her answer so far as they related to Exts. I and II were as follows:

> "One used new 'gilas' was stolen. It was used for a month or two. I myself purchased this 'gilas'. I did not tell the description of the durrie stolen."

The learned Sessions Judge has discarded the statement of Srimati Anandi on the ground that she did not produce the voucher in support of her contention that the tumbler had been purchased by her a month or two before the dacoity. We feel astonished that the learned Sessions Judge should have given that as a ground for rejecting the testimony of Srimati Anandi. When a person goes to purchase a tumbler in the bazar, especially in a village, a voucher is hardly, if ever, given, and even if it is given it is hardly ever preserved. Moreover, no questions were put to her in cross-examination to dispute her title nor was she asked about the voucher or its production.

(5) Three witnesses were produced by the prosecution to prove the recovery of these articles from the house of Moti and they were Onkar Singh, P. W. 24, Sheodan Singh, P. W. 32, and Samman Singh, P. W. 34. Onkar Singh said in his examination-in-chief that the durrie, Ext. II, and the tumbler, Ext. I, were recovered from the house of Moti, that the recovery list Ext. P29 was prepared in his presence and was signed by him and that the other witness, Samman Singh, also attested it. The evidence of Samman Singh was more or less similar. Learned counsel appearing for the accused did not cross-examine the two witnesses. The reason given by the learned Sessions Judge for discarding their testimony is that as these witnesses were not cross-examined he could not accept their evidence. When we read the judgment we thought that there was some mistake probably in the copy that had been prepared for the use of the Court. We, therefore, examined the original and found that the learned Judge had said that "the witness was not cross-examined at all. So I do not believe him." It is a most astounding proposition and if this is to be laid down as the general rule then no accused person need ever cross-examine any witness for the prosecution and that would be a sufficient ground for discarding the testimony of the prosecution witnesses. Having carefully considered the evidence we are satisfied that Exts. I and II belonged to Lakkha Singh, that they were removed from his house in the course of the dacoity and that they were recovered from the house of Moti accused.

(6) The accused Moti is said to have made a confession before Sri K. A. P. Stevenson, Magistrate, first class, Mathura. This confession is Ext. P16. It has not been included in the paper book that has been prepared for the use of the Court. The original confession made by the accused was before the learned Sessions Judge as Sri Stevenson has deposed with reference to that document. What has happened to it since it is difficult to say. It may be that as it contained matters which related not only to this case but to other cases it was withdrawn from this record, after the case was de-

cided by the lower court, and placed on the record of some other case. A copy of the document was, however, available on the record and was placed before us. The document begins as follows:

"Main ne Moti Ram se sawal kiya aur usko samjhaya ki woh az khud bayan kar raha hai jo uske khilaf istemal ho sakta hai aur woh bayan karne ke liye majbur nahin hai."

After having recorded the statement the learned Magistrate took the signature or the thumb impression of Moti and then appended the following certificate.

"I have explained to Moti, son of Bhola, that he is not bound to make a confession and that his confession may be used as evidence against him. I believe that the confession was voluntarily made. It was taken in my presence and written by me. It has been read over to Moti and admitted by him to be correct. It contains a full and true account of the statement made by him.

22-3-'48 Sd/ S. D. O., Saidabad."

As we have already said, before the Magistrate the accused reserved his reply to the court of session.

In the court of session he stated as follows: "I was sitting outside my house at the door. I was caught by Sheodan Singh and Pheru Singh. They abused me. They threatened me and asked me to confess about the dacoity. Second day I was challaned. I remained in jail for one night. Pheru Singh and Sheodan Singh took me from jail to the kothi of the Tahsildar. I was kept there in the night. In the morning they took me to Saidabad. The police officers asked me to name the persons told by them. The police officer forced me to drink some medicine and then I became unconscious. I remained unconscious for five or six days and I regained consciousness in jail. Pheru Singh burnt my body by lighting a match. Pheru Singh took me to several villages in a motor car. Ex. P16 read over. I did not make this statement before the Magistrate. ....."

The accused, therefore, before the learned Sessions Judge said that Ext. P16, which was the confession, was not made by him. The statement read as a whole probably means that the police first pressed on the accused to make a confession and later they gave him something to drink and he became unconscious and while he was in a state of unconsciousness they took his thumb impression on the paper Ext. P16.

(7) The learned Sessions Judge gave four reasons for discarding this confession and for holding that it could not be relied upon. The reasons given by him were these: (1) The Magistrate did not inform the accused that he was a Magistrate, first class. (2) He did not enter in Ext. P16 that he was a Magistrate first class and that no policeman was present there. (3) The accused was making the confession of his own free will was not entered in Ext. P16, and (4) After the confession the accused was taken away by C. I. Pheru Singh and S. I. Sheodan Singh.

The third objection seems to be clearly incorrect as there is a note both at the beginning as well as at the end of Ext. P16 which we have quoted and which goes to show that the Magistrate was satisfied and made a note to that effect that the confession was made by the accused voluntarily.

As regards objections Nos. 1 and 2, it is true that in Ext. P16 it is not recorded that no policeman was present at the time when the confession was made before the Magistrate and the Magistrate instead of writing that he was a Magistrate, first class, wrote that he was a Sub-Divisional Officer. It also does not appear from Ext. P16 that the Magistrate had informed the accused that he was a Magistrate first class. These are, however, defects which do not make the confession inadmissible in evidence. They may only detract from its evidentiary value. The learned Magistrate, Sri Stevenson, stated in the witness-box that when the accused was brought to him he kept the accused for about two hours inside his tent and the policemen were removed from the tent and that the policemen were not visible from the place where the accused was sitting.

The law relating to confessions and how they are to be recorded is contained in Criminal P. C., and Evidence Act. The relevant portion of S. 164, Cr. P. C., is as follows:

"164(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in Section 364 and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him, and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him, and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

Sd/ A. B.
Magistrate."

It is not necessary that a confession under S. 164 should be recorded only by a Magistrate, first class. Sub-section (1) of S. 164 authorises a Magistrate, first class and any Magistrate of the second class, especially authorised by the Government, to record a confession. It does not appear to be necessary that the person making the confession should be informed that the person recording the confession is a Magistrate of the first class or of the second class, especially authorised by the Government to record the confession. It is very necessary that the courts, before which confessions are placed as evidence against the accused, should be satisfied that the confession is the voluntary confession of the accused and it is to ensure that that S. 164(3) was enacted. The accused should know that the confession that he was making was before a Magistrate. He should make the confession in such circumstances as

to guarantee the fact that he was not making the confession by reason of threat or fear or inducement held out by the police.

It is to secure that end that a Magistrate has to explain to an accused person that he was not bound to make a confession. He is required to question the accused and satisfy himself that the confession that is going to be made before him is a voluntary confession. Though the section does not, in so many words, require it, yet unless the accused person is told that he is before a Magistrate and under his protection and that he is no longer in the custody of the police, it is not likely that he would have the courage to give correct answers to the questions that a Magistrate has to put to him under S. 164(3).

(8) The relevant sections of the Evidence Act relating to confession are S. 21, which makes an admission relevant, S. 24, which lays down when a confession caused by inducement, threat or promise is irrelevant in criminal proceedings, S. 25, which provides that no confession made to a police officer can be proved against a person accused of an offence, Section 26, which makes it clear that no confession made by a person whilst in the custody of a police officer is admissible in evidence unless it is made in the immediate presence of a Magistrate, and Section 29, which lays down in what circumstances a confession otherwise relevant does not become irrelevant because of promise of secrecy, etc. Though a confession made in the immediate presence of a Magistrate while an accused is still in police custody is admissible under S. 26, the fact that the accused was in police custody at the time when he makes the confession detracts to a large extent from the evidentiary value.

(9) Learned counsel appearing for the State has placed great reliance on S. 364 of the Code of Criminal Procedure. According to him, the learned Magistrate should have recorded in the form of questions and answers the questions put to the accused under section 364 (3) (sic) to satisfy himself that it was a voluntary confession. He has further raised an objection to the fact that the confession recorded is a long narrative and has not been divided into questions and answers.

(10) The second part of the objection has no substance. All that the S. 364 requires is that the whole of the examination, including the questions put to the accused and answers given, has to be recorded in full in the language in which the accused has been examined. Where an accused person makes in the form of a narrative the whole of his confession, without any question being put to him to elicit facts, it is not possible for the Magistrate to record the confession in the form of questions and answers. As regards the first part, which related to answers to the questions put under S. 364(3), (sic) it is no doubt correct that the Magistrate should have recorded the questions that he put to the accused and the answers that he elicited from the accused. The observations in — 'Prag v. Emperor', AIR 1930 Oudh 449 (A) which were quoted with approval by Sir Shah Muhammad Sulaiman, Chief Justice, in — 'Emperor v. Muhammad Ali', AIR 1934 All 81 at p. 84 (FB) (B) as follows, are very important:

> "It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes data which enable the court of session and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come as regards the voluntary nature of the confession. Without supplying these data or materials, it is impossible for the trial court or for this Court to form any estimate as to the voluntary nature of a confession."

Though, therefore, the Magistrate would have been well advised to record the questions that he had put to Moti accused to satisfy himself that he was making a voluntary confession and the answers given the mere fact that he did not, though it may detract from the value of the confession, does not in our view make it inadmissible, unless we are satisfied that the omission was not curable under the provisions of S. 533 of the Code. Section 533(1) provides that

> "If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

(11) Great reliance is placed by learned counsel on the decision of the Privy Council in — 'Nazir Ahmad v. King Emperor', AIR 1936 PC 253 (2) (C). We do not think that case supports the contention of learned counsel that the story of the accused, even if it is made to the Magistrate in the narrative form, should not be recorded by the Magistrate as it was made but should be split up in the form of questions and answers, nor does that case lay down that, if a Magistrate has failed to record the questions put by him to the accused under S. 164(3) prior to taking down the confession, the confession must be treated as inadmissible. The facts of Nazir Ahmad's case (C) were very peculiar. There the Magistrate had not followed the provisions of the Code. He had merely made short notes of the statement made by the accused and later from those notes he dictated to his stenographer a note which the prosecution wanted to be treated as the statement of the accused. The Magistrate had destroyed the notes that he had made. The Magistrate came into the witness-box to prove that what he had dictated to the stenographer was a correct reproduction of what the accused had said to him & of which he had taken notes at the time of the statement.

Their Lordships held that the statement dictated to the stenographer could not be treated as a confession of the accused or a statement under S. 164 and was, therefore, not admissible in evidence. Section 533 was relied upon to prove that the defect was cured under that section. Their Lordships, however, held that no question of the operation or scope of S. 533 arose on the facts of that case and, therefore, refused to express any opinion on the scope of S. 533. It was held in — 'Muhammad Ali's case' (B) that if a Magistrate had satisfied himself that the confession was being made voluntarily by an accused person and that it

was explained to the accused that he was not bound to make the confession and it could be used as evidence against him and the Magistrate had made a summary, of those questions and answers instead of recording them such a defect was curable under S. 533 of the Code. We have, therefore to consider whether the materials on the record go to show that the confession was being made voluntarily and the accused had been warned that he was not bound to make a confession and any confession made by him could be used in evidence against him.

(12) The confession in this case is a very long document and it not only deals with the dacoity in question but with a large number of other incidents with which the police was, at that time, not concerned and reading this long confession of about six pages one cannot help feeling that the whole of this statement could not have been made either as a result of tutoring or by reason of fear of the police. The accused, as we have already said, had been arrested on 15-3-1948. We have not got the exact date when he was sent to jail as an under-trial prisoner. It was probably very soon after his arrest that he was sent to jail custody. On 21-3-1948, he was taken from the jail to a Magistrate, Sri Kalendri Dayal. We shall have to deal with his evidence later. Sri Kalendri Dayal made certain investigations in the company of the accused and went to the places pointed out by the accused on the 21st and on the 23rd and it was in-between those two dates i.e. on the 22nd, that the accused made the confession before Shri Stevenson.

Sri Stevenson has admitted that two police officers had brought the accused for recording his confession and after his confession was recorded the same two police officers took him away. Sri Stevenson was examined as a witness for the prosecution and as already mentioned he said that after the accused was brought to him the policemen were removed from his tent and the accused was made to remain sitting there for two hours before his statement was recorded and that he had explained to the accused that he was not bound to make a statement, that any statement made by him would be used against him and that he could be convicted on his own confession. Though it would have been better if the Magistrate had written down in the form of questions and answers all that had transpired, we have no reason to discard the evidence of the Magistrate and the defect in our view is cured by S. 533, Criminal P. C., though by reason of the defects already pointed out the confession must be said to have lost much of its evidentiary value.

(13) More important than Ex. P. 16 is the evidence furnished by Sri Kalendri Dayal Magistrate, P. W. 1, and Ext. P. 43, the note made by the said Magistrate. The accused was produced before him from jail custody on 21-3-1948, and the accused took the Magistrate to the various places connected with the dacoity, pointed out the house where the dacoity had been committed, the manner in which the dacoits had scaled the wall, the place where the dacoits had divided the booty and so on. It is a very detailed report and, though at one stage learned counsel said that anything said by the accused in the presence of the police was not admissible, he did not object to the admissibility of the evidence furnished by the conduct of the accused. As we have already said under S. 26, Evidence Act, a statement made by an accused person in the immediate presence of a Magistrate is admissible even if he be in the custody of the police. Though we may not place much reliance on the statement made by the accused to the Magistrate, Sri Kalendri Dayal, the fact, that he took the Magistrate to the right house in village Kukergaon where the dacoity was committed, showed him the manner in which the dacoits had scaled the wall and similar other conduct of the accused was good evidence against him.

(14) Lastly, we have the evidence of one witness, Raghubir Singh, who identified the accused in the identification parade held in jail on 26-4-1948. The accused with several others was put up for identification in the district jail at Mathura. Raghubir Singh identified the accused and made no mistakes. There is a note by the Magistrate about the identification to the effect that the witness identified the accused quickly, that is, the witness does not appear to have taken much time or hesitated to identify the accused. It was not claimed that the witness knew the accused from before. The learned Sessions Judge has discarded the evidence of Raghubir Singh as in his cross-examination Raghubir Singh said that he saw the dacoits in the light of the lantern which they had and in the light of the torches which were with them.

This statement Raghubir Singh made in his examination-in-chief. He further said in his examination-in-chief that at Mathura he identified one dacoit and at Agra he identified two other dacoits. In his cross-examination by Sri B. C. Bhargava, the witness repeated what he had said in his examination-in-chief that the witness had recognised Moti dacoit in the light of the lantern and that one dacoit had a lantern. The learned Sessions Judge thought that it was not likely that the dacoits would carry a lantern and even if they did carry one it was not likely that they would throw the light of the lantern on the faces of the dacoits so that they might be identified by the villagers.

Whether Sri Raghubir Singh was right that the dacoits were carrying a lantern or he was wrong it is not possible to say because no other witness seems to have been asked about it. The fact, however, remains that out of a large number of persons who were in jail several of whom were accused persons Raghubir Singh had no hesitation in walking up straight to Moti and identifying him as one of the dacoits who had taken part in the dacoity at the house of Lakkha Singh. The cumulative effect of the entire evidence on the record, to our minds, proves without any doubt that Moti was guilty and he was one of the dacoits who had taken part in the dacoity at the house of Lakkha Singh on the night between the 15th and the 16th of October, 1947.

(15) We, therefore, set aside the order of the learned Sessions Judge, allow this appeal, convict Moti under S. 395, Penal Code, and sentence him to seven years rigorous imprisonment. He is acquitted of the charge under S. 397, Penal Code, as it is not established that he used any deadly weapon or caused any grievous hurt to any person at the time of committing the dacoity.

B/D.H.Z. Appeal allowed.

A.I.R. 1953 ALL. 797 (Vol. 40, C. N. 391)

CHATURVEDI J.

Ramdas, Defendant-Appellant v. Shree Ram Lakshman Janki, Plaintiff-Respondent.

Second Appeals Nos. 879 and 1012 of 1949, D/- 5-8-1953.

(a) Transfer of Property Act (1882), S. 111 (g) — Forfeiture for denial of title.

Owner of property by will bequeathing property to deity — Deity by its 'sarbarkar' suing tenant for rent — Tenant in his written statement stating that will was never executed and that plaintiff was not owner of property — Further assertion that 'sarbarkar' was very clever man — Denial held could not be read as mere omission to admit plaintiff's title with view to putting him to proof of it but as disclaimer of title — 9 Cal WN 928 and 12 Cal WN 525, Distinguished. (Paras 8 and 10)

Anno: T. P. Act, S. 111 N. 14 Pt. 14.

(b) Transfer of Property Act (1882), S. 111 (g) — Forfeiture for denial of title. AIR 1926 Cal 1205, Dissented from. Case law discussed.

If the title of the heir of the landlord is denied, the denial acts as a forfeiture of the tenancy, and the heir is entitled to eject the tenant on this ground. (Para 11)

Anno: T. P. Act, S. 111 N. 14 Pt. 13a.

(c) Transfer of Property Act (1882), S. 111 (g) — Forfeiture for denial of title.

When the title of the real heir or of the original lessor is denied, it certainly amounts to setting up a title in somebody else, because the property does not remain in vacuum. (Para 19)

Anno: T. P. Act, S. 111 N. 14.

K. B. Asthana, for Appellant; G. N. Kunzru and A. N. Kant, for Respondent.

CASES CITED:

(A) ('05) 2 Cal LJ 389: 9 Cal WN 928
(B) ('08) 12 Cal WN 525
(C) (1861) 10 CBNS 789: 142 ER 664
(D) (1841) 9 Car & P 773: 173 ER 1047
(E) ('26) AIR 1926 Cal 1205: 96 Ind Cas 1056
(F) ('43) AIR 1943 All 279: 208 Ind Cas 422
(G) ('19) AIR 1919 PC 1: 42 Mad 589 (PC)
(H) ('19) AIR 1919 Mad 266: 51 Ind Cas 709
(I) ('19) AIR 1919 Mad 897: 46 Ind Cas 62

JUDGMENT: These two appeals arise out of the same suit filed on behalf of a deity Sri Ram Lakshman Janki, through Durga Prasad, 'Sarbarakar' of the deity. Second Appeal No. 879 of 1949 has been filed by defendant 1, and Second Appeal No. 1012 of 1949 has been filed by defendant 2. Defendant 3 is one Mst. Vidyawati, who took no interest in the case, because she had executed a deed of relinquishment in favour of the plaintiff. Briefly put the facts of the case are these.

(2) House No. 76/100 situated in Coolie Bazar, Kanpur, along with other property belonged to one Smt. Janki Kuar. It is not disputed by any of the parties that Smt. Janki Kuar was the absolute owner of this house. Smt. Janki Kuar died on 6-6-1946, and the case of the plaintiff is that Smt. Janki Kuar executed a will on 2-6-1946 bequeathing the house. mentioned above, to the plaintiff idol, and appointing Durga Prasad as the 'Sarbarakar' of the idol. The plaintiff thus became the owner of this house, and it is said that defendant 1, who was admittedly a tenant of Smt. Janki Kuar in the house, paid one month's rent to Durga Prasad as 'Sarbarakar' of the plaintiff. After that defendant 1 refused to pay rent to the plaintiff, and the plaintiff brought a suit against the said defendant in the Court of the Judge of Small Causes at Kanpur. The suit was numbered as suit No. 191 of 1947.

Defendant 1 filed a written statement in the suit clearly denying the plaintiff's title to the house, and the learned Small Cause Court Judge returned the plaint because the question of title to immoveable property was raised in the suit, by the said defendant. After the return of the plaint, on 28-7-1947, the plaintiff gave a notice to defendant 1 terminating his tenancy on the ground of forfeiture, and asked the defendant to vacate the house by 5-8-1947. After the expiry of the period mentioned in the notice, the present suit was filed, and the reliefs claimed in the plaint were that defendant 1 be ejected from the house, and a decree be passed against him for the recovery of Rs. 122/1/- as arrears of rent at the rate of Rs. 9/- per mensem.

After the date fixed in the notice, the defendant was treated as a trespasser and the sum of Rs. 9/- per mensem was claimed as being mesne profits instead of rent as from the date. The claim for ejectment of defendant 1 was based on two grounds. The first ground was that the defendant had denied the plaintiff's title, and this denial acted as forfeiture of the defendant's tenancy. The second ground was that the defendant had committed wilful default in the payment of rent. Defendant 2 was added as a party because he was a brother of Smt. Janki Kuar, and defendant 3 was impleaded as she had previously alleged herself to be the daughter of Smt. Janki Kuar.

(3) The main pleas taken in defence by defendant 1 were that the allegations contained in the written statement filed by the defendant in Suit No. 191 of 1947 did not effect forfeiture of his tenancy, and that there had been no wilful default by the defendant in the payment of rent. The defendant admitted that he had taken the house on rent from Smt. Janki Kuar, but pleaded that, after her death. Smt. Vidyawati, defendant 3, took possession of her properties alleging herself to be the daughter of Smt. Janki Kuar, and defendant 1 in good faith paid a sum of Rs. 108/- to her as advance rent for a year.

He denied ever having paid rent to Durga Prasad, and did not admit the will said to have been executed by Smt. Janki Kuar in favour of the plaintiff. The main defence of defendant 2 was that the alleged will dated 2-6-1946 was not genuine, and the plaintiff was, therefore, not the owner of the property. On the other hand, defendant 2, as a brother of Smt. Janki Kuar, inherited the house from her. As already stated, defendant 3, Smt. Vidyawati, did not contest the suit at all, as she had executed a deed of relinquishment in favour of the plaintiff and had received a sum of Rs. 4000/- as consideration for executing the deed.

(4) The learned Munsif held that the will was not proved to be a genuine document, and appeared to be a forged one. and defendant 2, therefore, was the owner of the property in suit as an heir of Smt. Janki Kuar. On the question of payment of rent, the learned Munsif held that defendant 1 had paid advance rent for one year to defendant 3, but as there

were a number of claimants on the scene, he should not have paid the rent to any one of them. He, therefore, directed defendant 1 to deposit the entire arrears of rent in Court. In view of the fact that he held that the will was not a genuine one, he did not enter into any discussion as to whether the defendant's tenancy had come to an end by forfeiture. But he remarked that the denial of the plaintiff's title by the defendant was bona fide. On the findings mentioned above, he dismissed the suit.

(5) The plaintiff went up in appeal, and the lower appellate Court disagreed with the findings of the learned Munsif, and decided all the points in favour of the plaintiff. The learned Civil Judge held that the execution and proper attestation of the will by Smt. Janki Kuar had been fully established, and the plaintiff had acquired the right of ownership over the house under this will. He has further held that the denial of the plaintiff's title by defendant 1 in the written statement, filed in the previous suit, was not a bona fide denial, and it acted as forfeiture of the defendant's tenancy. On these findings, the learned Civil Judge decreed the claim for the ejectment of defendant 1 from the house in suit, and also for the recovery of arrears of rent as claimed by the plaintiff.

(6) Two separate appeals have been filed against this decree, one by defendant 1 and the other by defendant 2. In the appeal filed by defendant 1, the learned counsel argued two points. His first submission was that, taking all the circumstances existing at the time into consideration, the allegations made in the written statement filed in the Small Cause Court should not be interpreted as denying the plaintiff's title; and the other submission was that, in any case, the denial of a title of an assignee or an heir of the landlord did not effect forfeiture of the tenancy. In the other appeal filed by defendant 2, the only point argued was that the execution and attestation of the will by Smt. Janki Kuar had not been duly proved.

(7) I shall take up the appeal of defendant 2 first because the question whether the plaintiff is the owner of the house in suit comes first in order of time, and the points raised by defendant 1 fall to be considered only after it has been proved that the plaintiff is the owner of the house in suit. As I have already stated, in this appeal the only question that arises for consideration is whether due execution and attestation of the will by Smt. Janki Kuar has been proved while she was in a sound state of mind. The finding of the lower appellate Court on this point is a finding of fact, and after going through the judgment, I do not find that it is vitiated by any error of law. (His Lordship considered the evidence and dismissed the appeal. His Lordship then proceeded :)

(8) I shall now deal with the points raised by the learned counsel for the appellant in Second Appeal No. 879 of 1949, which is the tenant's appeal. The first question is whether the allegations, contained in the written statement, filed by this appellant in the Small Cause Court, amount to a denial of the plaintiff's title, and, therefore, effect a forfeiture of the appellant's rights as a tenant. In this written statement, the appellant clearly stated that Smt. Janki Kuar never executed the will relied upon by the plaintiff, and that the plaintiff was not the owner of the house in suit.

The denial was very emphatic and was accompanied by an assertion that Durga Prasad was a very clever man. It could not be argued that there was really no denial of the plaintiff's title in the written statement, but what was argued was that, taking into consideration all the facts and the circumstances of the case, the denial should not be treated as a denial but should be read as a mere omission to admit the plaintiff's title with a view to putting him to proof of it. In support of this argument, the learned counsel cited two cases reported in — 'Sm. Mallika Dassi v. Makham Lal', 9 Cal WN 928 (A) and — 'H. Mathewson v. Jadu Mahto', 12 Cal WN 525 (B).

(9) In the first case, the tenant in her written statement had only stated that she did not know anything about the purchase set up by the plaintiff and had no belief in it. This statement was taken to be merely putting the plaintiff to the proof of his title and not amounting to a disclaimer of his title. It was observed that to constitute the disclaimer there must be a direct repudiation of the relation of landlord and tenant. The other point decided in this case was that denying the plaintiff's title to a portion of the property did not act as forfeiture; and the third point decided was that the denial of title in the suit for ejectment itself could not be made the basis of ejectment in that suit. Such a denial must have been made before a suit was brought.

The second and the third points do not arise in this case. As regards the first point, the wordings of the written statement filed in that case appear to be very different. The defendant there had denied all knowledge of and belief in the purchase set up by the plaintiff, and this was treated not as a denial of his title, but merely a pleading putting the plaintiff to the proof of his title. In the present case, the position is very different and the denial of the execution of the will, and of the ownership of the plaintiff, is very specific and emphatic.

(10) In the second case 12 Cal WN 525 (B), the note made by the Judge of the tenant's statement was as follows :

> "I have no relation of landlord and tenant with Mr. Mathewson, the plaintiff in this suit. I owe no money to him. I am tenant of Lalit Ghosh to whom I pay rent."

After quoting from the Judge's note, the learned Judges then proceeded to consider the law on the point referred to in a number of cases in which different statements were held not to amount to a disclaimer. The statements referred to in the cases, considered by the learned Judges, were very different from the statements made in the Calcutta case itself. As regards the allegations made in the written statement, they were not so specific and clear and with reference to that statement the previous cases were considered, and it was held that the allegations in the written statement did not amount to a disclaimer. As far as the Judge's note of the statement made in Court was concerned, the learned Judges observed as follows :

> "The terms of the Judge's note of the defendant's deposition go further, as they undoubtedly represent the defendant as setting up a title in Lalit Ghosh. But we find it impossible to act on this statement as it comes before us."

The learned Judges then considered certain provisions of the Code of Civil Procedure and came to the conclusion that they could not restrict to this note alone for purposes of proving the statement made by the defendant in Court. In this case also, the statement made in the written statement was very much different from the statement made in the written statement in the present case, and the statement contained in the Judge's note was not relied upon. To my mind, these cases do not help the appellant. In my opinion, the allegations contained in the written statement, filed by the appellant, do amount to a disclaimer of the plaintiff's title and, therefore, effect a forfeiture of the tenancy.

(11) On the second point, the learned counsel cited an English case reported in — 'Jones and Wife v. Mills', (1861) 142 ER 664 (C). In this case, the tenant had merely said that he would not pay any more rent until he knew who was the right owner, and it was held that this did not amount to a disclaimer or repudiation of the title of the heir-at-law, so as to entitle him to eject the defendant without any notice to quit. The tenant's statement which was relied upon in this case was also very different from the statement made by the appellant in the present case. The case, therefore, does not help the appellant in any manner. On the other hand, a reading of this case shows that the doctrine of forfeiture by disclaimer of the landlord's title applies as much to the heir of the landlord as to the original landlord himself. If the title of the heir of the landlord is denied, the denial acts as a forfeiture of the tenancy, and the heir is entitled to eject the tenant on this ground.

(12) To the similar effect is the decision in another English case reported in — 'Doe v. Long', (1841) 173 ER 1047 (D), which was also a case of the disclaimer of the title of an heir of the original lessor.

(13) The other case relied upon by the learned counsel, which really appears to help him, is a case reported in — 'Abdulla v. Mohammad Muslim', AIR 1926 Cal 1205 (E). This case is similar in many respects to the present case, and concerning the law on the point under consideration, the learned Judges observed as follows:

> "There cannot be any doubt whatsoever that the denial of the right of an assignee from the original lessor by the tenant does not work a forfeiture of the tenancy. This principle has been long settled and this cannot and is not disputed at the Bar."

No authorities have been cited in support of this proposition in this case, because the correctness of the proposition was not disputed at the Bar. The learned counsel for the appellant has also failed to cite a single previous case in which this proposition of law has been laid down. So besides this case, no other case has been brought to my notice which supports the proposition so emphatically laid down in this Calcutta case.

(14) As I have already said, the two English cases cited above point to a contrary conclusion; and as far as the decisions in India are concerned, the learned counsel for the respondent brought to my notice only one single Judge decision of this Court reported in — 'Anand Sarup v. Taiyab Hasan', AIR 1943 All 279 (F). This case goes so far as to hold that mere non-admission of title amounts to a denial and, therefore, forfeiture comes into existence when the lessee fails to admit that he is holding the property as such. In this case no decision was cited by the learned counsel wherein a contrary view was taken, and the learned Judge was of the opinion that a mere non-admission causes forfeiture. The refusal to admit the zamindar's right was made by the purchaser in execution of a decree, and the plaintiff here was one of the zamindars, though it does not appear that he was one of the lessors of the defendant.

(15) I might also refer to a decision of the Privy Council reported in — 'Maharaja of Jaypore v. Rukmani Pattamahdevi', AIR 1919 PC 1 (G). In this case, their Lordships quoted the provisions of S. 111(g), T. P. Act and held that the rule of law, which had already been adopted in India, was put in a statutory form by the said provision. They further held that the rules of English law as to forfeiture were held to be in accordance with justice, equity and good conscience, and, therefore, applicable to India also.

(16) A Madras case reported in — 'Venkatachariar v. Rangaswami Ayyangar', AIR 1919 Mad 266 (H), appears to be a clear authority in favour of the plaintiff respondent. It has been held in this case that the denial of a derivative title will work a forfeiture as much as the denial of the original landlord's title. If a tenant, honestly and not intending to identify himself with a third party, merely puts the alleged derivative title of the landlord to the proof of the latter's title before recognising him as such, such conduct may not work a forfeiture. But if the denial of the derivative title is clear and specific, there is no reason why it should not work as a forfeiture of the tenancy.

(17) To the same effect is another Madras case reported in — 'Rama Iyengar v. Gurusami Chetti', AIR 1919 Mad 897 (I). In this case also it has been held that S. 111, T. P. Act, applies not only to disclaimer of the landlord's title but also to the title of his heirs, transferees and assigns.

(18) From a consideration of the cases cited above, it would appear that the proposition laid down in the Calcutta case AIR 1926 Cal 1205 (E), is not such a universally accepted proposition as was remarked by the learned Judges. The two English cases cited by me above, as also the two Madras cases, are clear authorities against that view. The decision of this Court mentioned above appears to be in conformity with the decisions of the Madras and the English Courts.

(19) Reliance was also placed by the learned counsel for the appellant on the wordings of S. 111(g), T. P. Act. The relevant portion of the said clause runs as follows:

> "By forfeiture, that is to say (2) in case the lessee renounced his character as such by setting up a title in a third person or by claiming title in himself,"

a lease of immoveable property is determined. It was argued that, in the present case, the appellant did not renounce his character as a tenant, nor did he set up a title in a third person or in himself. What he did merely was to clearly deny the title of the plaintiff. It was urged that, in such a case, the denial does not act as a forfeiture, but I find it difficult to

accept this argument. In case it were necessary to set up a title in a third person, or in himself, before forfeiture could be incurred, the legal position would be that if the title of even Smt. Janki Kuar herself had been denied without setting up a title in any body else, the denial would not act as a forfeiture. This result, to my mind, is an impossible one. When the title of the real heir or of the original lessor is denied, it certainly amounts to setting up a title in somebody else, because the property does not remain in vacuum. If the title of the plaintiff is denied, that certainly means that a title in some other person has been set up.

(20) The argument of the learned counsel comes to this that the clearest denial of even the defendant's original landlord's title would not by itself amount to a disclaimer till title was specifically set up in somebody else. In my opinion, this is not the correct legal position, nor any case has been cited before me which lays down any such proposition. In the present case, the appellant clearly denied the execution of the will and also the plaintiff's title acquired under it; the result of this denial was that the appellant set up a title in the heir of Smt. Janki Kuar, though such an heir may not have been named in the written statement. In the written statement, the appellant did state that defendant 3 entered into possession of the house after the death of Smt. Janki Kuar; and his further allegation that he had paid a sum of Rs. 108/- as rent to her shows that he was setting up a title in her, though in the written statement he did not, in so many words, say that defendant 3 was the daughter of Smt. Janki Kuar.

On a proper reading of the written statement, the position taken by the appellant appears to be that he was setting up a title in the heir of Smt. Janki Kuar. It is difficult to believe that he had actually paid a sum of Rs. 108/- as advance rent for the whole year to defendant 3. But he did manage to obtain a receipt from her and was therefore, till the date of the written statement, trying to help the said defendant. The conduct of the appellant shows that his denial of the plaintiff's title was not bona fide, and he was actually taking the side of defendant 3 from whom he had managed to obtain a receipt for the payment of a whole year's rent in advance, though as a matter of fact, it is very doubtful whether the appellant could possibly have acted so foolishly as to have paid advance rent in a case, where there were at least three contestants in the field, to the knowledge of the appellant himself.

I am, therefore, of the opinion that the denial of the plaintiff's title was not bona fide, and it, being a clear and unequivocal denial of its title, acts as a forfeiture of tenancy. The decree of the learned Civil Judge, therefore, appears to be perfectly correct.

(21) The result is that both the appeals fail and are hereby dismissed with costs.

(22) Leave to appeal to a Division Bench is granted to the appellant in S. A. No. 879 of 1949; and it is refused to the appellant in S. A. No. 1012 of 1949.

A/V.R.B. Appeals dismissed.

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